

# No Hiding the Ball: Medical Privacy and Pro Sports

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# NO HIDING THE BALL: MEDICAL PRIVACY AND PRO SPORTS

MICHAEL K. MCCHRYSTAL\*

## I. INTRODUCTION

Physical performance is the essence of most sports and certainly of the most popular American professional spectator sports. It makes sense that professional sports teams are particularly concerned with acquiring performance-related medical information about their players. Toward that end, teams in the leading professional sports leagues employ staff physicians and other personnel to evaluate and treat the medical conditions of players.

Substantial scholarly thought is devoted to the role of team physicians and, particularly, to the conflicting interests of which they take account, including the interests of the patient-players whom they treat and the teams that employ them.<sup>1</sup> To cast the conflict in its simplest terms, the long-term health of the player and the short-term interest of the team may conflict. As my colleague, Professor Matthew Mitten, has noted, “The team physician has the potentially conflicting responsibilities of providing medical care to the players and protecting their health while also facilitating the club’s ability to win games by having its best players on the field.”<sup>2</sup>

The conflicts of interest confronted by team physicians form an important component of an even larger set of concerns related to the privacy or transparency of information about player health. Players can be conflicted about whether or not to seek treatment for a nagging injury and risk loss of playing time. Teams may be hesitant to disclose a key player’s injury for fear that it will assist an opponent in developing its game plan. The National Football League (NFL) has been accused of fraudulently concealing the health risks to

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\* Professor of Law, Marquette University. My thanks to Joffrey Van Nostrand, who provided excellent research assistance.

<sup>1</sup> See Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians vs. Athlete Patients*, 50 ST. LOUIS U. L.J. 185, 187–88 (2005); Barry R. Furrow, *The Problem of the Sports Doctor: Serving Two (or Is It Three or Four?) Masters*, 50 ST. LOUIS U. L.J. 165, 168, 172–73, 183 (2005); Matthew J. Mitten, *Team Physicians and Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries*, 55 U. PITT. L. REV. 129, 131, 140–41, 168 (1993).

<sup>2</sup> Matthew J. Mitten, *Team Physicians as Co-Employees: A Prescription That Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 ST. LOUIS U. L.J. 211, 212 (2005).

players caused by concussion injuries,<sup>3</sup> thus concealing from the players the full extent of medical risks to which their injuries had exposed them.

What we encounter, then, in considering the privacy or transparency of medical information about professional athletes, are complex forces of short-term and long-term interests on the part of various stakeholders. Players, healthcare providers, teams, and leagues all have their own complicated interests when it comes to discovering and disclosing medical information about players.

This article is an effort to sort out some of the privacy and transparency issues implicated by the centrality of player health to team performance in leading professional sports leagues. Part II of this article outlines, in general terms, the law that governs privacy of medical information. Part III describes the contractual structures in the various leagues governing disclosure of medical information by players and the incentives for players to withhold information. Part IV concerns the contractual structures and the extent to which they require or permit disclosure of player medical information by teams.

This article is limited to the extent and nature of privacy interests in medical information concerning professional athletes in Major League Baseball (MLB), the National Basketball Association (NBA), the National Hockey League (NHL), and the NFL. The available evidence with respect to these leagues leads to some unsurprising conclusions: Players in these leagues bargain away most of the privacy protection provided by federal law, even though the incentives for players to conceal medical problems sometimes are strong. Teams have a strong interest in gaining comprehensive information about player health for economic and competition reasons, and they have mixed interests in sharing that information with their league and the public. The leagues have a strong interest in the medical condition of players, particularly related to fair competition, and they, too, have mixed interests in sharing that information with the public, particularly as it may affect public perception of their sport. In other words, player medical information is valuable to all stakeholders, but there are reasons that each stakeholder may not want the information to go any further.

## II. HEALTH CARE PRIVACY LAW AND THE DOCTRINE OF CONSENT

The privacy of information collected in the course of health care is protected

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<sup>3</sup> Plaintiffs' Amended Master Admin. Long-Form Complaint, at Count IV, ¶ 4, In re Nat'l Football League Players' Concussion Injury Litig., No. 2:12-md-02323-AB, (E.D. Pa. July 17, 2012) (case settled July 7, 2014) (2014 WL 3054250).

under federal law,<sup>4</sup> state statutes,<sup>5</sup> and common law.<sup>6</sup> The Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>7</sup> directed the United States Department of Health and Human Services (HHS) to promulgate regulations concerning health information privacy applicable to most health care providers.<sup>8</sup>

The privacy of medical information is important for practical reasons and to protect the dignity and autonomy of the individual. Among the most compelling practical reasons to guard privacy about health issues is the patient's pocketbook, particularly in cases where employment opportunities might be adversely affected by health concerns. This is, of course, an issue of enormous importance to professional athletes.

Even beyond pocketbook concerns, health issues can strongly affect a person's self- and public image. Medical concerns are often associated with a physical deficiency, and professional athletes take particular pride in their physical accomplishments and the positive image they associate with those accomplishments.<sup>9</sup>

So, on the one hand, medical privacy is taken seriously by many people and by the law. On the other hand, legal protection for medical privacy is generally subject to the significant limitation that privacy is lost when the patient consents to disclosure. With respect to the privacy interests of professional athletes, HHS, in responding to a comment on its proposed privacy rules—which are now final—said the following:

Professional sports teams are unlikely to be covered entities [, which owe primary duties of confidentiality under the regulations]. Even if a sports team were to be a covered entity, employment records of a covered entity are not covered by this Rule. If this comment is suggesting that the records of professional athletes should be deemed “employment records” even

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<sup>4</sup> Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, § 2713, 110 Stat. 1936 (1996) [hereinafter HIPAA]; HIPAA Privacy Rule, 45 C.F.R. § 164.502(5) (2013).

<sup>5</sup> See Joy L. Pritts, *Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Rule*, 2 YALE J. HEALTH POL'Y L. & ETHICS 327, 332–40, 349–50 (2002).

<sup>6</sup> The physician-patient relationship generally entails a duty of confidentiality that has been extended to other health care providers. This principle of the common law has informed the scope of the evidentiary privilege with respect to information supplied to health care providers, including psychotherapists. See generally Peter A. Winn, *Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law*, 33 RUTGERS L.J. 617 (2002).

<sup>7</sup> HIPAA, *supra* note 4, at § 2713.

<sup>8</sup> See 45 C.F.R. § 164.502(a)(5).

<sup>9</sup> There are many thoughtful discussions on the importance of privacy to individual personality. See, e.g., ALAN F. WESTIN, *PRIVACY AND FREEDOM* (1967); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006).

when created or maintained by health care providers and health plans, the Department disagrees. No class of individuals should be singled out for reduced privacy protections. As noted in the preamble to the December 2000 Rule, nothing in this Rule prevents an employer, such as a professional sports team, from making an employee's agreement to disclose health records a condition of employment. A covered entity, therefore, could disclose this information to an employer pursuant to an authorization.<sup>10</sup>

The operating principle suggested by HHS is that a player may be compelled to authorize the release of medical information to his team without violating federal health care privacy regulations under HIPAA. Therefore, players can be compelled to consent to disclosure of information about their medical condition without violating privacy principles under federal law. The same is generally true under state law.<sup>11</sup>

### III. DISCLOSURE OF MEDICAL INFORMATION BY THE PLAYER

The four most celebrated United States and Canadian professional sports leagues—MLB, the NBA, the NFL, and the NHL—rely on certain controlling documents in establishing their policies relating to players' medical information.<sup>12</sup> Generally, for these four leagues, similar contractual structures are in place. Each league has a collective bargaining agreement (CBA) that is negotiated between the league, representing the owners and teams, and the players, represented by the player union. Each league's CBA regulates, to some extent, the health, safety, and right to medical care of athletes employed in the league.<sup>13</sup> For each league, the CBA is supplemented by a uniform player contract that also addresses issues concerning player health.<sup>14</sup>

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<sup>10</sup> Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53,182, 53,193 (Aug. 14, 2002) (to be codified at 45 C.F.R. pt. 160 & 164).

<sup>11</sup> See, e.g., WIS. STAT. § 146.82(1) (2011–2012) (“All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient.”).

<sup>12</sup> See *infra* note 13.

<sup>13</sup> See MLB COLLECTIVE BARGAINING AGREEMENT art. XIII (2012–2016) [hereinafter MLB CBA]; NBA COLLECTIVE BARGAINING AGREEMENT art. XXII (2011) [hereinafter NBA CBA]; NFL COLLECTIVE BARGAINING AGREEMENT art. 39 (2011) [hereinafter NFL CBA]; NHL COLLECTIVE BARGAINING AGREEMENT art. 34 (2012–2022) [hereinafter NHL CBA].

<sup>14</sup> See MLB CBA, *supra* note 13, at sched. A, ¶6.(b) [hereinafter MLB UNIFORM PLAYER'S CONTRACT]; NBA CBA, *supra* note 13, at exhibit A, ¶ 7(b)(d)(f)(h) [hereinafter NBA UNIFORM PLAYER CONTRACT]; NFL CBA, *supra* note 13, at app. A, ¶¶ 8, 13 [hereinafter NFL PLAYER CONTRACT]; NHL CBA, *supra* note 13, at exhibit 1, ¶¶ 3, 5(a)(b) [hereinafter NHL STANDARD

A. *Player's Duty to Submit to Medical Examination*

Health care in the big leagues often starts with a medical history and a physical examination conducted before the prospective player is even signed to a contract.<sup>15</sup> Unsurprisingly, one of the most important factors a team will consider in drafting a prospective player is the health and medical condition of the athlete.<sup>16</sup> A medical examination conducted by a team can severely impact a player's chance not only of getting drafted, but also the player's future employment once he lands a spot in the league.<sup>17</sup>

Among the four leagues, only the NBA CBA specifically governs pre-draft medical examinations.<sup>18</sup> The NBA CBA provides:

Prior to any NBA Draft, the NBA and/or its Teams, acting jointly, may request that persons eligible . . . voluntarily submit to the administration of standardized medical or laboratory tests . . . and intelligence and/or personality tests, the results of which shall be made available to any Team upon request, but which shall be kept confidential from the public and the media.<sup>19</sup>

The permissive language is important: Top players entering the NBA draft routinely skip the NBA Scouting Combine, which means they also skip the medical exams provided for in the CBA.<sup>20</sup> Instead, the player's condition can be assessed through individual workouts with teams that may draft the player.<sup>21</sup> One reason a player may opt out of the league's various tests is that, under the CBA, the results are "made available to any Team upon request."<sup>22</sup> The pre-draft medical examinations could expose a prior injury or condition that might affect the player's long-term value, either in terms of an initial contract or a contract down the road. A player may prefer to skip these tests and, instead, test individually with teams so that the medical information stays within that

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PLAYER'S CONTRACT].

<sup>15</sup> See Dave Siebert, *An Inside Look Into the NFL Medical Exam Process at the Combine*, BLEACHER REPORT (Feb. 21, 2014), <http://bleacherreport.com/articles/1968230-an-inside-look-into-the-nfl-medical-exam-process-at-the-combine>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> NBA CBA, *supra* note 13, at art. XXII, § 4.

<sup>19</sup> *Id.*

<sup>20</sup> Scott Howard-Cooper, *Teams Won't Be Deterred If Top Prospects Skip Draft Combine*, NBA (May 14, 2014), <http://www.nba.com/2014/news/05/14/draft-combine-prospects-skip/>.

<sup>21</sup> *Id.*

<sup>22</sup> NBA CBA, *supra* note 13, at art. XXII, § 4.

organization rather than being disseminated throughout the league.

The NFL, the most violent of the professional sports, provides for medical examinations of players in its Player Contract.<sup>23</sup> As for prospective players, the original purpose of the NFL Scouting Combine was to have all the draft-eligible players come to one place and undergo medical evaluations and examinations.<sup>24</sup> While there is no controlling clause in the NFL CBA or Player Contract with respect to draftees, it has apparently become an accepted practice that if you are attending the NFL Combine, you must submit yourself to a medical examination by any team that requests it.<sup>25</sup> Players are subjected to a battery of tests performed by the individual doctors and physicians of every team that is interested in the player; this could mean the player may be subject to thirty-two different rounds of tests.<sup>26</sup> The results of these exams are kept confidential by the teams, but again, they may have major economic consequences, presently and in the future, for the prospective players involved.<sup>27</sup>

Players who have not yet been drafted and, thus, are not yet members of their respective leagues' players unions, have asserted unsuccessfully that the CBA provisions governing players should not apply to them.<sup>28</sup> Those unsuccessful challenges have served to reinforce the regime in which medical testing of professional players begins before they land a contract and continues throughout their careers.

The leagues' uniform or standard player contracts require players, implicitly or explicitly, to make themselves available for medical examinations.<sup>29</sup> Each of the standard player contracts contains some form of language stating that the player agrees that he will remain in top physical condition and is physically able to perform up to the best of his abilities.<sup>30</sup> Due to the physically demanding nature of professional sports, teams require players to represent that they are in

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<sup>23</sup> NFL PLAYER CONTRACT, *supra* note 14, at ¶ 8.

<sup>24</sup> See Jene Bramel, *Welcome, RB19. The NFL Will See You Now: The Combine Medical Exam*, FOOTBALLGUYS (Feb. 18, 2014), [http://subscribers.footballguys.com/apps/article.php?article=14bramel\\_combine\\_medical\\_exam](http://subscribers.footballguys.com/apps/article.php?article=14bramel_combine_medical_exam).

<sup>25</sup> See Siebert, *supra* note 15. See also Len Pasquarelli, *Physical Exam Most Dreaded Part of Combine*, ESPN (Mar. 1, 2002), <http://sports.espn.go.com/nfldraft/columnist?id=1343355>.

<sup>26</sup> See Pasquarelli, *supra* note 25; Siebert, *supra* note 15.

<sup>27</sup> See *id.*

<sup>28</sup> *Clarett v. Nat'l Football League*, 369 F.3d 124, 138–39 (2d Cir. 2004); *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 960 (2d Cir. 1987).

<sup>29</sup> See MLB UNIFORM PLAYER'S CONTRACT, *supra* note 14; NBA UNIFORM PLAYER CONTRACT, *supra* note 14; NFL PLAYER CONTRACT, *supra* note 14; NHL STANDARD PLAYER'S CONTRACT, *supra* note 14.

<sup>30</sup> See NBA UNIFORM PLAYER CONTRACT, *supra* note 14, at exhibit A, ¶ 7(a); NFL PLAYER CONTRACT, *supra* note 14, at app. A, ¶ 8; NHL STANDARD PLAYER'S CONTRACT, *supra* note 14, at exhibit 1, ¶ 2(b). See also MLB UNIFORM PLAYER'S CONTRACT, *supra* note 14, at sched. A, ¶ 7.(b) (“[T]he Player shall . . . keep himself in first-class physical condition . . .”).

top physical condition, and the teams assert the right to examine players to assure themselves that this is so.<sup>31</sup>

*B. Player's Duty of Candor*

Players in MLB, the NBA, and the NFL agree to disclose medical information about themselves.<sup>32</sup> The NBA Uniform Player Contract requires that,

The Player agrees to provide to the Team's coach, trainer, or physician prompt notice of any injury, illness, or medical condition suffered by him that is likely to affect adversely the Player's ability to render the services required under this Contract, including the time, place, cause, and nature of such injury, illness, or condition.<sup>33</sup>

An NFL player agrees "to make full and complete disclosure of any physical or mental condition known to him [that] might impair his performance."<sup>34</sup> A MLB "[p]layer represents that he has no physical or mental defects known to him and unknown to the appropriate representative of the Club that would prevent or impair performance of his services."<sup>35</sup>

The standard of candor expected of MLB and NFL players seems especially high in that it extends to any condition that "would impair"<sup>36</sup> (MLB) or "might impair"<sup>37</sup> (the NFL) the player's performance. It is not a standard, however, without limits. Certain medical conditions that would be regarded as quite sensitive, such as sexually transmitted diseases, often would not relate to the player's performance for the team.<sup>38</sup> Mental health issues also are likely beyond

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<sup>31</sup> *Id.*

<sup>32</sup> MLB UNIFORM PLAYER'S CONTRACT, *supra* note 14, at sched. A, ¶ 4(b); NBA UNIFORM PLAYER CONTRACT, *supra* note 14, at exhibit A, ¶ 7(d); NFL PLAYER CONTRACT, *supra* note 14, at app. A, ¶ 8. The NHL CBA and Standard Player's Contract are less explicit about the player's duty of candor than are comparable documents in the other leagues. The NHL Standard Player's Contract does provide, "The Club may from time to time during the continuance of this SPC establish reasonable rules governing the conduct and conditioning of the Player, and such reasonable rules shall form part of this SPC and the Agreement as fully as if herein written." NHL STANDARD PLAYER'S CONTRACT, *supra* note 14, at exhibit 1, ¶ 4.

<sup>33</sup> NBA UNIFORM PLAYER CONTRACT, *supra* note 14, at exhibit A, ¶ 7(d).

<sup>34</sup> NFL PLAYER CONTRACT, *supra* note 14, at app. A, ¶ 8.

<sup>35</sup> MLB UNIFORM PLAYER'S CONTRACT, *supra* note 14, at sched. A, ¶ 4(b).

<sup>36</sup> *Id.*

<sup>37</sup> NFL PLAYER CONTRACT, *supra* note 14, at app. A ¶ 8.

<sup>38</sup> See MLB UNIFORM PLAYER'S CONTRACT, *supra* note 14, at sched. A, ¶ 4(b); NFL PLAYER CONTRACT, *supra* note 14, at app. A, ¶ 8.



the player's duty of candor.<sup>39</sup>

The willingness of players to meet high standards of candor about their playing condition may be doubted. In a midseason poll of players conducted in 2012, over half responded that they would try to hide concussion symptoms to keep playing.<sup>40</sup>

Big-time players delivering big-time plays while playing hurt are legendary in sports. A classic illustration is Kirk Gibson's walk-off home run in the first game of the 1988 World Series.<sup>41</sup> Gibson, an all-star who was selected as National League Most Valuable Player in 1988, injured his leg so severely in the league championship series that he was held out of the lineup for the first game of the World Series, not even taking batting practice on the day of the game.<sup>42</sup> He signaled to Coach Tommy Lasorda in the bottom of the ninth, with his team trailing by a run, that he thought he was fit enough to pinch hit, and that he did, hitting a two-out, two-strike, walk-off home run and limping around the bases to win the game for his team.<sup>43</sup>

Another celebrated case in point: MLB star Miguel Cabrera, of the Detroit Tigers, played in the 2013 World Series while suffering various injuries.<sup>44</sup> "He's not 100 percent," his manager, Jim Leyland, said at the time.<sup>45</sup> "He's been playing in a lot of pain. He's a real tough guy. I think if anybody knew the pain he's playing in, they probably wouldn't believe it."<sup>46</sup>

Playing hurt is an expected part of the game. Great players in their prime, like Kirk Gibson and Miguel Cabrera, are likely to stay in the lineup even if they are not 100% healthy. Players who are considered more dispensable to the team have more reason to conceal injuries that may impair their performance. They may lose playing time, or even a spot on the team, if coaches know they are injured and may play below their potential.

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<sup>39</sup> William C. Rhoden, *With No One Looking, a Hurt Stays Hidden*, N.Y. TIMES (Oct. 29, 2012), <http://www.nytimes.com/2012/10/30/sports/with-no-one-looking-mental-illness-in-athletes-can-stay-hidden.html?pagewanted=all>.

<sup>40</sup> *NFL Concussion Poll: 56 Percent of Players Would Hide Symptoms to Stay on Field*, SPORTING NEWS (Nov. 12, 2012), <http://www.sportingnews.com/nfl/story/2012-11-11/nfl-concussions-hide-symptoms-sporting-news-midseason-players-poll>.

<sup>41</sup> See Tom Lasorda, *Gibson's Homer in Lasorda's Words*, L.A. TIMES (Oct. 16, 2008), <http://articles.latimes.com/2008/oct/16/sports/sp-lasorda16>.

<sup>42</sup> *Id.*

<sup>43</sup> *NFL Concussion Poll*, *supra* note 40.

<sup>44</sup> See Associated Press, *Miguel Cabrera's Health a Concern*, ESPN, [http://espn.go.com/mlb/playoffs/2013/story/\\_/id/9760412/2013-mlb-playoffs-miguel-cabrera-detroit-tigers-playing-lot-pain-jim-leyland-says](http://espn.go.com/mlb/playoffs/2013/story/_/id/9760412/2013-mlb-playoffs-miguel-cabrera-detroit-tigers-playing-lot-pain-jim-leyland-says) (last updated Oct. 3, 2013).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

Players have additional reasons to conceal injuries if those injuries are suffered outside of the game. In one manner or another, the leagues disclaim any responsibility for non-work-related injuries or conditions that a player may suffer, and they take steps to avoid the risks of those injuries.<sup>47</sup> The NHL, for example, prohibits players from participating in other sports without the consent of the team,<sup>48</sup> and a team may suspend a player without pay if a non-work-related medical condition renders him “unfit to play skilled hockey.”<sup>49</sup> Similarly, the NFL Player Contract prohibits players from “engag[ing] in any activity other than football [that] may involve a significant risk of personal injury,”<sup>50</sup> and the NFL CBA permits the team to suspend the player without pay if the player “is unavailable to the team due to a nonfootball injury” resulting from such an activity.<sup>51</sup>

These sorts of provisions have been relevant in a few publicized cases. For example, Kellen Winslow II, a tight-end for the Cleveland Browns, seriously injured his knee (torn ACL) while riding his motorcycle, causing him to miss an entire season,<sup>52</sup> and Vladimir Radmanovic, a player with the Los Angeles Lakers, separated his shoulder while snowboarding, an activity forbidden in his contract.<sup>53</sup>

The salient point is that while contractual agreements between the player and the league establish a duty of candor with respect to the player’s physical condition, a player may be hesitant to disclose either the fact of an injury or its cause. Candor about such matters may, in some circumstances, be harmful economically to the player. There also may be some hesitation in complaining about injuries that the player believes—or hopes—are minor, especially considering the culture of toughness that plays such a dominant role in professional sports.

### C. Player’s Right to Treatment

Each league’s CBA provides players with access to medical treatment for employment-related conditions at the teams’ expense.<sup>54</sup> The NHL CBA, for

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<sup>47</sup> See NFL PLAYER CONTRACT, *supra* note 14, at app. A, ¶ 3; NHL STANDARD PLAYER’S CONTRACT, *supra* note 14, at exhibit 1, ¶ 7.

<sup>48</sup> NHL STANDARD PLAYER’S CONTRACT, *supra* note 14, at exhibit 1, ¶ 7.

<sup>49</sup> *Id.* at ¶ 5(b).

<sup>50</sup> NFL PLAYER CONTRACT, *supra* note 14, at app. A, ¶ 3.

<sup>51</sup> NFL CBA, *supra* note 13, at art. 4, § 9(a).

<sup>52</sup> ESPN.com News Services, *Sources: Player’s Contract Forbids Riding a Motorcycle*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=2051653> (last updated May 4, 2005).

<sup>53</sup> ESPN.com News Services, *Radmanovic Fined by Lakers for Lying about Injury*, ESPN, <http://sports.espn.go.com/nba/news/story?id=2784898> (last updated Mar. 2, 2007).

<sup>54</sup> See generally MLB CBA, *supra* note 13, at art. XIII; NBA CBA, *supra* note 13, at art. XXII;

example, provides that “[e]ach Club shall provide its Players with high quality health care appropriate to their needs as elite professional hockey players.”<sup>55</sup> The NFL promises players the availability of specialized care in orthopedics, neurology, and cardiovascular disease.<sup>56</sup>

The NFL and the NHL agreements also have explicit language providing that team physicians owe their primary obligation to the players, not the team.<sup>57</sup> Even so, team physicians are expected to share medical information concerning players with coaches and others in the organization. The physician’s freedom to disclose players’ medical information to team officials is quite explicit in the NBA CBA: “A Team physician may disclose all relevant medical information concerning a player to (i) the General Manager, coaches, and trainers of the Team by which such player is employed . . . .”<sup>58</sup>

Similarly, the “Authorization for the Use and/or Disclosure of Major League Player Health Information”<sup>59</sup> implements the requirement of full disclosure with respect to player health expressed in MLB CBA Article XIII.<sup>60</sup> The MLB Authorization permits disclosure to team officials of medical information about the player and “applies to all health information” in the possession of “[a]ll health care providers” with whom the player has “consulted pursuant to [his] Uniform Player’s Contract (‘UPC’), the Basic Agreement, or for a work-related disability, injury, illness or condition.”<sup>61</sup>

The contractual agreement across the leagues is that the team can require players to submit to medical examinations, during which players have a duty of

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NFL CBA, *supra* note 13, at art. 39; NHL CBA, *supra* note 13, at art. 34.

<sup>55</sup> NHL CBA, *supra* note 13, at art. 34, § 34.1(a). *See also* MLB CBA, *supra* note 13, at art. XIII; NBA CBA, *supra* note 13, at art. XXII; NFL CBA, *supra* note 13, at art. 39.

<sup>56</sup> NFL CBA, *supra* note 13, at art. 39, § 1(b).

<sup>57</sup> *Id.* at art. 39 § 1(c) (“[E]ach Club [physician’s] primary duty in providing player medical care shall be not to the Club but instead to the player-patient.”). *See also* NHL CBA, *supra* note 13, at art. 34, § 34.1(b) (“The primary professional duty of all individual health care professionals, such as team physicians, . . . shall be to the Player-patient regardless of the fact that he/she . . . is retained by such Club to diagnose and treat Players.”).

<sup>58</sup> NBA CBA, *supra* note 13, at art. XXII, § 3(a).

<sup>59</sup> MLB CBA, *supra* note 13, at attachment 18, § 1 [hereinafter MLB AUTHORIZATION].

<sup>60</sup> MLB CBA, *supra* note 13, at art. XIII, § G(1).

Each year upon reporting to spring training, or upon signing a Major League Uniform Player’s Contract (“UPC”) for that season, whichever is earlier, each Player must, consistent with Paragraph 6(b)(1) of the UPC, execute the Authorization for the Use and/or Disclosure of Major League Player Health Information (“Authorization”) attached as Attachment 18 hereto.

*Id.*

<sup>61</sup> MLB AUTHORIZATION, *supra* note 59, at attachment 18, §§ 1–2.

candor. In addition to and in furtherance of the duty of candor, players are required to report injuries to the team physician. Players are entitled to expert medical care that is focused on the player's health, but teams have a right to be informed of information about a player's ability to perform.

#### D. Player's Right to a Second Opinion

Team physicians perform their services under a potential conflict of interest in that their player-patient's interest and their team-employer's interest could lead to different decisions affecting the player's health.<sup>62</sup> Team physicians make judgments that can adversely affect a player's long-term health and his ability to earn a living.

The power of team physicians to impact the careers of players is strikingly illustrated by the weight attached to the physicians' decisions as to whether or not a player is medically fit to play. For example, the NBA Uniform Player Contract provides that a player may be suspended if, "in the judgment of the Team's physician, [the player is] unfit to play skilled basketball" for reasons other than a work-related injury.<sup>63</sup> The NFL Player Contract also provides that, "If [a] Player fails to . . . maintain his excellent physical condition to the satisfaction of the Club physician, . . . then Club may terminate this contract."<sup>64</sup>

Given the responsibility vested in the team physician, it is no surprise that the players associations in each league have achieved, in their respective CBAs, the right of a player to secure a second medical opinion. The MLB CBA, for example, provides that, "[A] Player may seek a 'second evaluation' from a medical specialist . . . provided that the Player is not absent from the Club for an unreasonable period of time."<sup>65</sup> Players are not only allowed to get advice or evaluations from these secondary medical opinions, but MLB teams are required to pay for all reasonable costs associated with the trip.<sup>66</sup>

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<sup>62</sup> See Calandrillo, *supra* note 1; Furrow, *supra* note 1; Mitten, *supra* note 1.

<sup>63</sup> NBA UNIFORM PLAYER CONTRACT, *supra* note 14, at exhibit A, ¶ 7(b).

<sup>64</sup> NFL PLAYER CONTRACT, *supra* note 14, at app. A, ¶ 8.

<sup>65</sup> MLB CBA, *supra* note 13, at art. XIII, § D. The team is required to pay the cost of a second medical opinion (unless it otherwise agrees in writing) only if the secondary evaluation is undertaken by a physician on the "accepted listing of medical specialists, by specialty and by geographic region" and only if advance notice is given by the player. *Id.*

<sup>66</sup> *Id.* But see MLB CBA, *supra* note 13, at art. XIII, § G(2)(a).

A Player is not required to provide his Club with notice of a consultation or evaluation of a Work-Related Injury by a health care provider who is not affiliated with the Club provided that the Player: (i) receives no treatment in connection with the consultation or evaluation; (ii) does not submit to an invasive test or procedure; and (iii) is not invoking his right to a Second Medical Opinion under Section D of this Article. In addition, if such an evaluation

The teams want to stay in the loop when a player seeks a second medical opinion. The NBA Uniform Player Contract provides that if a player decides to consult his own physician, he must notify the team and authorize the physician to disclose the results of the examination to the extent that they may affect the player's performance.<sup>67</sup> The NFL and NHL CBAs have special provisions, generally requiring collaboration between the player and the team, in the event that a player requires surgery.<sup>68</sup>

#### IV. DISCLOSURE OF MEDICAL INFORMATION BY THE TEAM

As between the player and the team, the guiding principle of disclosure of medical information is transparency. How well this principle is applied is open to some doubt. As noted, players may have economic reasons to be less than candid with the team. Moreover, commentators have suggested that the team may be less concerned with the player's health than with the player's availability to perform and, so, fall short on candor, as well.<sup>69</sup> The concussion class action lawsuit against the NFL provides some support for these commentators' views.<sup>70</sup>

Although transparency of medical information between the player and the team may be imperfect, the team is bound to have substantial medical information about players' medical information that is also of considerable interest to the league, other teams, fans, and various other stakeholders in the world of professional sports.

League documents address, in varying ways, a team's freedom or duty to disclose a player's medical information to the league, other teams, and the public.<sup>71</sup>

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or consultation was not authorized by the Club, the Club will not be responsible under Regulation 2 of the UPC for any expenses incurred by the Player in connection with it.

*Id.*

<sup>67</sup> NBA UNIFORM PLAYER CONTRACT, *supra* note 14, at exhibit A, ¶ 7(h).

<sup>68</sup> See NFL CBA, *supra* note 13, at art. 39, § 5; NHL CBA, *supra* note 13, at art. 34, § 34.5.

<sup>69</sup> See Calandrillo, *supra* note 1, at 191–92; Furrow, *supra* note 1, at 171; Mitten, *supra* note 1, at 140.

<sup>70</sup> See generally Plaintiffs' Amended Master Admin. Long-Form Complaint, *supra* note 3.

<sup>71</sup> See MLB CBA, *supra* note 13, at art. XIII, § G(4); NBA CBA, *supra* note 13, at art. XXII, § 3(d); NHL CBA, *supra* note 13, at art. 34, § 34.3(c). The NFL CBA contains little concerning medical disclosures, while the NFL Constitution densely defines player categories, in part based on a player's medical status. See NFL CBA, *supra* note 13, at art. 39. See also CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE, art. XVII, § 17.1(A) (2010) [hereinafter NFL CONSTITUTION].

A. *Disclosure to the League*

Teams disclose player medical information to their league for a number of reasons. One essential feature of the leagues is a set of rules governing the rosters of teams, including the number and status of players permitted on a team.<sup>72</sup> Those rules take account of player injuries, particularly where a player who is under contract is unavailable by reason of a medical condition to play for his team.<sup>73</sup>

The NFL has particularly complex rules governing player status, much of it related to the medical injury of the player involved.<sup>74</sup> For example, an NFL player who is injured might be classified as Reserve/Injured, Reserve/Physically Unable to Perform (Reserve/PUP), or Reserve/Non-Football Illness/Injury (Reserve/NF/I).<sup>75</sup> Each status has a distinct impact on the team's roster and the availability of the player to play, or even to practice with the team. The league's management of team rosters, a crucial aspect of balanced competition, requires that the league receive some information regarding the affected player's medical condition.<sup>76</sup> Of course, these medically related status determinations affect the NFL player as well as the team, and, in some circumstances, the player may challenge the status that he was given by the team.<sup>77</sup>

Beyond these official player statuses,

NFL coaching staffs are required to provide an injury report that is updated throughout the week. On these reports, players are listed as:

Inactive (IA) [-] Players are officially inactive for the current game and will not play[;]

Out (O) – Not scheduled to play[;]

Doubtful (D) – Players have approximately a 25% chance of playing[;]

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<sup>72</sup> MLB CBA, *supra* note 13, at art. XV, § E(1); NBA CBA, *supra* note 13, at art. XXIX, § 1; NFL CONSTITUTION, *supra* note 71, at art. XVII, § 17.1(A); NHL CBA, *supra* note 13, at art. 16, § 16.4(a).

<sup>73</sup> *See id.*

<sup>74</sup> NFL CONSTITUTION, *supra* note 71, at art. XVII, § 17.1(A).

<sup>75</sup> *Id.*

<sup>76</sup> *See* NFL CONSTITUTION, *supra* note 71, at art. XVII.

<sup>77</sup> *See, e.g.,* NFL CBA, *supra* note 13, at art. 44.

Questionable (Q) – Players have approximately a 50% chance of playing[;]

Probable (P) – Players are very likely to start in the upcoming week.<sup>78</sup>

Some NFL coaches have been accused of gaming the reports to the league. For example, two former New England Patriots players claimed that they were reported to the league as injured when they were not.<sup>79</sup> One study suggests that over-reporting injuries is a common practice in the NFL.<sup>80</sup> Bill Belichick, the Patriots' coach who is accused of gaming reports, suggests that it is almost impossible to over-report player injuries:

“We have to give an injury report daily, before the game, the Friday injury report with the league ... [sic]” Belichick said. “Every week it's required. So it isn't about anybody wanting or not wanting to do anything. It's whatever it is it is. That's the way we do it.[”]

“We've played four preseason games, this is our ninth regular-season game, so we've played 13 consecutive weeks, plus two weeks of training camp before that, plus however many practices we've had. So who do we think that's playing is 100 percent in that locker room? I mean, let's list those guys. Who is on that list? I don't know. It would be a real short one. It's the middle of the football season. Everybody on that team who's playing has got something. Guys on the practice squad have stuff.[”]

“Not saying it's, you know, it makes them doubtful or anything. I'm just saying it's playing football and that's part of it. I don't think any player in the league who's played that much football feels a whole 100 percent. I can't imagine. Name another player

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<sup>78</sup> *Injury Report and Inactives*, NFL, <http://www.nfl.com/fantasyfootball/help/injuryreport> (last visited Nov. 19, 2014).

<sup>79</sup> Michael David Smith, *Spikes, Talib Say Patriots File False Injury Reports*, NBC SPORTS (Mar. 19, 2014), <http://profootballtalk.nbcsports.com/2014/03/19/spikes-talib-say-patriots-file-false-injury-reports/>.

<sup>80</sup> Anthony Zonfrelli, *Inaccuracies in the Injury Report Across the NFL*, HARV. COLL. SPORTS ANALYSIS COLLECTIVE (Nov. 6, 2013), <http://harvardsportsanalysis.org/?p=4520>.

in the league that's fresh as a daisy in the beginning of November after nine regular-season games and six weeks of training camp and preseason games before that. Who would that be? If all the guys who didn't feel 100 percent didn't practice, we'd probably have two people out at practice. Maybe not even that.”<sup>81</sup>

Belichick's assessment notwithstanding, it is possible that some NFL coaches see a tactical advantage in over-reporting injuries. If opposing teams are uncertain of what players they will face or what an opposing player's condition will be, that could affect their preparation for the game. How much time should a team spend in preparation for an injured starter who has one set of tendencies as opposed to a back-up who has a different set of tendencies? Hiding the ball with respect to what personnel will take the field and what their condition will be could provide the tactical advantage of misdirection and surprise. Of course, this rationale could apply equally to under-reporting injuries as to over-reporting them. The element of surprise, potentially, is served by any false reporting.

Required reports to the league concerning player medical information are somewhat less expansive in MLB.<sup>82</sup> The Office of the Commissioner of MLB may receive player medical information,

[W]hen a Player's medical and/or health condition is at issue in a grievance or a potential grievance. The medical or health information also shall be provided to the Office of the Commissioner (with a copy to the Association) when such records are [relevant] to an investigation of whether the Player violated the Basic Agreement, his UPC or Major League Baseball's Joint Drug [Prevention] and Treatment Program, provided that the Office of the Commissioner first provides the Association with notice of its intent to request such records and an opportunity to object.<sup>83</sup>

This limited disclosure means that the team has a lot of player medical in-

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<sup>81</sup> Nick Underhill, *Bill Belichick on Injury Talk: 'Name Another Player in the League That's Fresh as a Daisy in the Beginning of November,'* MASS LIVE, [http://blog.masslive.com/patriots/2013/11/bill\\_belichick\\_on\\_injury\\_talk.html](http://blog.masslive.com/patriots/2013/11/bill_belichick_on_injury_talk.html) (last updated Nov. 1, 2013, 6:03 PM).

<sup>82</sup> MLB CBA, *supra* note 13, at art. XIII, § G(5).

<sup>83</sup> *Id.*



formation that is not shared with the league. At the same time, because disclosure of player medical information to the public is broadly permitted under the MLB CBA,<sup>84</sup> the team may be keeping less information confidential than may at first appear.

### *B. Disclosure to Other Teams*

The MLB, NBA, and NHL CBAs provide that a team may disclose a player's medical information to another team if an assignment of the player's contract is being contemplated.<sup>85</sup> Generally, these disclosures seem in keeping with the due diligence that would be expected in purchasing a valuable asset, such as a player's contract. If the transaction in fact occurs, the new team will have information about the player from the team, which it would otherwise be contractually entitled to get from the player or to discover through required medical examinations.

The NFL documents do not appear to contain comparable provisions. Instead, teams apparently rely on their own medical examinations of players before finalizing the assignment of a player's contract.<sup>86</sup>

### *C. Disclosure to the Public*

All four leagues provide for some degree of public disclosure of player medical information.<sup>87</sup> The relevant provision in the MLB CBA is as follows:

For public relations purposes, a Club may disclose the following general information about employment-related injuries: (a) the nature of a Player's injury, (b) the prognosis and the anticipated length of recovery from the injury, and (c) the treatment

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<sup>84</sup> *Id.* at § G(4) ("For public relations purposes, a Club may disclose the following general information about employment-related injuries: (a) the nature of a Player's injury, (b) the prognosis and the anticipated length of recovery from the injury, and (c) the treatment and [surgical] procedures undertaken or anticipated in regard to the injury.").

<sup>85</sup> *Id.* at § G(3)(c); NBA CBA, *supra* note 13, at art. XXII, §§ 3(b)–(c); NHL CBA, *supra* note 13, at art. 34, §34.3(c)(v).

<sup>86</sup> *See, e.g.*, Richard Lezin Jones, *Coles Completes a U-Turn and Is Back with the Jets*, N.Y. TIMES (Mar. 10, 2005), [http://www.nytimes.com/2005/03/10/sports/football/10nfl.html?pagewanted=print&position=&\\_r=0](http://www.nytimes.com/2005/03/10/sports/football/10nfl.html?pagewanted=print&position=&_r=0) (indicating that a trade became final only after the new team completed a medical examination of the player); *NFL Player's Life Might Have Been Saved When Tumor Found*, SPORTING NEWS (Oct. 20, 2011), <http://www.sportingnews.com/nfl/story/2011-10-20/physical-may-have-saved-harrisons-life> ("Physical exams are routine on players traded in the NFL, and deals aren't complete until all players involved are cleared by doctors.").

<sup>87</sup> MLB CBA, *supra* note 13, at art. XIII¶ G(4); NBA CBA, *supra* note 13, at art. XXII; NFL CBA, *supra* note 13, at art. 39; NHL CBA, *supra* note 13, at art. 34, § 34.3(c)(iii).

and surgical procedures undertaken or anticipated in regard to the injury. For any other [medical] condition that prevents a Player from rendering services to his Club, a Club may disclose only the fact that a medical condition is preventing the Player from rendering services to the Club and the anticipated length of the Player's absence from the Club.<sup>88</sup>

Although not permitting a fine-grained disclosure of player medical information, the provision gives the sort of account that, for example, friends might share among friends. The NHL CBA is nearly identical in its scope.<sup>89</sup>

The NBA CBA is somewhat more general in its terms, permitting public disclosure of player medical information “provided that such information relates solely to the reasons why any such player has not been or is not rendering services as a player.”<sup>90</sup> In addition, the NBA CBA provides an exception for life-threatening or career-threatening injuries or illnesses and those that are non-work-related, in which case, players or their families have the right to approve the timing and the terms of the disclosure to the public.<sup>91</sup>

#### D. Medical Information and Gambling

One commentator, who calls himself “the nation’s most skeptical fan,”<sup>92</sup> suggests that league-required injury reports particularly serve the interests of gamblers who rely on such information in placing bets on sports events.<sup>93</sup> While some studies suggest that sports gambling is largely a game of chance rather than superior knowledge,<sup>94</sup> those who predict the outcomes of sports events—for money or otherwise—seem to think differently.<sup>95</sup>

If teams and leagues did not disclose player injuries prior to game time as a matter of course, people who make money—or believe they will—from player

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<sup>88</sup> MLB CBA, *supra* note 13, at art. XIII, § G(4).

<sup>89</sup> NHL CBA, *supra* note 13, at art. 34, § 34.3(c)(iii).

<sup>90</sup> NBA CBA, *supra* note 13, at art. XXII, § 3(d).

<sup>91</sup> *Id.* at § 3(e).

<sup>92</sup> Brian Tuohy maintains a website on which he makes the claim. Brian Tuohy, THE FIX IS IN, <http://thefixisin.net/> (last visited Nov. 19, 2014).

<sup>93</sup> Brian Tuohy, *Why the NFL's Stance Against Gambling Is Complete BS*, BLEACHER REPORT (July 25, 2009), <http://bleacherreport.com/articles/223843-why-the-nfls-stance-against-gambling-is-complete-bs>. See BRIAN TUOHY, LARCENY GAMES: SPORTS GAMBLING, GAME FIXING AND THE FBI 294 (2013).

<sup>94</sup> Michael Cantinotti, Robert Ladouceur & Christian Jacques, *Sports Betting: Can Gamblers Beat Randomness?*, 18 PSYCH. OF ADDICTIVE BEHAVIORS 143, 145 (2004).

<sup>95</sup> See, e.g., Jon Boswell, Note, *Fantasy Sports: A Game of Skill That Is Implicitly Legal under State Law, and Now Explicitly Legal under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1270 (2008).

medical information would likely try to gain the information on their own. Whether through surveillance, bribery, or other means, players and teams would be exposed to wrongful efforts to gain information.<sup>96</sup> The current regime of public disclosure seems to satisfy the public demand for player medical information, whether that information is sought as a matter of general interest or in support of sports betting.

## V. CONCLUSION

Professional athletes have more reason than most of us to jealously guard information about their health. As people often highly paid for their physical abilities, adverse health information can cost professional athletes millions, or even end careers. In addition, endorsements and other income opportunities, both during the athlete's playing days and thereafter, can be affected by the player's image, including aspects of that image that relate to health and vitality.

Privacy is not costless, however, particularly in professional sports. Teams spend millions relying on the ability of a player to perform at an exceptional level. A concealed health problem can cheat the team of the value for which it bargained.

Professional sports leagues also have a substantial interest in player medical information, both for reasons of safety in the sport (and the public perception associated with disregard for player safety) and in order to maintain fair competition in terms of team rosters. In addition, sports fans make substantial emotional and financial investments<sup>97</sup> in the anticipated performance of the teams that they follow, and the adverse effect of a key player's concealed health problem on a team can cause significant loss of value to fans.

The balance that has been struck, through a process of collective bargaining, favors disclosure of player medical information over privacy. It is difficult to imagine it working any other way, notwithstanding the important trade-offs involved.

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<sup>96</sup> *See id.*

<sup>97</sup> The financial investment can include the cost of attending a game or a wager placed on a game.