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A SUMMARY OF THE NFL'S INVESTIGATION INTO THE NEW ORLEANS SAINTS ALLEGED BOUNTY PROGRAM AND RELATED PROCEEDINGS

*Christopher R. Deubert**

The last few presentations lead well into what I am going to talk about, as certainly a many people think that there is a link between the concussion litigation and what transpired in the New Orleans Saints “pay-for-performance”/”bounty” program matter. Our firm, Peter R. Ginsberg Law, LLC represented Jonathan Vilma, Saints linebacker, in all matters related to the alleged Bounty Program. This presentation turned article will detail the multi-step process of the relevant proceedings.

The Saints were alleged to have run a Bounty Program for the 2009, 2010, 2011 seasons led by defensive coordinator Gregg Williams whereby players allegedly put money into a pool to encourage the injury of their opponents. The NFL alleged these actions violated the NFL’s purported “Bounty Rule.”

On March 2, 2012, the National Football League (“NFL”) released its first press release about the allegations. At the same time, there was also an internal security report that was released just to NFL Clubs. This is the first time any of the players allegedly involved had ever heard of this investigation. You could imagine Vilma was a little surprised when he hears that there is an allegation that says he placed a \$10,000 bounty on Brett Favre during the 2010 NFC Championship Game.

The NFL’s March 2, 2012 press release claimed the NFL reviewed over 18,000 documents totaling 50,000 pages to support its allegations. Among other things, the NFL alleged that Saints players, coaches and officials violated the NFL Constitution and Bylaws. The Bylaws allegedly violated prohibit non-contract bonuses:

No member, nor any stockholder, director, officer, partner or employee thereof, or person holding an interest therein, nor any officer or employee of the League shall. . . [o]ffer or pay a player or coach, and no player or coach may receive any bonus, money, or thing of

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value for winning any game played in the League. No club or any representative thereof, shall offer to pay, directly or indirectly, to a player, and no player shall receive, any bonus of any kind unless such bonus provision is attached to and/or incorporated in the contract of such player[.]

Article 9.1(C)(8).

No bonus may be paid to a player or players for winning a particular game; neither may remuneration or gifts of any kind other than those listed in the contract of a player be announced, promised, or paid directly or indirectly by a member club or by any person connected with or employed by a club.

Article 9.3(F).

No blanket remuneration or bonuses shall be paid or given to players at any time.

Article 9.3(G).

NFL players are forbidden from being paid for anything that is not contained within the four corners of their contracts. The NFL Constitution and Bylaws is a separate legal document from the Collective Bargaining Agreement negotiated between the NFL and the NFL Players Association (“NFLPA”). Nevertheless, the NFL Constitution and Bylaws are incorporated by reference into the Collective Bargaining Agreement. The players are thus bound by the terms of the NFL Constitution and the Bylaws.

The purpose of the prohibition against non-contract bonuses is to prevent salary cap circumvention. Beginning with when the NFL salary cap was implemented in 1993, any compensation paid to a player has to count against the salary cap. Players and Clubs cannot circumvent or go around the salary cap by giving the player something is not called for in the contract. The prohibition is encompassed within the NFL’s purported “Bounty Rule”:

National Football League rules prohibit a club from offering or paying bonuses to a player for his or his team’s performance against a particular team, a particular opposing player or players, or a particular group of an opposing team, or for on-field misconduct, such as personal fouls to or injuries inflicted on opposing players.

This restriction on clubs, which is called the “bounty rule,” also prohibits players and any other club employee from offering or accepting such a bonus. The “bounty rule” is designed not only to preserve the League’s competitive integrity, but also to promote player safety by prohibiting a player or players from placing a “bounty” on their opponents that could lead to unnecessarily violent acts.

Clubs, and players, are also prohibited from offering or paying bonuses to players that are not included in the player’s NFL Player

Contract. Prohibited conduct by players includes, but is not limited to, the establishment of bonus pools for special teams performance, offering or sharing playoff game compensation with teammates, payment of cash and non-cash awards to teammates for outstanding performances or achievements, or agreements among players to reimburse or indemnify teammates in the event they are fined or suspended without pay by the Commissioner.

However, gifts by players to teammates or other members of the organization are permissible after the conclusion of a club's playing season, provided that no offer, promise, or announcement of such a gift was made during a club's playing season. If a player who has been elected to the Pro Bowl desires to take a teammate or teammates to the game, it is permissible to make such arrangements after the announcement of Pro Bowl squads, provided that no offer, promise, or announcement of such a gift was made prior to the selection of the squads.

Prohibited conduct by players includes, but is not limited to, the establishment of bonus pools for special teams performance, offering or sharing playoff game compensation with teammates, or payment of cash or noncash awards to teammates for outstanding performances or achievements.

Violators may be subject to appropriate disciplinary action for conduct detrimental to the League or professional football.

NFL League Policies for Players.

The prohibition against non-contract bonuses also prohibits players from receiving compensation for the injury of other players. The Bounty Rule is contained in the NFL League Policies for Players, which is not a collectively bargained document. Players have no say in the League Policies for Players. From the NFLPA's perspective, the NFL's League Policies for Players are not enforceable as a matter of labor law. The players receive the Policies and in certain years Clubs have required players to sign and acknowledge their receipt. In other years, the Policies were simply given to the players.

On March 21, 2012, about three weeks after the initial press release, The NFL disciplined the Saints coaches and officials: Williams, who by this time was with the St. Louis Rams, was suspended indefinitely; head coach Sean Payton was suspended for one year; General Manager Mickey Loomis was suspended for eight games; and, assistant head coach and linebackers coach Joe Vitt was suspended for six games. The Saints were fined \$500,000 and required to forfeit second round draft picks in the 2012 and 2013 NFL Drafts.

THE LITIGATION MATTERS

In total there were six matters or six different litigations that took place concerning the Saints' alleged Bounty Program.

Matter number one was purportedly brought pursuant to Article 46 of the Collective Bargaining Agreement, entitled Commissioner Discipline. Article 46 provides the process by which the Commissioner can discipline players and the mechanism by which players can challenge the imposition of discipline by the Commissioner. Article 46 is one of most controversial parts of the Collective Bargaining Agreement because, in any other sport, any discipline imposed upon the player by a commissioner is subject to neutral arbitration. That is not the case in the NFL. This issue became much more important when Commissioner Roger Goodell took over in 2006. Since taking over, Commissioner Goodell has been renowned for his iron fist approach to player conduct and discipline.

We move now to May 2, 2012, the first time that any players are suspended: Vilma was suspended for one year; defensive tackle Anthony Hargrove, at the time with the Green Bay Packers, was suspended for eight games; defensive end Will Smith was suspended for four games; and linebacker Scott Fujita, an NFLPA player representative with the Cleveland Browns, was suspended three games. Prior to May 2, 2012, the NFL had stated that approximately 23 to 27 players had been involved in the alleged Bounty Program. Consequently, players had been wondering who was going to be disciplined. The ground for suspending Vilma, Smith and Fujita is that they were captains of the defense during this time. Anthony Hargrove, on the other hand, is alleged to have lied to NFL investigators when the NFL first learned of the alleged Bounty Program in the winter of 2010.

Moving to matter number two, the day after discipline was first imposed, the first grievance is filed by the players under the Collective Bargaining Agreement. Article 43 controls the non-injury grievance process. This grievance claimed that the release signed as part of the Collective Bargaining Agreement prohibited the discipline imposed by the NFL. The release reads in relevant part:

The NFL, on behalf of itself, the NFL, and the NFL Clubs and their respective heirs, executors, administrators, representatives, agents, successors and assigns, releases and covenants not to sue, or to support financially or administratively, or voluntarily provide testimony of any kind, including by declaration or affidavit in, any suit (including any Special Master proceeding brought pursuant to the White SSA and/or the Prior Agreement) against the NFLPA or any of its members, or agents acting on its behalf, or any member of its bargaining unit, with respect to conduct occurring prior to the execution of this Agreement.

Art. 4, § 3.

The release was an especially important part of the 2011 Collective Bargaining Agreement because the parties had just gone through approximately six months of litigation.¹ Importantly here, the release prohibited the parties from suing with respect to conduct occurring prior to the execution of the 2011 Collective Bargaining Agreement. The grievance was brought by us and the NFLPA, representing Smith, Hargrove and Fujita. We argued that Article 4, Section 3 prohibited the majority of the NFL's intended discipline. We argued the NFL could not punish the players for conduct that occurred prior to the 2011 Collective Bargaining Agreement. The bulk of the conduct was alleged to have occurred in 2009, including the alleged bounty by Vilma on Farve. This grievance was denied. Arbitrator Shyam Das determined that the NFL's proposed discipline was not a "suit" as contemplated by Article 4, Section 3.

Also on May 3, the second grievance, and third matter, was filed. We commenced a System Arbitrator with System Arbitrator Stephen Burbank. To understand the role of Special Master requires a detailed understanding of NFL labor relations. Going back to the 1980s, from 1987 to 1993 there was no Collective Bargaining Agreement. There were multiple antitrust laws, mostly commenced in the United States District Court for the District of Minnesota.² Eventually, Reggie White led a lawsuit in 1992 that could have potentially resulted in billions of dollars in damages for antitrust violations.³ That lawsuit was settled and the settlement of the lawsuit became what essentially is the modern Collective Bargaining Agreement. That settlement and the resulting Collective Bargaining Agreement established the salary cap, free agency, and several other provisions common to fans today.

As part of the settlement of the lawsuit, Minnesota District Court Judge David Doty retained jurisdiction over the Collective Bargaining Agreement, because it was the stipulation and settlement agreement of the *White* lawsuit that became the basis of the Collective Bargaining Agreement. That Collective Bargaining Agreement was extended

1. For more information on the 2011 Collective Bargaining Agreement and related litigation, see Chris Deubert, Glenn Wong and John Howe, "All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League" 19 *UCLA Entertainment Law Review* 1 (2012).

2. See *Powell v. Nat'l Football League*, 678 F. Supp. 777 (D. Minn. 1988); *Powell v. Nat'l Football League*, 930 F.2d 1293 (8th Cir. 1989); *Powell v. Nat'l Football League*, 764 F. Supp. 1351, 1358-59 (D. Minn. 1991); *McNeil v. Nat'l Football League*, 790 F.Supp. 871, 876 (D. Minn. 1992); *Jackson v. Nat'l Football League*, 802 F. Supp. 226, 228 (D. Minn. 1992).

3. *White v. Nat'l Football League*, 822 F. Supp. 1389, 1395 (D. Minn. 1993). The NFL also paid \$200 million to the players for the settlement of that lawsuit. See Will McDonough, *Tentative Deal Reached in NFL Free Agency Among Concessions Made by Owners to NFL Players*, *BOSTON GLOBE*, Dec. 23, 1992, at 59.

three times (1998, 2001 and 2006) and Judge Doty always had to approve the new Collective Bargaining Agreement. Federal Rules of Civil Procedure Rule 53 permits Courts to appoint Masters to help deal with complicated litigation. To help resolve anticipated disputes under the new Collective Bargaining Agreement, a Special Master was appointed as part of the *White* settlement.⁴

In 2002, University of Pennsylvania law professor Stephen Burbank—an admitted non-football fan—was chosen as the third Special Master. Each year there were approximately ten or a dozen Special Master grievances that could ultimately be appealed to Judge Doty.⁵ However, the 2011 CBA ended Judge Doty's jurisdiction over the Collective Bargaining Agreement. The parties agreed however to keep Professor Burbank in a very similar role and designated him the System Arbitrator. System Arbitrator Burbank retained jurisdiction over what are considered system issues, *i.e.*, the type of issues that could be subject to antitrust litigation, such as the Draft, free agency, salary cap and the franchise tag. The salary cap being one of those issues, possible circumvention of the salary cap is an issue that comes within the System Arbitrator's jurisdiction.

We argued that what the players were really being punished for was alleged circumvention of the salary cap, *i.e.*, being paid something that was not in their contract. Circumvention of the salary cap falls within the exclusive jurisdiction of the System Arbitrator:

A Club (or a Club Affiliate) and a player (or a Player Affiliate or player agent) may not, at any time, enter into undisclosed agreements of any kind, express or implied, oral or written, or promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kind: (a) involving consideration of any kind to be paid, furnished or made available or guaranteed to the player, or Player Affiliate, by the Club or Club Affiliate either prior to, during, or after the term of the Player Contract; and/or (b) concerning the terms of any renegotiation and/or extension of any Player Contract by a player subject to a Franchise Player or Transition Player designation.

Art. 14, § 1.

Thus, if the NFL wanted to punish the players that they had to bring a system arbitration and that the players' conduct was not subject to

4. Fordham Law professor John Feerick was the original Special Master. NFL Has Labor Agreement, but Salary Cap Stirs Debate, ASSOCIATED PRESS, Oct. 16, 1994, available at 1994 WLNR 1991229. Feerick was replaced by Jack Friedenthal in 1996. Dave Sell, Schuler's Salary Cap Status Requires Further Review, WASH. POST, Aug. 24, 1996, available at 1996 WLNR 6488812.

5. See, *e.g.*, *White v. Nat'l Football League*, 2007 WL 939560, at *1 (D.Minn. Mar. 26, 2007); *White v. NFL*, 533. F.Supp.2d 929 (D.Minn. 2008).

Commissioner discipline under Article 46. System Arbitrator Burbank denied our grievance but that was not the end of this matter.

Matter number four began two weeks after the first grievance was filed. On May 17, 2012, Vilma filed a lawsuit in the United States District Court for the Eastern District of Louisiana alleging defamation for the things Commissioner Goodell had said publicly. Vilma, contrary to the Commissioner's statements, alleged that he never:

- established, or assisted in establishing, a Bounty Program or any similar program in violation of NFL rules.

- "pledged," made or received payments of any kind encouraging or resulting from an opposing player being carried off the field, i.e., "cart-offs."

- "pledged," made or received payments of any kind encouraging or resulting from an opposing player being unable to return to the game, i.e., "knockouts."

- "pledged," made or received payments of any kind encouraging or resulting from an opposing player being injured.

- "targeted" an opposing player in any manner that would violate NFL rules.

- engaged "in unsafe and prohibited conduct intended to injure players."

- "participate[d] in a program that potentially injured opposing players."

- "embraced" a Bounty Program or any similar program in violation of NFL rules.

- paid, or intended to pay, \$10,000, or any amount of money, as an incentive to any player to knock Warner, Favre, or any other player, out of the 2009 Divisional Playoff Game, 2010 NFC Championship Game, or any other game.

- placed \$10,000, or any amount of money, on any table or anywhere else as part of a Bounty Program or any other program in violation of NFL rules.

On July 5, 2012, Commissioner Goodell moved to dismiss the defamation lawsuit claiming that Vilma's claims were preempted by the Labor Management Relations Act ("LMRA").⁶ The LMRA is the federal law that governs the relationship between employers and employees. The LMRA provides the basis for collective bargaining agreements and strongly supports the proposition that the grievance process under collective bargaining agreements is to be the exclusive remedy by which an employee can challenge an employer's action. Consequently, state law claims are generally preempted or barred by the LMRA and a collective bargaining agreement. Claims like breach of contract and medical malpractice are often preempted.

6. 29 U.S.C. § 185.

Whether a state law claim is preempted turns on whether the claim is “inextricably intertwined” with the collective bargaining agreement.⁷ The question in Vilma’s case was essentially whether the Court needed to interpret the Collective Bargaining Agreement to determine whether Commissioner Goodell was permitted to make the statements he made.

We now go back to matter number one, the Article 46 Commissioner Discipline proceeding. On June 18, 2012, the first appeal hearing had occurred at the NFL offices. Commissioner Goodell served as the arbitrator, even though he is not an attorney. Consequently, NFL General Counsel Jeffrey Pash served as Commissioner Goodell’s advisor during the hearing, which consisted of a room full of twenty or so attorneys and the four players.

The players did not participate on the merits during the first appeal hearing, *i.e.*, the players did not attempt to argue the merits of the case. The players made procedural objections based on the failure to produce documents, witnesses and Commissioner Goodell’s bias. Representing the NFL in this proceeding was Mary Jo White, recently nominated by President Obama to be the Chairperson of the Securities Exchange Commission. At the time, she was a Partner with Debevoise Plimpton, LLP, a very prominent law firm in New York City. She was formerly the United States Attorney for the Southern District of New York. Clearly the NFL was taking the matter seriously. Nevertheless, due to the procedural infirmities, the players refused to participate that day. The hearing adjourned and Commissioner Goodell took the matter under advisement.

We turn now to matter number five. On June 30, 2012, Vilma commenced a second lawsuit in the Eastern District of Louisiana, requesting Goodell to issue his decision because at that point everyone knew what was going to happen. The players were planning to file an action to vacate Commissioner Goodell’s arbitration decision. Finally, on July 3, Commissioner Goodell issues his arbitration decision, affirming all of his previously imposed discipline. On July 5, Vilma amended his complaint to include claims seeking to vacate the arbitration decision under the LMRA and the Federal Arbitration Act.⁸ Vilma alleged that the arbitration decision should be vacated for the following reasons: a fundamentally unfair hearing; an arbitrary and capricious award; the award failed to draw its essence from the Collective Bar-

7. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

8. 9 U.S.C. §§ 1-16.

gaining Agreement; arbitrator misconduct; the arbitrator exceeded his authority; and arbitrator partiality.

Moving to matter number six, also on July 5, 2012, the NFLPA filed suit in the Eastern District of Louisiana on behalf of the three players and themselves. The NFLPA action is substantially similar to Vilma's action and sought to vacate Commissioner Goodell's arbitration decision. On July 20, the NFL moved to dismiss both cases, citing courts' deference to arbitration decisions.

Going back for a moment, Commissioner Goodell's suspension of Vilma took effect immediately, meaning Vilma was barred from training camp which got underway in July. In an attempt to avoid missing training camp, Vilma brought a motion for temporary training order and for a preliminary injunction to try and get himself back on the field as soon as possible. During the hearing, the Honorable Helen G. Berrigan indicated her preference to rule in Vilma's favor:

THE COURT: Well, I'll be candid with you. I would like to rule in Mr. Vilma's favor. I think the proceedings were neither transparent nor fair. I think I made that clear the other day. I think the refusal to identify the accusers, much less have them at the hearing to be cross-examined, to look at biases, flaws in their testimony, and 18,000 documents that apparently were relied upon by Mr. Goodell, less than 200 were actually provided to you, many of them were redacted. I do think you did exhaust your remedies at that hearing, because in essence, I think you were thwarted at every time by Mr. Goodell's refusal to provide you meaningful access to witnesses and to documents. . .

MR. GINSBERG: Sure. Let me say that I too hope that you can rule for Mr. Vilma.

THE COURT: If I can do it legally, I will. If I find a way, I will.

The Court took Vilma's motion under advisement.

Now going back to matter number three, the system arbitration before professor Burbank. The players lost in front of System Arbitrator Burbank. Under the old Collective Bargaining Agreement, as I mentioned the parties could appeal then-Special Master Burbank's decisions to Judge Doty. Although Judge Doty was divested of jurisdiction, the parties did retain an appeal process. The parties agreed that there would be an Appeals Panel but, at the time of the Bounty proceedings, the Appeals Panel had not yet been constituted.

The Appeals Panel was eventually constituted and considered the players' appeal of System Arbitrator Burbank's decision during a hearing on August 30, 2012. On September 7, 2012, two days before the season began, the Appeals Panel reversed System Arbitrator Burbank's decision, vacated the discipline and remanded the matter to

Commissioner Goodell. The Appeals Panel found that System Arbitrator Burbank would have exclusive jurisdiction to determine penalties for agreements to receive payments from a pool. The Appeals Panel found that Goodell's basis for the discipline was unclear and had to be reconsidered on remand.

On remand, the players agreed to meet with Commissioner Goodell. Those meetings took place on September 17 and 18, 2012. During those meetings, for the first time and more than six months after the allegations were first made public, Commissioner Goodell identified the accusers. The players' suspicions were confirmed that the accusers were Gregg Williams and Mike Cerullo, Williams' former assistant who was fired after his one season with the Saints in 2009. Ultimately, there were many, many reasons to question Cerullo's credibility, only some of which was been made public.

After the meetings, Commissioner Goodell reimposed discipline. The discipline was substantially the same: Vilma was suspended for the remainder of the season, having been unable to play due to injury; Hargrove, who at that point was unemployed, received credit for the games he has missed; and Smith's suspension stayed the same. The biggest change occurred with Fujita's discipline. Fujita had told Commissioner Goodell that he did not participate in the pool. Commissioner Goodell believed Fujita and vacated his prior grounds for disciplining Fujita. Commissioner Goodell instead came up with an entirely new ground, an entirely new alleged violation of the Constitution and Bylaws resulting in a one game suspension for Fujita.

On October 11, 2012, the players appealed the Commissioner's newest round of discipline. The suspensions did not take affect while the appeals were pending. At the same time as the appeal, the players requested Commissioner Goodell to recuse himself from the process in light of his having spent months publicly defending his actions and the discipline.

Following the Appeals Panel's vacatur of Commissioner Goodell's discipline, Judge Berrigan indicated she would let the process play out before making any decisions. Nevertheless, the Court requested that we conditionally file motions to vacate the anticipated result of the appeals process. Judge Berrigan wanted to be able to render a decision as soon as Commissioner Goodell issued his arbitration decision on the appeal. The players took this as a good sign that the Court was prepared to vacate any discipline imposed.

On October 19, 2012, the day after the conditional motions to vacate were fully briefed, Commissioner Goodell recused himself from the process and appointed former Commissioner Paul Tagliabue as

the arbitrator for the second appeal hearing. After leaving the NFL in 2006, Commissioner Tagliabue rejoined the law firm of Covington & Burling LLP. Commissioner Tagliabue began his legal career at Covington & Burling, which has been the NFL's chief outside chief counsel for the last 50 years. Commissioner Tagliabue personally represented the NFL in dozens of cases before becoming Commissioner. Additionally, Covington & Burling was representing Commissioner Goodell and the NFL in the proceedings in the Eastern District of Louisiana.

In light of these issues, the players filed a motion to recuse Commissioner Tagliabue with Commissioner Tagliabue and also submitted supplemental briefing on the issue to the Court. On November 5, 2012, Commissioner Tagliabue denied the motion to recuse. The second appeal process then commenced with various pre-hearing conferences and additional discovery. There was an immediate difference in the way Commissioner Tagliabue handled the proceedings as compared to Commissioner Goodell.

Hearings were held in Washington, D.C. on November 27, 29 and 30 and in New Orleans on December 3. On December 11, 2012, Commissioner Tagliabue issued his decision, vacating all discipline against the players but purported to "affirm" Commissioner Goodell's findings, except as to Fujita. Commissioner Tagliabue determined that Vilma, Smith and Hargrove had engaged in conduct detrimental to the game of football but that discipline was not appropriate. Commissioner Tagliabue placed the blame for any wrongdoing on the Saints' coaches and organization and faulted Commissioner Goodell's efforts to rapidly change a long-standing practice in the NFL. Commissioner Tagliabue did, however, find that Fujita did not engage in conduct detrimental.

On December 12, 2012, the day after Commissioner Tagliabue's decision, the players indicated to the Court that they accepted Commissioner Tagliabue's decision and the players' actions to vacate (matters five and six) were dismissed. Vilma's defamation case was still pending.

On January 17, 2013, the Court dismissed the defamation case on preemption grounds.⁹ The Court determined that Goodell's comments were made as part of his duties under the Collective Bargaining Agreement and thus any complaints needed to be addressed by the processes provided for in the Collective Bargaining Agreement. De-

9. *Vilma v. Goodell*, 12-cv-1283, 2013 WL 192436 (E.D.La Jan. 17, 2013).

spite the Court's decision, the Court did take the opportunity to chide Commissioner Goodell and the NFL for its handling of the matter:

While the Court is extremely disturbed by the fundamental lack of due process in Goodell's denying the players the identities of and the right to confront their accusers, that was substantially rectified later in the process. So while the process was initially procedurally flawed, the statements were ultimately found to have enough support to defeat the defamation claims. . .

Even though this matter has been pending only since May of this year, it feels as protracted and painful as the Saints season itself, and calls for closure. The Court nonetheless believes that had this matter been handled in a less heavy handed way, with greater fairness toward the players and the pressures they face, this litigation and the related cases would not have been necessary.

After a nearly ten month process, the players ultimately were not suspended which can only be viewed as a win for the players and an indictment of Commissioner Goodell's handling of the matter.