

## **NFL Bounty Programs: Who Pays?**

On March 2, 2012, the National Football League (“NFL”) issued an official statement confirming that its investigation disclosed that between 22 and 27 defensive players on the New Orleans Saints participated in a “bounty” program whereby players were rewarded with cash payments for inflicting injuries on opposing players. Specifically, players were paid \$1,500 for a “knockout,” meaning that the opposing player was not able to return to the game, and \$1,000 for “cart-offs,” meaning that the opposing player was carried or carted off the field.

Perhaps the most surprising part of the recent news was the involvement of coaches and team personnel in these “bounty” programs. According to the NFL investigation, the bounty program was administered by the defensive coordinator of the Saints, Gregg Williams, while other defensive coaches and the head coach of the Saints, Sean Payton, had direct knowledge of the program. The NFL is also investigating whether Williams administered a similar program with other teams, including the Washington Redskins and Buffalo Bills. While the Saints may be the target of the NFL’s current investigation, it is obvious that other teams and players have or had similar programs in place.

Of course, nobody could forget what became known as the infamous “Bounty Bowl,” a game between the Philadelphia Eagles and Dallas Cowboys in 1989. During that game, Eagles coach Buddy Ryan allegedly instructed one of his linebackers, Jesse Small, to deliver a hard block on Cowboys kicker, Luis Zendejas, who happened to be a former Eagle player. Since any football fan knows that the kicker is not worth blocking, it raised some red flags when Small delivered the hit. In the postgame conference by Cowboys coach Jimmy Johnson, he said that he believed the Eagles had a \$200 “bounty” on Zendejas and a \$500 “bounty” on Cowboys quarterback Troy Aikman.

Some critics have taken the position that these “bounty” programs are traditional and commonplace, and that violence and injuries are a part of the NFL game. Others concede that football is a violent sport and injuries happen, but argue that paying players to intentionally try to injure another player brings the sport to another level. Regardless, there is no doubt that such “bounty” programs are a clear violation of the NFL Rules. In fact, before the 2011-2012 season, the NFL commissioner, Roger Goodell, sent a memo to all teams explicitly stating, “[n]o bonuses or awards may be offered or paid for on field misconduct (for example, personal fouls to or injuries inflicted on opposing players).” Thus, violations have clearly been committed, and surely, the NFL will inflict what it feels are appropriate consequences to the teams and its players.<sup>1</sup> However, one lingering question still remains: Can the teams and their players, as well as their insurers, be held liable for civil lawsuits which may be filed by victimized players?

Although there is no clear answer, this is not the first time that courts have been faced with the question of whether a player or team could be held civilly liable for an injury to an opposing NFL player. In Hackbart v. Cincinnati Bengals, Inc., et. al., a pro football player for the Denver Broncos, Dale Hackbart, initiated litigation against an opposing player, Charles

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<sup>1</sup> The NFL portrayed how serious it is taking these “bounty” programs, when it issued a one-year suspension to coach Sean Payton and an indefinite suspension to former defensive coordinator Gregg Williams, as well as a \$500,000 fine to the Saints organization and a loss of draft picks.

Clark, and the opposing team, the Cincinnati Bengals, for an injury that occurred during an NFL game in 1973. 435 F. Supp. 352 (N.D. Colo. 1977). Although Hackbart remained in the game, he claimed that he suffered a neck injury when Clark intentionally struck him in the back of his head with his right forearm after the play had ended. *Id.* at 353. Apparently, the officials did not observe the incident, so no penalty was called. *Id.* After a bench trial, and notwithstanding the Court's finding that Clark's act was intentional, the U.S. District Court for Colorado entered judgment for Clark and the Bengals, mainly on the basis that Hackbart assumed the risk of injury. *Id.* at 356. In effect, the Colorado District Court's decision signaled that an NFL player could not be held responsible for any violent conduct on the field, even if it was intentional.

However, Hackbart appealed to the Tenth Circuit Court of Appeals. *See Hackbart v. Cincinnati Bengals, Inc., et. al.*, 601 F.2d 516 (10<sup>th</sup> Cir. 1979). In a decision that reversed the Colorado District Court, the Court of Appeals held that the evidence in the case supported the proposition that the intentional striking of a player in the head from the rear is not an accepted part of either the playing rules or the general customs of the game of professional football. *Id.* at 520. Thus, the Court held that players (and potentially teams) could be held responsible if they acted with reckless disregard for their opponents' safety. *Id.* at 524. In reversing the trial court, this decision left the door open for players to be held responsible for their conduct on the field.

With regard to these "bounty" programs, the question is whether a player's intent to injure an opposing player for a bonus is an ordinary and accepted part of the game. Moreover, have NFL players assumed the risk of violent conduct which is intended to injure and may be motivated by the player's ability to earn a bounty? And if the player can be held liable, can that player's team also be held liable? These are just some of the many questions that courts will have to decide if players start to bring civil lawsuits for being the victim or target of another team's "bounty" program.

While the Court of Appeals in *Hackbart* did not provide any of these answers, it did hint that the standard for reckless disregard of the safety of others may be applicable. If such a standard could be met, then it may be a situation where the victimized player did not assume that risk, and therefore, the player inflicting the injury may be liable. Based on a plain reading of the standard as enunciated by the Restatement (Second) of Torts, it appears that there is a possibility that players may be held liable for this type of conduct. Section 500 of the Restatement states:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts § 500 (1965).

Considering this standard and the evidence revealed by the NFL's investigation, it appears that there would be potential to hold a player liable under the Restatement. Certainly, players realize that their conduct could create an unreasonable risk of physical

harm to another player. In fact, the standard is even more easily met if it can be proven that the player was intentionally trying to cause physical harm. However, this raises the major question that will arise in all of these cases. How will the injured or victimized player prove that the act (or hit) which caused his injury was an intentional hit delivered by the opposing player with the intent to injure and possibly motivated by money? Since football is undoubtedly a violent sport and maybe every hit is intended to be as hard as possible, many critics believe that it will be impossible to prove in court.

If the player can be liable, the next question is whether that player's team can also be liable. Matt Mitten, the director of the National Sports Law Institute at Marquette University Law School, believes that teams can be liable. See Judy Battista, *Teams Could Be Held Liable for Injuries Traced to Bounties*, N.Y. TIMES, March 4, 2012. According to Mitten, "[e]mployers are liable for employees' torts committed within the scope of employment. If you could show the coaching staff directed this, the club could be liable." Id. Therefore, in the case of the Saints, where it is conceded that the team and coaching staff were aware of the "bounty" program and even directed it, it would seem that the team could be held liable. In contrast, where the coaches were not aware of a "bounty" program and it was administered solely by the players, the question is more difficult. Since the acts of the players (or employees) may be deemed intentional and not within the normal scope of their employment, it is possible that the teams could escape liability if they were not aware of the program.

A logical inquiry may also be how these potential lawsuits are handled by insurance companies. Dan Burns is the President of a sports insurer, Pro Financial Services, LLC. See Jared Shelly, *Bounty Ball*, RISK & INSURANCE ONLINE, March 13, 2012. According to Burns, he has received multiple calls from insurance underwriters who were worried when they heard about the "bounty" programs. Id. However, Burns is not concerned, and claims that he is instructing the underwriters that a "bounty" program will not increase the rate of injuries in the NFL. Id. While that is debatable, there still remains the question whether insurers will be obligated to defend the teams and their players should lawsuits be filed as a result of these "bounty" programs. Although a copy of a sample insurance policy for an NFL team could not be obtained, it is likely that most of them contain some form of language excluding coverage for intentional torts. Depending on the language in the policy and the allegations in any Complaint, especially allegations directed at the knowledge or acquiescence of the team's executives, insurers may have a duty to defend and indemnify the team or at least some, if not all, of the team's executives and management.

An interpretation of the policies, as well as the many other issues highlighted in this article, will inevitably provide a challenge for our courts, which raises one last question: is there anyone who will not be affected by these "bounty" programs and if so, who pays?