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Comments: Fourth and Long: How the Well-Established System of Workers' Compensation Poses a Substantial Threat to the Financial Stability of the NFL

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FOURTH AND LONG: HOW THE WELL-ESTABLISHED SYSTEM OF WORKERS' COMPENSATION POSES A SUBSTANTIAL THREAT TO THE FINANCIAL STABILITY OF THE NFL

I. INTRODUCTION

The National Football League (NFL) is facing a looming threat to its financial stability because of the well-established and prevalent legal regime of workmen's compensation.[1] Professional football is, like all contact sports, "inherently dangerous," yet nothing prevents current players—or former players—from filing claims to seek the benefits under a controlling workers' compensation regime.[2] While such claims may, in some cases, be minimal, the proliferation of long-term injuries, many of which do not manifest for years after a player's career has ended,[3] as well as the long-term medical treatment plans that necessarily follow, have the potential to impute liability upon NFL teams that may approach millions of dollars annually.[4]

The severity of this threat was realized in *Matthews v. NFL Management Council*, where the Court of Appeals for the Ninth Circuit helped "pave the way" for future players to claim benefits under a state's codified workers' compensation regime, notwithstanding contractual arbitration clauses that purport to compel players to pursue all workers' compensation claims through an in-state arbitration process.[5] Between 1983 and 2002, Hall of Fame offensive lineman Bruce Matthews enjoyed an illustrious, nineteen year NFL career, playing for the Houston Oilers and the Tennessee Titans.[6] In 2008, Matthews filed for workers' compensation benefits

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1. Darren Rovell, *Teams Face Workers' Comp Threat*, ESPN, http://espn.go.com/espn/otl/story/_/id/8316657/nfl-teams-facing-large-bills-related-workers-compensation-claims-head-injuries (last updated Aug. 30, 2012).
2. *Id.*
3. *See infra* Part III.A.
4. *See infra* Part III.A.
5. *See* Matthews v. NFL Mgmt. Council, 688 F.3d 1107, 1112–13 (9th Cir. 2012); Mike Florio, *Bruce Matthews Case Gives Players a Path to California Workers' Compensation Benefits*, PROFOOTBALLTALK (Aug. 14, 2012, 8:58 PM), http://profootballtalk.nbcsports.com/2012/08/14/bruce-matthews-case-gives-players-a-path-to-california-workers-compensation-benefits/.
6. *Matthews*, 688 F.3d at 1110; Floyd Reese, *Matthews Represents All that is Good About the NFL*, ESPN,

in California, claiming an array of disabilities that manifested from injuries sustained during his employment by the NFL.[7] Specifically, Matthews claimed that he sustained his injuries while playing at "various" locations over his nineteen year career.[8] In response, the NFL Management Council filed a grievance against Matthews, contesting his claims because a provision in his employment contract provided that all workers' compensation claims would be decided by an arbitrator under Tennessee law.[9] Accordingly, an arbitrator issued an award under Tennessee law and ordered Matthews to cease his claim in California.[10] In response, Matthews filed a claim in the District Court for the Southern District of California, seeking to vacate the arbitration award.[11] The district court dismissed Matthews' claim, whereafter he filed an appeal to the Ninth Circuit.[12] Ultimately, the Ninth Circuit held that Matthews could not claim benefits under California's statutory workers' compensation regime,[13] but only because Matthews alleged neither any specific injury in California, nor a need for medical services therein.[14] In so holding, the Ninth Circuit implicitly established that a player who makes a *prima facie* showing that the claimed injury occurred in California may bring the claim within the state's statutory workers' compensation regime, which in turn would allow a court to vacate an otherwise binding arbitration award as a matter of established state policy.[15]

As a result of the holding in *Matthews*, the future of all workers' compensation claims in the NFL may be forever changed, impacting both the players, as employees and potential claimants, and the NFL itself, as a liable employer.[16] Regarding the players, *Matthews* asserts a clear holding that a player must make a "*prima facie* showing" that

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http://sports.espn.go.com/nfl/halloffame07/columns/story?columnist=reese_floyd&id=2959672 (last updated Aug. 3, 2007).

7. *Matthews*, 688 F.3d at 1110.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1114. California's workers' compensation regime "establishes a rule that an employee who is otherwise eligible for California benefits cannot be deemed to have contractually waived those benefits, and an employer who is otherwise liable for California benefits cannot evade liability through contract." *Id.* at 1111.
14. *Id.* at 1113.
15. *See id.* at 1114; Florio, *supra* note 5.
16. *See* Rovell, *supra* note 1.

the claimed injury occurred in California—or the state in which a player seeks to claim benefits under the governing workers' compensation regime.[17] On the one hand, this holding seems to benefit the players, who may now seek to set aside binding arbitration awards by claiming that a specific injury occurred in a state like California, which has established public policy that will set aside arbitration awards and allow an employee to claim additional benefits under the state's statutory workers' compensation regime.[18] On the other hand, this holding also presents a potential difficulty for claimants, namely that the adverse effects of certain injuries may not manifest for several years,[19] thereby complicating the ability of a claimant to make the necessary *prima facie* showing that the injury occurred in a certain state.[20]

Regarding the NFL, the holding in *Matthews* operates to threaten the NFL's financial structure because claimants in an inherently dangerous profession may seek to avoid the enforcement of negotiated arbitration clauses and hold the NFL liable for injuries traced to specific games.[21] Moreover, because the very nature of the NFL requires players to play in twenty-two states, as well as the District of Columbia,[22] the holding in *Matthews* could open the floodgates of litigation for players claiming injuries in a number of states.[23] Finally, because the nature of football-related injuries may take years to fully manifest,[24] the NFL could be open to this flood of litigation, not only from current players, but from former ones as well.[25]

This comment will explore the two-fold effect that *Matthews* will likely have on the future of workers' compensation litigation in the NFL, namely as it relates to the resulting challenges and difficulties facing both the players, as claimants, and the NFL, as a liable

17. *See Matthews*, 688 F.3d at 1114.
18. CAL. LAB. CODE §§ 2804, 3600(a)(1), 5000 (West 2011); *see Matthews*, 688 F.3d at 1114.
19. *See infra* Part III.A.
20. *See infra* Part IV.A.1.
21. *See* Rovell, *supra* note 1.
22. *See NFL Teams*, NFL, http://www.nfl.com/teams (last visited Sept. 29, 2013) (classifying teams by conference, division, and city). Specifically, the states with NFL teams are as follows: Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin.
23. *See* Rovell, *supra* note 1.
24. *See* discussion *infra* Part III.A.
25. *See* Rovell, *supra* note 1.

employer.[26] To provide background necessary to understand the current state of affairs of workers' compensation litigation in the NFL, Part II will present a historical analysis of the advent and development of the statutory workers' compensation regime, as well as its interplay with professional sports.[27] To provide insight into the interplay between former players and the future of workers' compensation litigation in the NFL, Part III will examine the proliferation of long-term injuries that may not manifest during a player's career.[28] Finally, Part IV will tie together the extant legal doctrine and developmental background to elucidate the ambiguous state of affairs facing both professional athletes and the NFL, while proposing a potential avenue to resolve this looming instability.[29] In short, the prevailing goal of this discussion is to highlight the looming threat facing NFL players and teams, while advocating for an equitable resolution to ensure the continued financial stability of the NFL and its affiliates.[30]

II. A HISTORICAL ANALYSIS OF THE ADVENT AND DEVELOPMENT OF WORKERS' COMPENSATION REGIMES, AS WELL AS THE INTERPLAY WITH THE WORLD OF PROFESSIONAL SPORTS BEFORE *MATTHEWS*.

The workers' compensation regime, although commonly referred to as a "system" or "regime," is hardly systematic.[31] Instead, each of the fifty states and the District of Columbia has its own workers' compensation system; but even so, these systems do share a number of overarching characteristics,[32] which will be analyzed in this

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26. *See infra* Part IV.
27. *See infra* Part II. Specifically, this section will provide a general analysis of workers' compensation law, as well as a focused analysis on the relationship between workers' compensation law and the world of professional sports before *Matthews*.
28. *See infra* Part III. This section will also explore the legal development of asbestos litigation in this country, which will act as an analogue to symptoms and injuries that may not manifest during the course of employment.
29. *See infra* Part IV.
30. *See infra* Parts II–IV.
31. *See* Matthews v. NFL Mgmt. Council, 688 F.3d 1107, 1110 (9th Cir. 2012); JEFFREY V. NACKLEY, PRIMER ON WORKERS' COMPENSATION 1–2 (2d ed. 1989).
32. NACKLEY, *supra* note 31, at 1–2. For example, most systems differentiate among "types of claims, types of compensation, conditions for coverage, kinds of insurance coverage available," and other basic administrative and procedural requirements. *Id.* at 2. For additional insight into the development of workers' compensation regimes in the United States, the reader is urged to consider the United States Chamber of Commerce's publication that analyzes such development on an annual basis. *See* U.S.

comment.[33] Professional athletes have a unique place within workers' compensation regimes and therefore warrant an independent review of such placement therein.[34] Accordingly, subpart A will provide a general overview of workers' compensation law,[35] while subpart B will provide a detailed analysis of the interplay between workers' compensation regimes and the world of professional sports, as it existed before *Matthews*.[36]

A. A General Overview of Workers' Compensation Law

The advent of the workers' compensation regime can historically be traced to the nineteenth and twentieth centuries, when the Industrial Revolution effectuated profound changes in the landscape of everyday employment.[37] Specifically, the Industrial Revolution gave rise to the proliferation of heavy and complex machinery, which carried with it, as an unfortunate but unavoidable corollary, a stark rise in the number and severity of injuries occurring in the workplace.[38] Employees seeking redress for their injuries found little success, as the available mechanisms for recovery, which were rooted in contract and tort law, were widely considered to be wholly inadequate methods of compensation.[39] Specifically, tort law provided few avenues for redress because negligence principles were generally thwarted by various common law defenses that shielded employers from liability, while contributory negligence principles barred recovery if the employee contributed to the resulting injury.[40] Additionally, contract law was not a cognizable avenue for recovery

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CHAMBER OF COMMERCE, 2013 ANALYSIS OF WORKERS' COMPENSATION LAWS (2013) (providing a detailed comparison between the varying state workers' compensation regimes).

33. *See infra* Part II.A.1-5.

34. *See* Stephen Cormac Carlin & Christopher M. Fairman, *Squeeze Play: Workers' Compensation and the Professional Athlete*, 12 U. MIAMI ENT. & SPORTS L. REV. 95, 104 (1995). Examining the relationship between workers' compensation law and professional athletics has been widely undeveloped, but this scholarly article provided invaluable insight into the otherwise sparse analytic field. It is only through the authors' earlier research that this comment can examine the recent developments that arose in light of *Matthews*. *See infra* Part IV.A–B.

35. *See infra* Part II.A.

36. *See infra* Part II.B.

37. NACKLEY, *supra* note 31, at 1; Michael A. Bilandic, *Workers' Compensation, Strict Liability, and Contribution in Illinois: A Century of Legal Progress?*, 83 ILL. B.J. 292, 292–93 (1995).

38. NACKLEY, *supra* note 31, at 1; Bilandic, *supra* note 37, at 292–93.

39. NACKLEY, *supra* note 31, at 1.

40. Bilandic, *supra* note 37, at 293–94.

because courts would generally subject an employment contract to the doctrinal tort defense of "assumption of risk."[41] As such, the perceived injustice of the prevailing state of affairs created a situation that begged for change.[42] Accordingly, lobbyists and lawmakers alike sought guidance from European compensation systems and the radical workers' compensation movement swept the country.[43]

Today, the statutory regime of workers' compensation law exists as a mechanism by which individuals who are injured during the course of their employment receive compensation "for their disabilities, medical costs, and on some occasions, the costs of their rehabilitation."[44] With the advent of workers' compensation systems that allow for such claims, legislators were able to achieve three primary objectives, namely: (1) guaranteed compensation to injured employees; (2) administrative efficiency and predictability; and (3) safety enhancement.[45] Essentially, the workers' compensation system is a synthesis of the aforementioned objectives, as employees who fall within the statutory regime will receive guaranteed compensation,[46] which imputes a form of strict liability upon an employer,[47] thereby motivating an employer to take the necessary steps to prevent employment injuries and promote workplace safety.[48]

To effectuate such humanitarian goals, each of the fifty states and the District of Columbia developed its own statutory workers' compensation regime.[49] Despite the natural variance that will occur within these systems, most regimes share a number of common characteristics, including: (1) types of covered claims; (2) types of

41. *See* NACKLEY, *supra* note 31, at 1 (stating that traditional theories in tort and contract law were inadequate at providing compensation to injured workers); Bilandic, *supra* note 37, at 293; Jane P. North, *Employees' Assumption of Risk: Real or Illusory Choice?*, 52 TENN. L. REV. 35, 42 (1984) (stating that the doctrine of "assumption of risk" was prominent in the American court system in the twentieth century and was used to bar recovery in employment accidents).

42. Bilandic, *supra* note 37, at 293.

43. *Id.*

44. NACKLEY, *supra* note 31, at 1.

45. Carlin & Fairman, *supra* note 34, at 97–98.

46. This speaks to the first objective of workers' compensation systems, which is to guarantee compensation for injured employees. *Id.* at 97.

47. This achieves the second objective of workers' compensation systems, as guaranteed compensation will provide administrative efficiency and predictability. *Id.* at 97–98.

48. This reflects the third objective of workers' compensation systems, which is to ensure safety enhancement in the workplace. *Id.* at 98.

49. *See* NACKLEY, *supra* note 31, at 1; Dean M. Hashimoto, *The Future Role of Managed Care and Capitation in Workers' Compensation*, 22 AM. J.L. & MED. 233, 242 (1996); Jason M. Solomon, *Fulfilling the Bargain: How the Science of Ergonomics Can Inform the Laws of Workers' Compensation*, 101 COLUM. L. REV. 1140, 1145 (2001).

compensation; (3) scope of the coverage; (4) various administrative functions and procedural rights; and (5) employers' rights and protections.[50]

1. Types of Claims

"A workers' compensation claim is an application by an individual . . . for compensation and other benefits for a medical condition that resulted from work."[51] "The most common type of workers' compensation claim," and the type that serves as the basis for analysis in this comment, is the "injury or accident" claim", which compensates injuries that are actually caused "in the course of and arising out of employment."[52]

2. Types of Compensation

Because "injury or accident" claim[s]" must generally arise in the course of employment,[53] workers' compensation statutes generally only compensate the employee for financial harms resulting from injury, but not related harm, such as pain and suffering.[54] Most jurisdictions compensate employees under a number of similar categories, including temporary and permanent total disability, temporary and permanent partial disability, scheduled losses, and change-of-occupation compensation.[55]

3. The Scope of Coverage

Employers who are subject to a specific workers' compensation regime must also comply with controlling statutory provisions that provide for mandatory insurance.[56] The failure to obtain such insurance will not act to bar an employee's claim, but will subject the insurer to various penalties, such as fines or the loss of common law tort defenses in lawsuits filed by injured employees.[57]

50. NACKLEY, *supra* note 31, at 1–2.
51. *Id.* at 2.
52. *Id.* at 11–13.
53. *See id.*
54. Carlin & Fairman, *supra* note 34, at 99.
55. NACKLEY, *supra* note 31, at 4.
56. *Id.* at 5.
57. *Id.*

4. Administrative Functions and Procedural Rights

To facilitate the mechanisms of the various workers' compensation systems, administrative agencies were created to conduct hearings, resolve disputes, and oversee the distribution statutory awards.[58] These agencies provide a salient alternative to adjudication in an already congested court system, and as such, agencies play a key role in effectuating an efficient and predictable resolution to each workers' compensation claim.[59]

Procedurally, most states require that notice of injury be given to either the employer or the adjudicating administrative agency.[60] When states do not require that notice be filed separately from a claim, the notice period will match the governing statute of limitations, which is often two years.[61]

Evidentiary rules for workers' compensation administrative review are generally geared towards achieving an informal and expeditious resolution.[62] These goals are furthered by the narrow scope of judicial review, which is generally limited to appellate review of the record under an "abuse of discretion" framework, where reviewing courts will generally defer to the factual findings and expertise of the administrative agency.[63]

5. Employers' Rights and Protection

With the rise of the workers' compensation system, employees are generally given swift and reasonably certain recovery, while employers receive immunity from lawsuit, provided that they pay the required workers' compensation insurance premiums.[64] As a result, an employer cannot be sued for "negligence that results in a compensable claim."[65] Essentially, the mechanisms of the workers' compensation regime ensure the exclusivity of the workers' compensation remedy.[66] Recognizing the generally superior bargaining power of employers, most workers' compensation regimes complement the exclusive remedy with an "anti-waiver provision."[67] This waiver proscribes the use of contractual provisions that purport

58. Carlin & Fairman, *supra* note 34, at 101.
59. *Id.*
60. NACKLEY, *supra* note 31, at 7.
61. *Id.*
62. *Id.*; Carlin & Fairman, *supra* note 34, at 101.
63. NACKLEY, *supra* note 31, at 7; Carlin & Fairman, *supra* note 34, at 101–02.
64. NACKLEY, *supra* note 31, at 7.
65. *Id.* at 7–8.
66. Carlin & Fairman, *supra* note 34, at 101.
67. *Id.* at 100.

to comprise an employees' right to make a claim under the governing workers' compensation system.[68]

B. Workers' Compensation Regimes and Professional Athletes

With the proliferation of the workers' compensation regime, where there are as many systems as there are jurisdictions in this country,[69] it naturally follows that each state varies in its treatment of professional athletes.[70] Because the NFL currently has teams in twenty-two states, as well as the District of Columbia,[71] injured players may be subjected to a number of varying statutory schemes, which makes it necessary to elucidate the applicable state laws.[72] Accordingly, subpart 1 will examine the statutory differences that may affect a player's ability to claim workers' compensation benefits in a particular state.[73] Subpart 2 will examine the extant limitations that may prevent an otherwise eligible player from claiming benefits.[74] Finally, subpart 3 will elucidate the positions of legal scholars before *Matthews*.[75]

1. The Relationship Between Professional Athletes and the Interstate Diversity of State Workers' Compensation Regimes

Among the twenty-three relevant statutory regimes to which the NFL is subject,[76] it is possible to analyze the systematic treatment of professional athletes by the following five distinct classifications: (1) systematic silence, (2) systematic inclusion, (3) systematic exclusion, (4) choice of benefits, and (5) statutory set-off devices.[77]

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68. *Id.*
69. NACKLEY, *supra* note 31, at 1.
70. Carlin & Fairman, *supra* note 34, at 104; Michelle M. Modery, Comment, *Injury Time-Out: Justifying Workers' Compensation Awards to Retired Athletes with Concussion-Caused Dementia*, 84 TEMP. L. REV. 247, 256 (2011); Rachel Schaffer, Comment, *Grabbing Them by the Balls: Legislatures, Courts, and Team Owners Bar Non-Elite Professional Athletes from Workers' Compensation*, 8 AM. U. J. GENDER SOC. POL'Y & L. 623, 639–40 (2000).
71. *See supra* note 22 and accompanying text.
72. Modery, *supra* note 70, at 256.
73. *See infra* Part II.B.1.
74. *See infra* Part II.B.2.
75. *See infra* Part II.B.3.
76. *See supra* note 22 and accompanying text.
77. Carlin & Fairman, *supra* note 34, at 104–12. While Carlin and Fairman were the first scholars to promulgate this list, it should be noted that this list was further developed in at least two law review comments. *See* Modery, *supra* note 70, at 256; Schaffer,

a. Systematic silence

Because the interplay between workers' compensation law and professional sports has not been widely analyzed,[78] it is not surprising that a majority of jurisdictions do not explicitly address the issue of workers' compensation benefits for professional athletes.[79] Specifically, among the twenty-three jurisdictions that have at least one NFL team,[80] the following fourteen jurisdictions do not explicitly mention professional athletes within their workers' compensation regimes: (1) Arizona, (2) California, (3) Colorado, (4) Illinois, (5) Indiana, (6) Georgia, (7) Maryland, (8) Minnesota, (9) New Jersey, (10) New York, (11) North Carolina, (12) Tennessee, (13) Washington, and (14) Wisconsin.[81]

In the absence of an explicit statutory provision, state courts are called to interpret the governing workers' compensation regime and determine the availability of benefits to professional athletes thereunder.[82] In the vast majority of cases, courts hold that athletes are considered "employees" within the controlling statutory system.[83]

Albrecht v. Industrial Commission[84] is a particularly insightful case that was decided before *Matthews*. Ted Albrecht was a former first-round draft pick of the Chicago Bears in 1977.[85] Albrecht played for five seasons before suffering a career-ending back injury

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supra note 70, at 639–47. Modery's comment included a sixth category called "In-State Exclusion," but it is only applicable to Kentucky, which does not have an NFL team and is therefore beyond the scope of the present comment. *See* Modery, *supra* note 70, at 260; *NFL Teams*, *supra* note 22.

78. *See supra* note 34 and accompanying text.

79. *See generally* Marjorie A. Shields, Annotation, *Award of Workers' Compensation Benefits to Professional Athletes*, 112 A.L.R. 5th 365 (2003) (providing a collection and discussion of various state court cases in which the court was called to evaluate the availability, or lack thereof, of workers' compensation benefits to professional athletes).

80. *See supra* note 22 and accompanying text.

81. *See* ARIZ. REV. STAT. ANN. § 23-901 (2012); CAL. LAB. CODE §§ 3351, 3351.5 (West 2011); COLO. REV. STAT. ANN. § 8-40-301 (West 2013); GA. CODE ANN. §§ 34-9-1 to -2 (West 2008); 820 ILL. COMP. STAT. ANN. 305/1(b) (West 2011 & Supp. 2012); IND. CODE ANN. § 22-3-2-9 (LexisNexis 1997); MD. CODE ANN., LAB. & EMPL. § 9-202 (LexisNexis 2002 & Supp. 2012); MINN. STAT. ANN. § 176.041 (West 2006); N.J. STAT. ANN. § 34:15-1 (West 2011); N.Y. WORKERS' COMP. LAW § 2 (McKinney 2005); N.C. GEN. STAT. ANN. § 97-2 (2011); TENN. CODE ANN. § 50-6-102 (2008); WASH. REV. CODE ANN. §§ 51.08.180 to .181, 51.08. 185, 51.08.195 (West 2010).

82. Shields, *supra* note 79, § 1[a].

83. Carlin & Fairman, *supra* note 34, at 104–05.

84. 648 N.E.2d 923 (Ill. App. Ct. 1995).

85. *Id.* at 924.

during training camp before the 1982 NFL season.[86] Albrecht began a travel service business, where his earnings were substantially less than when he was employed by the Chicago Bears.[87] Albrecht sought benefits under the relevant workers' compensation regime,[88] but the trial court affirmed an arbitrator's refusal to provide compensation under Illinois law.[89] Specifically, the trial court held that "[f]rom the moment [Albrecht] started playing football, [he] was in a position of temporary employment, not a career where he could anticipate continued employment as long as he desired."[90] Moreover, the trial court concluded that Albrecht was unable to make a sufficient showing to suggest that "but for" his back injury, he would be otherwise able to continue his employment with the Chicago Bears.[91] The trial court further concluded that Albrecht could not demonstrate a change in earning capacity, stating that "[w]here no evidence exists that [Albrecht] would have continued in his usual and customary line of employment, earning his pre-injury wages, an award of wage differential is not appropriate."[92]

On appeal, the Appellate Court for the First District of Illinois reversed the lower court and remanded the action to allow the governing workers' compensation commission to enter an award, pursuant to Illinois law, in favor of Albrecht.[93] The appellate court noted that an established purpose of Illinois' statutory regime is to compensate an injured employee for lost earning capacity that arose because of the employee's injury.[94] As a precondition for such compensation, Albrecht was therefore required to show that, but for his injury, he would have continued his career as a professional football player for the Chicago Bears into the 1982 NFL season.[95] Despite speculation and conjecture from senior management within

86. *Id.* As an interesting side note, Albrecht was injured while performing a "leap frog" exercise, during which Albrecht sustained an array of back injuries, including both a bulging disc and disc herniation. *Id.*

87. *Id.*

88. *See* 820 ILL. COMP. STAT. ANN. 305/1(d) (West 2011 & Supp. 2012) (setting the amount of compensation that shall be paid to employees for accidental injuries not resulting in death).

89. *See Albrecht*, 648 N.E.2d at 925.

90. *Id.* (alteration in original) (internal quotation marks omitted).

91. *Id.*

92. *Id.* (alteration in original) (internal quotation marks omitted).

93. *Id.* at 927.

94. *Id.* at 925.

95. *Id.* at 926.

the Chicago Bears' organization,[96] the appellate court held that the record demonstrated that, before the 1982 NFL season, Albrecht had started every game of his NFL career, which created a presumption that, but for Albrecht's injury, he would have continued his career into the 1982 NFL season.[97] Most importantly, the appellate court rejected the lower court's finding that professional football players are "beyond the realm of the skilled worker contemplated" by those cases awarding compensation under Illinois law.[98] Specifically, the appellate court concluded that "professional football players are *skilled workers contemplated under the statute* and that any shortened work expectancy in [Albrecht]'s career would not preclude him from a wage-loss differential award under [Illinois Law]."[99]

Even in those states where dated authority established that athletes do not fall within the domain of the controlling workers' compensation regime,[100] modern authority has generally moved to a broad presumption of inclusion,[101] thereby allowing NFL players to seek benefits under the relevant workers' compensation regime.[102]

Despite the general consensus that professional athletes are well-within statutory workers' compensation regimes, there is some contrary authority that suggests otherwise.[103] *Palmer v. Kansas City Chiefs Football Club*[104] is widely considered to be the seminal case embodying the erroneous point of view that professional athletes are *not* within the ambit of the governing workers' compensation regime.[105] Gery Palmer established himself as an accomplished

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96. Jim Finks, the general manager for the Chicago Bears, stated in an affidavit that each player is evaluated on a yearly basis and, as such, no player is guaranteed employment beyond the current season. *Id.* Furthermore, Finks stated that the average career for an offensive lineman in the NFL is less than ten years. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 927 (emphasis added).

100. *See, e.g.*, Rowe v. Balt. Colts, 53 Md. App. 526, 536, 454 A.2d 872, 878 (1983) (holding that former defensive tackle David Rowe's arm injury, which he sustained during an exhibition game with the Philadelphia Eagles, was not within the ambit of Maryland's comprehensive workers' compensation regime because Rowe did not demonstrate an "accidental injury within the meaning of the [system].") (alteration in original), *overruled by*, Pro-Football, Inc. v. Tupa, 428 Md. 198, 51 A.3d 544 (2012).

101. *See* Carlin & Fairman, *supra* note 34, at 104–05.

102. *See, e.g.*, Pro-Football, Inc. v. Tupa, 428 Md. 198, 210, 51 A.3d 544, 551 (2012) (holding that a back injury sustained by former Washington Redskins punter Thomas Tupa was an "accidental injury" within the meaning of Maryland's workers' compensation regime, thereby overruling *Rowe*).

103. Carlin & Fairman, *supra* note 34, at 106.

104. 621 S.W.2d 350 (Mo. Ct. App. 1981).

105. Carlin & Fairman, *supra* note 34, at 106.

offensive lineman with the Kansas City Chiefs, but a routine blocking assignment left Palmer with a back injury that limited his ability to continue in the course of his employment with the Kansas City Chiefs.[106] The Missouri Industrial Commission determined that Palmer's injury was the result of an "abnormal strain," which the law treats as an accidental physical injury within the scope of Missouri's workers' compensation regime.[107] The Missouri Court of Appeals rejected the commission's determination that Palmer's injury was the result of an "accident" within the meaning of Missouri law.[108] The court of appeals stated that the entire purpose of the "trap play" is to enable an offensive lineman to maneuver himself below the pad lever of the opposing defensive lineman and, in the event that the offensive lineman fails to properly execute this maneuver, it is likely that the player will be amenable to injury.[109] The court of appeals therefore concluded that "[w]hatever strain resulted was an expected incident of the usual work task done in the usual way."[110] In short, the court of appeals interpreted the state's workers' compensation regime to protect against *accidental* injury, which is statutorily defined to mean those injuries that result from unexpected events in the usual course of employment,[111] but which does not contemplate that the "deliberate collision between human bodies constitutes an accident or that injury in the usual course of such an occupation is caused by an unexpected event."[112]

Despite the unusual holding proffered by *Palmer*,[113] it is widely considered to represent an exception to the general rule that statutory

106. *Palmer*, 621 S.W.2d at 352–53. Palmer detailed the injury as one involving a routine blocking assignment, where he was called to drive the defensive lineman from the path of play. *Id.* at 352. On this particular play, however, the defensive lineman was able to place his pad level below Palmer, which forced him to absorb a striking blow that sent a numbing sensation throughout his entire upper body. *Id.*

107. MO. ANN. STAT. § 287.020 (West Supp. 2013) (defining "accident" to mean "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift"); *Palmer*, 621 S.W.2d at 353.

108. *Palmer*, 621 S.W.2d at 357.

109. *Id.* at 356.

110. *Id.*

111. MO. ANN. STAT. § 287.020(2)–(3) (West Supp. 2013).

112. *Palmer*, 621 S.W.2d at 356.

113. *See id.* at 356–57.

silence imbues a presumption of inclusion for professional athletes within statutory workers' compensation regimes.[114]

b. Systematic inclusion

In a minority of jurisdictions in which the NFL currently has a professional franchise,[115] the governing workers' compensation system statutorily includes professional athletes.[116] Specifically, the following jurisdictions recognize that professional athletes may be compensated, in varying degrees, under the provisions set forth by the controlling regime: (1) the District of Columbia, (2) Michigan, and (3) Pennsylvania.[117]

Even in those jurisdictions that do provide benefits for professional athletes, the applicable statute often acts to limit, rather than benefit, a professional athlete's access to such benefits.[118] For example, Pennsylvania's workers' compensation regime provides that the eligibility of professional athletes to seek compensation for any injury shall be statutorily limited.[119] In *Lyons v. Workers' Compensation Appeal Bd. (Pittsburgh Steelers Sports, Inc.)*,[120] the court held that the statutory limitation placed on the ability of professional athletes to claim workers' compensation benefits did not violate the Equal Protection Clause of the Fourteenth Amendment.[121]

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114. It should also be noted that Missouri's statutory workers' compensation regime now deals directly with the professional athlete by using a "statutory set-off device." *See infra* Part II.B.1.e.

115. *See supra* note 22 and accompanying text.

116. Carlin & Fairman, *supra* note 34, at 107.

117. *See* D.C. CODE § 32-1508(3)(W) (LexisNexis 2001); MICH. COMP. LAWS ANN. §418.360 (West Supp. 2013); 77 PA. STAT. ANN. § 565 (West 2002 & Supp. 2013). It should be noted that, although Michigan's statutory regime recognizes that athletes are entitled to seek compensation therein, the statute applies only insofar as the claimant makes less than 200% of the state's average weekly wage, which effectively excludes all NFL players. MICH. COMP. LAWS ANN. § 418.360. Accordingly, this comment will refer to Michigan's regime as providing for both "systematic inclusion" and "systematic exclusion." *See infra* Part II.B.1.c.

118. *See, e.g.*, 77 PA. STAT. ANN. § 565(c) (providing that compensation payable to professional athletes shall be reduced by: (1) any wages payable by the employer during the period of disability under the employee's contractual arrangement; (2) any payments made by a self-insurance or similar plan funded by the employer; or (3) any other injury benefits payable as per the express terms of the employee's contractual arrangement or collective bargaining agreement).

119. *See* 77 PA. STAT. ANN. § 565(a).

120. 803 A.2d 857 (Pa. Commw. Ct. 2002).

121. *See id.* at 860–62.

The commonwealth court applied the "rational basis" test[122] to conclude that professional athletes "willfully hold themselves out to risk of frequent, repetitive and serious injury in exchange for lucrative compensation," and as such, "the legislature could have rationally placed a different value on those who risk bodily harm to provide entertainment from those, such as police officers and fire fighters, who risk bodily harm to protect society."[123]

While such statutory regimes may limit a professional athlete's access to workers' compensation benefits,[124] the systems also unequivocally codify a professional athlete's ability to seek compensation therein, which therefore provides a sense of clarity and predictability that is otherwise missing in those jurisdictions which do not address the interplay between professional athletes and workers' compensation benefits.[125]

c. Systematic exclusion

In stark contrast to the approach of inclusive jurisdictions,[126] some states have elected to codify statutory provisions that exclude professional athletes from the governing workers' compensation regime.[127] Such an approach is often traced to the influential lobbying of professional franchise owners who are obviously adverse to the benefits that are provided by workers' compensation systems.[128] Among those jurisdictions in which an NFL team is located,[129] only three work to statutorily exclude professional athletes, namely: (1) Florida, (2) Massachusetts, and (3) Michigan.[130]

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122. Courts are called to apply the "rational basis" test when a state regulation affects no sensitive classification, such as race, and impairs no fundamental right. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993). The standard of review over such classifications is a "paradigm" of judicial constraint, where courts are called to recognize that legislative regulations are constitutionally endowed with a presumption of validity, which means that classifications will survive rational basis scrutiny as long as there is some rational relationship between the regulation and a legitimate state purpose. *See id.* at 314–15; *Lyons*, 803 A.2d at 861.

123. *Lyons*, 803 A.2d at 862.

124. *See, e.g.*, 77 PA. STAT. ANN. § 565(c).

125. *See supra* Part II.B.1.a.

126. *See supra* Part II.B.1.b.

127. Carlin & Fairman, *supra* note 34, at 108.

128. *Id.*

129. *See supra* note 22 and accompanying text.

130. *See* FLA. STAT. ANN. § 440.02(17)(c)(3) (West 2009 & Supp. 2013); MASS. GEN. LAWS ANN. ch. 152, § 1(4)(b) (West 2005 & Supp. 2013); MICH. COMP. LAWS ANN. § 418.360 (West Supp. 2013).

Florida's workers' compensation regime soundly represents those jurisdictions which unequivocally deny benefits to professional athletes.[131] In pertinent part, Section 440.02 of West's Florida Statutes Annotated states that "'Employment' does not include services performed by or as . . . professional athletes, such as professional boxers, wrestlers, baseball, *football*, basketball, hockey, polo, tennis, jai alai, and similar players."[132] Despite the fact that workers' compensation coverage is generally required for any employer with a minimum number of employees,[133] *Rudolph v. Miami Dolphins, Ltd.*[134] illustrates that Florida courts will uphold the statutory exclusion of professional athletes from claiming benefits under Florida's workers' compensation regime.[135] In *Rudolph*, three professional football players, Council Rudolph, William Windauer, and Floyd Wells, sought workers' compensation benefits for injuries sustained during their employment with the Miami Dolphins.[136] The appellate court upheld the order denying the availability of such benefits, holding that "[t]he professional athlete exclusion is not a wholly arbitrary one."[137] The court noted that players are frequently amenable to serious injuries, willfully hold themselves out to such injuries, and are generally well paid for their services.[138] Accordingly, the court could not conclude that the statutory exclusion promulgated by the state legislature was an unconstitutional violation of the athletes' due process right of equal protection under the law.[139]

While Florida's statutory regime embodies those jurisdictions which apply blanket exclusions to all professional athletes,[140] Michigan's regime is organized such that professional athletes are statutorily included,[141] but systematically or functionally excluded.[142]

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131. *See* FLA. STAT. ANN. § 440.02(17)(c)(3).
132. *Id.* (emphasis added).
133. NACKLEY, *supra* note 31, at 5.
134. 447 So. 2d 284 (Fla. Dist. Ct. App. 1983).
135. *Id.* at 291–92.
136. *Id.* at 286–87. Specifically, each player was injured in training camp before the start of the NFL season, summarily dismissed from the team, and subsequently denied workers' compensation benefits by the governing workers' compensation commission. *Id.*
137. *Id.* at 291.
138. *Id.*
139. *Id.* at 291–92.
140. FLA. STAT. ANN. § 440.02(c)(3) (West 2009 & Supp. 2012); *see supra* notes 127–31 and accompanying text.
141. *See* MICH. COMP. LAWS ANN. § 418.360 (West 1999 & Supp. 2013) (providing that a person who suffers an injury as a professional athlete is entitled to weekly benefits).

Specifically, Section 360 of Michigan's Worker's Disability Compensation Act allows a professional athlete to claim benefits only insofar as the athlete earns less than 200% of the Michigan average weekly wage.[143] The effect of this provision is to functionally exclude all NFL players, even those who are far from a level of "superstar" status, from claiming benefits, because a simple comparison between Michigan's current state average weekly wage and the average salaries paid to NFL players exemplifies the reality that Michigan law has systematically excluded NFL players from the governing workers' compensation regime.[144] Moreover, this reality is further realized by a brief examination of the NFL Collective Bargaining Agreement (CBA), which establishes base minimum salaries for players that far exceed the 200% limit placed on athletic salaries under Michigan law.[145]

d. Choice of benefits

Some jurisdictions have resorted to an alternative method to resolve the conflict between professional athletes and the governing workers' compensation regime, namely an election or choice of benefits method.[146] Among those jurisdictions in which an NFL team is located,[147] only Texas has promulgated a scheme in which a claimant has the option to receive benefits under the Texas Workers' Compensation Act or equivalent benefits under the player's employment contract or collective bargaining agreement.[148] This statutory provision is conditioned, however, on the additional requirement that a player is only entitled to make such an election if

142. *See id.* (providing that the ability of a professional athlete to claim workers' compensation is conditioned on the requirement that the athlete's average weekly wage must be less than 200% of Michigan's average weekly wage).

143. *Id.*

144. *Compare State Average Weekly Wage Chart*, WORKERS' COMP. AGENCY, http://www.michigan.gov/wca/0,4682,7-191--38774--,00.html (last visited Oct. 2, 2013) (providing that, in 2012, the state average week wage was $860.34), *with 2009–10 NFL Salaries by Team*, USA TODAY, http://content.usatoday.com/sportsdata/football/nfl/salaries/team (last visited Oct. 2, 2013) (providing that, in 2010, the average NFL salary among teams ranged from $1,410,856 to $2,470,622).

145. *See* NFL & NFL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT art. 33, § 3 (2011) (stating that, in 2012, the minimum salary to be paid to practice squad players shall be $5,700 per week).

146. Carlin & Fairman, *supra* note 34, at 110.

147. *See supra* note 22 and accompanying text.

148. TEX. LAB. CODE ANN. § 406.095 (West 2006).

the contract benefits are equal to or greater than the benefits provided under the Texas regime.[149]

While it may seem that those jurisdictions adopting a "choice of benefits" method are doing so to protect injured athletes, some scholars posit that the statute was actually designed to remove professional athletes from the governing workers' compensation regime.[150] Assuming *arguendo* that this is the case, the Texas statute explicitly provides that an athlete need only make such an election when the athlete's contractual benefits are equal to or greater than the corresponding benefits provided under Texas law.[151] This seems to suggest that this statutory provision actually works to ensure financial stability for both professional athletes and their employers.[152]

e. Statutory set-off devices

The final classification that affects a professional athlete's' access to workers' compensation benefits is through a statutory "set-off" device.[153] Jurisdictions electing to adopt this mechanism provide statutory workers' compensation coverage to professional athletes, but reduce such benefits in direct proportion to the contractual benefits paid by the employer to the injured athlete.[154] Among those jurisdictions in which an NFL team is located,[155] only three states have experimented with set-off devices, namely: (1) Louisiana, (2) Missouri, and (3) Ohio.[156] In Louisiana, the legislature promulgated a 1993 statute that provided for a traditional set-off device, whereby employee benefits may be reduced on a dollar-for-dollar basis if the

149. *Id.*

150. *See* Carlin & Fairman, *supra* note 34, at 111 (arguing that the purpose of the Texas statute is to add professional athletes to the list of those employees who are exempt from statutory workers' compensation protection, so as to reduce the accrued expenses of major league sports franchises).

151. TEX. LAB. CODE ANN. § 406.095. The plain meaning of the statute was further confirmed by case law. *See* Gulf Ins. Co. v. Hennings, 283 S.W.3d 381, 388–89 (Tex. App. 2008) (holding that, where a professional football player's contractual benefits were *not* equal to or greater than those available under the governing workers' compensation regime, the player need not elect between the choice of benefits).

152. *See generally infra* Part IV (providing a discussion of a potential equitable approach to ensure both the adequate protection to NFL players and the continued financial viability of the NFL).

153. Carlin & Fairman, *supra* note 34, at 111.

154. *Id.*

155. *See supra* note 22 and accompanying text.

156. LA. REV. STAT. ANN. § 23:1225(D) (West 2011) (repealed 2004); MO. ANN. STAT. § 287.270 (West 2005); OHIO REV. CODE ANN. § 4123.56 (LexisNexis2007).

injured athlete receives any external wages or benefits.[157] In 2004, the statute was repealed,[158] but proposed legislation would reenact the earlier "dollar-for-dollar" off-set device.[159] Missouri employs a set-off device that allows employers to take full credit for any benefits paid to the injured athlete.[160] Ohio combines the preceding two systems, providing that any payment made to an athlete will be deemed to be an advanced payment of workers' compensation benefits, which in turn will allow the employer to seek future reimbursement from payments made to the athlete under Ohio's workers' compensation regime.[161] The purpose and end result of such regimes is to ensure that benefits paid to professional athletes will be reduced by those amounts received by the player while under a contract for hire as a professional athlete.[162]

2. Contractual Provisions and General Statutory Limitations May Also Work to Limit a Professional Athlete's Access to Benefits under the Governing Workers' Compensation Regime

The substantive structure of a jurisdiction's workers' compensation regime is not the only mechanism that can limit a professional athlete's unfettered access to such benefits.[163] Within the NFL context, there are two such limitations that warrant greater analysis, namely: (1) the negotiations and contractual terms set forth in the player's contract; and (2) general statutory limitations that are applicable to claims for benefits under the governing workers' compensation regime.[164]

a. The National Football League Collective Bargaining Agreement and Player Contracts

Some scholars posit that professional football is the most significant source of analysis in terms of the interplay between professional athletes and workers' compensation benefits.[165] Specifically, this view is based on the fact that professional football players make more claims for workers' compensation benefits than

157. § 23:1225(D).
158. *Id.*
159. H.B. 617, 38th Gen. Assemb., Reg. Sess. (La. 2012).
160. § 287.270.
161. § 4123.56.
162. Carlin & Fairman, *supra* note 34, at 112.
163. *Id.*
164. *Id.*; Modery, *supra* note 70, at 261–62.
165. Carlin & Fairman, *supra* note 34, at 112–13.

any other athletes,[166] which is traced to the reality that NFL players are at constant risk of serious bodily injury.[167] Accordingly, the NFL Collective Bargaining Agreement (CBA) and player contracts have been forced to address this issue.[168]

On August 4, 2011, the NFL Management Council and the NFL Players' Association ratified the current CBA, which elucidates the complete understanding of the parties on all matters contained within the 318 page document.[169] Article 41 of the CBA is particularly relevant, as it sets forth the default rules, subject to an external agreement, governing any issues related to workers' compensation.[170] Section 1 provides that a player must be given equivalent contractual guarantees for workers' compensation benefits to those that must paid under the state regime in which the NFL team is located; but in the absence of such a state regime, the NFL team must guarantee equivalent benefits.[171] Section 4 specifically addresses workers' compensation offset provisions, providing that no NFL team is entitled to a "dollar-for-dollar" offset, and is instead entitled only to a "time" offset, whereby an NFL team that pays an athlete's salary subsequent to an injury is entitled to a reduction of the number of weeks of the players' award under the governing workers' compensation regime.[172]

Beyond the CBA, two provisions set forth in a standard NFL player contract may affect an athlete's access to workers' compensation benefits.[173] Paragraph 9 governs the team's required response to a player's injury.[174] In relevant part, under this provision:

> Unless this contract specifically provides otherwise, if Player is injured in the performance of his services under this contract and promptly reports such injury to the Club

166. *Id.* at 113 (citing PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 740 (1st ed. 1993)).

167. Carlin & Fairman, *supra* note 34, at 113.

168. *See* NFL & NFL PLAYERS ASS'N, *supra* note 145, art. 41, §§ 1–6 (establishing provisions related to workers' compensation issues); *see also id.* app. A (providing an NFL player contract).

169. *Id.* art. 2, § 4. The current CBA is effective from August 4, 2011 through the final day of the 2020 NFL year. *Id.* art. 69, § 1.

170. *Id.* art. 41, §§ 1–6.

171. *Id.* art. 41, § 1.

172. *Id.* art. 41, § 4(i)–(ii).

173. Carlin & Fairman, *supra* note 34, at 113; *see* NFL & NFL PLAYERS ASS'N, *supra* note 145, app. A, ¶¶ 9, 10.

174. NFL & NFL PLAYERS ASS'N, *supra* note 145, app. A, ¶ 9.

> physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and will continue to receive his yearly salary for so long, during the season of injury only and for no subsequent period covered by this contract, as Player is physically unable to perform the services required of him by this contract because of such injury.[175]

Paragraph 10 specifically addresses the issue of workers' compensation, providing that:

> Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workers' compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workers' compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workers' compensation.[176]

Carlin and Fairman succinctly explain the result that occurs after synthesizing the aforementioned material.[177] Essentially, an injured player will be compensated for the remainder of the current NFL season, whereafter the NFL team is released from any contractual obligation to pay the player's salary benefits.[178] While an NFL team may seek credit, or repayment, in the event that a player receives a workers' compensation award, Carlin and Freeman explain that the employer's right to credit applies only to periods that compensation is provided under the terms of the player's contract, and only insofar as the player's award is based on temporary, as opposed to permanent, benefits.[179] The final effect of the aforementioned provisions is to ensure that a player is duly compensated for an injury arising out of and in the course of employment, while preventing the player from

175. *Id.*

176. *Id.* app A, ¶ 10.

177. Carlin & Fairman, *supra* note 34, at 113–14.

178. *Id.* at 113. It should be noted that the CBA does provide additional injury protection payments. *See* NFL & NFL PLAYERS ASS'N, *supra* note 145, art. 45, § 2 (stating that an injured player is entitled to receive an amount equal to fifty percent of his salary for the season following the injury, up to a maximum payment of $1,050,000.00, as of the 2013–2014 League years).

179. Carlin & Fairman, *supra* note 34, at 114–15.

receiving compensation by way of salary benefits *and* workers' compensation benefits.[180]

b. General statutory limitations applicable to claims for benefits under the governing workers' compensation regime

There are two primary limitations that apply to all employees seeking benefits under the governing workers' compensation regime, which may bear more heavily on the ability of a professional athlete to make a claim thereunder.[181] First, every workers' compensation system is governed by a statute of limitations that controls an employee's ability to state a claim for benefits.[182] Specifically, there are two relevant limitations periods that affect an employee's ability to state an actionable claim, namely: (1) notice of injury and (2) limitations on a claim for compensation.[183] The notice requirement is an obvious and necessary method to ensure that the employer can provide medical treatment and consider an inquiry into the alleged injury.[184] The limitations period on a claim for compensation is generally as long as two years,[185] which may seem to be problematic for professional athletes, whose injuries may not manifest for several years after their playing careers have ended.[186] That being said, many jurisdictions have addressed this potential shortcoming by flexibly extending the statute of limitations to commence only upon the employee's reasonable realization of the injury, which is known as the "discovery rule."[187]

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180. *Id.*

181. Modery, *supra* note 70, at 261.

182. NACKLEY, *supra* note 31, at 7; Modery, *supra* note 70, at 261.

183. NACKLEY, *supra* note 31, at 7; Modery, *supra* note 70, at 261. California law soundly examples these limitations. *See, e.g.*, CAL. LAB. CODE § 5400 (West 2011) ("[N]o claim to recover compensation under this division shall be maintained unless within thirty days after the occurrence of the injury which is claimed to have caused the disability or death, there is served upon the employer notice in writing, signed by the person injured or someone in his behalf . . .").

184. Modery, *supra* note 70, at 261.

185. NACKLEY, *supra* note 31, at 7.

186. *See infra* Part III.A.

187. *See, e.g.*, 77 PA. STAT. ANN. § 565 (West 2002 & Supp. 2013) ("[A]ll claims for compensation shall be forever barred, unless, within three years after the injury, the parties shall have agreed upon the compensation payable under this article; or unless within three years after the injury, one of the parties shall have filed a petition as provided in article four hereof."); Johnson v. Heartland Specialty Foods, 672 N.W.2d 326, 328 (Iowa 2003); Zippo Mfg. Co. v. Workers' Comp. Appeal Bd. (Louser), 792 A.2d 29, 33 (Pa. Commw. Ct. 2002) (holding that, in cases involving cumulative trauma, the statute of limitations may begin to run on the date of diagnosis).

Choice of law and jurisdictional provisions may also limit a professional athlete's access to workers' compensation benefits.[188] Most typically, workers' compensation regimes apply to injuries arising within the state's jurisdictional boundaries.[189] That being said, other jurisdictions may promulgate additional requirements for coverage within the governing regime.[190] For example, California considers whether the contract for employment was entered within its boundaries as a factor for coverage.[191] The ultimate effect of the preceding general statutory limitations is to create another hurdle that a professional athlete must clear to seek benefits, which may be especially difficult in situations where the athlete has played for multiple teams and the athlete's injuries do not manifest for several years after his tenure with the NFL has terminated.[192]

3. The Position of Legal Scholars before the Holding in *Matthews*

Despite the general pervasiveness of workers' compensation law and a plethora of legal analysis,[193] the interplay between workers' compensation law and professional athletes has been widely undeveloped by legal scholars.[194] That being said, there are a small collection of scholars who have elucidated the precarious situation facing those professional athletes who are often limited in their access to workers' compensation benefits.[195] These scholars brought the issues facing professional athletes to the forefront of discussions

188. NACKLEY, *supra* note 31, at 59–70; Modery, *supra* note 70, at 262.

189. Modery, *supra* note 70, at 262. Pennsylvania soundly exemplifies this view. *See* 77 PA. STAT. ANN. § 1 (West 2002 & Supp. 2013).

190. Modery, *supra* note 70, at 262.

191. NACKLEY, *supra* note 31, at 64.

192. *See infra* Part III.A.

193. *See, e.g.*, ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW (2013) (providing a comprehensive and authoritative analysis of workers' compensation law).

194. Bobbi N. Roquemore, Comment, *Creating a Level Playing Field: The Case for Bringing Workers' Compensation for Professional Athletes into a Single Federal System by Extending the Longshore Act*, 57 LOY. L. REV. 793, 795 (2011).

195. *See, e.g.*, Carlin & Fairman, *supra* note 34, at 117–27 (discussing the tension between professional athletes and the purported goals of workers' compensation regimes); Modery, *supra* note 70, at 269–81 (positing that those professional athletes who suffer from dementia ought to be able to seek workers' compensation benefits); Roquemore, *supra* note 194, at 841–56 (stating that professional athletes should be subject to a federal system of workers' compensation); Schaffer, *supra* note 70, at 650–54 (recommending that all state legislatures work to ensure that no professional athlete is excluded from statutory coverage under the governing workers' compensation regime).

surrounding workers' compensation law; yet while such works advocate for the athlete's seemingly unfettered access to workers' compensation systems,[196] the looming financial threat facing the NFL—and other professional sport enterprises—has been widely disregarded.[197]

In 1994, Stephen Carlin and Christopher Fairman endeavored to resolve the tension between professional athletes and the purported systematic goals of workers' compensation regimes.[198] Carlin and Fairman correctly quelled the misconception that workers' compensation regimes were not designed for professional athletes, who are thought to assume the risk of injury by engaging in a dangerous occupation that pays out handsome salaries.[199] Carlin and Fairman highlighted the fact that workers' compensation regimes were created with a primary purpose to avoid such common law defenses as the doctrine of "assumption of risk."[200] Accordingly, Carlin and Fairman argued that any judicial or statutory restriction on a professional athlete's access to the governing workers' compensation regime is both unwarranted and inappropriate.[201] Finally, Carlin and Fairman argued that the scope of contractual setoffs[202] ought to be limited, and post-recovery suits, filed by those NFL teams which seek reimbursement for workers' compensation benefits paid to injured players, ought to be prohibited.[203]

In 2000, Rachel Schaffer sought to build upon the foundation laid by Carlin and Fairman by further dispelling the myth that all professional athletes earn exorbitant salaries, and recommending that all state legislatures ensure that professional athletes are covered within the governing workers' compensation regime.[204] Schaffer noted that the extant limitations on, and exclusion of, benefits provided to professional athletes had an incongruent impact upon female professional athletes, who have lower rates of pay and increased risks of injury than their male counterparts.[205] With these

196. *See supra* note 195 and accompanying text.
197. *See* Rovell, *supra* note 1.
198. Carlin & Fairman, *supra* note 34, at 96.
199. *Id.* at 117–18. The scholars also state the reality that, while many professional athletes are well paid, there are many who are not. *Id.* at 118.
200. *Id.*
201. *Id.* at 118–21.
202. *See* NFL & NFL PLAYERS ASS'N, *supra* note 145, app. A, ¶ 10 (providing contractual setoff provisions for workers' compensation benefits paid to an injured professional football player).
203. Carlin & Fairman, *supra* note 34, at 121–26.
204. Schaffer, *supra* note 70, at 625.
205. *Id.* at 650.

realities in mind, Schaffer argued for unambiguous statutory inclusion of professional athletes within all workers' compensation regimes, as well as assurances that no regime can functionally exclude professional athletes from such benefits.[206] Finally, Schaffer argued that team owners should not be given the option of whether to participate in workers' compensation programs, nor should any agreement provide for any type of setoff scheme.[207]

In 2011, Michelle Modery provided the first foray into concussion-related dementia and the issues facing those retired athletes who seek workers' compensation benefits.[208] Modery acknowledged the hurdles facing claimants in a dementia case, but argued that such cases still fit evenly within the scope of workers' compensation regimes.[209] Specifically, Modery explained that the availability of damages for such claimants will turn on several key factors, including the claimant's ability to: (1) prove a direct link between past concussions and current dementia; (2) successfully argue that dementia is an occupational disease; (3) successfully establish inclusion, as a professional athlete, within the governing workers' compensation regime; and (4) overcome any equitable considerations offered by the athlete's former employer.[210] Modery argued that because workers' compensation is remedial in nature, established systems should therefore be construed to include the broadest array of claimants, which indicates that a retired athlete suffering from dementia should satisfy any requirements for compensation thereunder.[211]

Finally, in 2011, Bobbi Roquemore advocated that a single federal system may be an appropriate way to address the issues facing those

206. *Id.* at 651. Michigan's workers' compensation regime soundly examples those states that purport to functionally exclude professional athletes from coverage thereunder. *See* MICH. COMP. LAWS ANN. § 418.360 (West 1999 & Supp. 2013) (providing coverage to professional athletes only insofar as the athlete's salary is less than 200% of the Michigan average weekly wage).

207. Schaffer, *supra* note 70, at 653–54. It should be noted that Schaffer also advocated for the unionization of non-elite athletes, which is a sound recommendation, but one that has no bearing on the state of affairs facing the NFL in light of *Matthews*. *See id.* at 654.

208. Modery, *supra* note 70, at 248.

209. *Id.* at 270.

210. *Id.* at 269.

211. *Id.* at 281–82; *see also infra* Part III (providing a brief foray into long-term injuries that may not manifest until an athlete's career has ended, which will affect the player's ability to seek remedial benefits provided under the governing workers' compensation regime).

professional athletes who seek workers' compensation benefits.[212] Roquemore is also the first to acknowledge that workers' compensation may seem, at times, to be excessive in its coverage of retired players.[213] Roquemore explained that a uniform system for resolving workers' compensation claims exists at the federal level through the Longshore Act,[214] which was originally drafted to resolve the unavoidable jurisdictional issues that prevailed in maritime-related workers' compensation claims, where covered employees were injured or killed while navigating interstate waters.[215] Roquemore further explained that the Longshore Act has since been extended to include other types of employment, including civilian employees who work on national security-related endeavors while under contract with the United States government.[216] When the Longshore Act is extended, each subsequent act sets forth its own provisions regarding the essential terms of coverage, such as identifying those employees who are entitled to receive compensation thereunder.[217] With this in mind, Roquemore suggested that extending the Longshore Act to include professional athletes, which Roquemore called the "Professional Athlete Workers' Compensation Act," would be a sound way to ensure proper coverage for all professional athletes.[218] Specifically, Roquemore stated that such an act could carry an array of useful benefits, including: (1) uniformity; (2) predictability; (3) judicial efficiency; and (4) international efficiency.[219] Accordingly, Roquemore drafted the proposed "Professional Athletes' Compensation Act"[220] to provide the aforementioned benefits and bring clarity to a system that has otherwise seemed both excessive and inequitable.[221]

212. Roquemore, *supra* note 194, at 799–801.
213. *Id.* at 795–96.
214. 33 U.S.C. §§ 901–950 (2012).
215. Roquemore, *supra* note 194, at 841.
216. *Id.*
217. *Id.* at 842.
218. *Id.*
219. *Id.* at 848–52.
220. *Id.* at 857–59.
221. *Id.* at 856.

III. THE PROLIFERATION OF LONG-TERM INJURIES THAT MAY NOT MANIFEST DURING THE COURSE OF A PLAYER'S CAREER CREATE AN UNCERTAINTY THAT MUST BE ADDRESSED IN LIGHT OF *MATTHEWS*

In recent years, scientists began to recognize that brain injuries, especially those occurring in professional sports, gave rise to an "emerging silent epidemic" that creates nearly a quarter of a million new patients each year who exhibit signs of long-term deficiencies.[222] The realization of such injuries among professional athletes has already created a firestorm of litigation,[223] and when coupled with other injuries that may not manifest until long after an athlete's career has ended, the end result is to create a broad uncertainty that exposes the NFL to the risk of financial instability.[224] The goal of this section is to shed light on the emergence of such crucial issues within the context of the NFL.[225] To do so, subpart A will highlight the development of "the concussion crisis"[226] within the NFL,[227] while subpart B will provide a brief foray into asbestos litigation to elucidate the methods used to handle claims made by those employees whose work-related injuries did not manifest for several years following the termination of their employment.[228]

A. The Manifestation of Long-Term Injuries in the NFL

Approximately forty-four million children are involved in recreational and interscholastic sports.[229] An alarming study published by the Centers for Disease Control and Prevention (CDC) suggests that there are between 1.6 million and 3.8 million sport-related concussions sustained annually.[230] While the seriousness of brain injuries is finally being realized, scientists and academics alike

222. LINDA CARROLL & DAVID ROSNER, THE CONCUSSION CRISIS: ANATOMY OF A SILENT EPIDEMIC xi–xiii (2011).
223. *See infra* Part III.A.
224. Rovell, *supra* note 1.
225. *See infra* Part III.A–B.
226. *See* CARROLL & ROSNER, *supra* note 222.
227. *See infra* Part III.A.
228. *See infra* Part III.B.
229. *See* CARROLL & ROSNER, *supra* note 222, at 11.
230. *Id.* While the CDC's estimate is certainly a broad range, perhaps this can be traced to the fact that children and their parents are still mostly unaware of the true dangers facing today's athletes. *See id.* at xi (providing a 2010 survey, which found that just eight percent of parents felt that they had a strong working knowledge of the dangers facing their children).

are working against a subculture of players and trainers who have historically taken head injuries very lightly.[231] It is certainly true that the phraseology of a player "getting [his] 'bell rung'" was often a mainstream diagnosis that made light of the likely negative consequences that could manifest from a brain injury.[232]

The reluctance to truly acknowledge the consequences of brain injuries can be feasibly traced to the difficulties facing those doctors who examine victims of brain trauma.[233] Specifically, conventional brain imaging methods, such as MRI machines and CAT scans, will often show no signs of visible damage.[234] As a result, the only way doctors can truly determine the adverse effects of a brain injury is by tracing the victim's deficits, such as short-term memory loss or cloudy vision.[235]

While the rest of the world began to acknowledge the dire consequences of brain trauma, the sports world was slow to follow.[236] In 2007, the NFL arranged a summit meeting to address the controversial concussion crisis.[237] Physicians and trainers from all thirty-two teams were summoned to engage in a heated debate, wherein the NFL's doctors would defend the view that brain injuries present minimal risks, and brain injury experts would attempt to elucidate both the short-term and long-term effects of brain injuries.[238] While the summit settled few arguments, it represented the NFL's apparent willingness to listen and respond to critics.[239] In fact, the same day that the NFL called for the summit conference, NFL Commissioner Roger Goodell, who was serving his first year in the position, announced novel NFL standards for concussion diagnosis and management.[240] Borrowing from the system already established in the National Hockey League (NHL), Goodell promulgated a number of key procedures, including: (1) neuropsychological baseline testing for every player before each new season; (2) a requirement that decisions whether to allow an injured player to return to the field of play would be based solely on health, as opposed to competitive, considerations; and (3) a "whistleblower"

231. *Id.* at 10–11.
232. *Id.* at 10.
233. *Id.* at 142–43.
234. *Id.*
235. *See* CARROLL & ROSNER, *supra* note 222, at 143.
236. *Id.* at 245.
237. *Id.*
238. *Id.* at 245–46.
239. *Id.* at 248.
240. *Id.*

hotline empowering anyone to anonymously report situations in which an injured player was forced back into the field of play.[241]

Despite the NFL's apparent willingness to address the short-term and long-term effects of brain trauma, it was still reluctant to acknowledge the long-term ramifications of brain injuries.[242] In 2009, the NFL commissioned an independent study that finally pushed the stalemate to a tipping point.[243] In a survey of 1,063 retired NFL players, University of Michigan researchers found that retired players over forty-nine years old were five times more likely than similarly aged non-players to be diagnosed with dementia, Alzheimer's disease, or similar memory-related diseases.[244] Moreover, retired players between thirty and forty-nine years old were nineteen times more likely to develop a memory-related disease than their non-playing counterparts.[245] This sparked congressional interest, and on October 28, 2009 and January 4, 2010, the House Judiciary Committee conducted a two-part hearing on "[l]egal issues related to football head injuries."[246] During the hearing, Commissioner Goodell attempted to defend the initiatives taken by the NFL, including the "88 Plan," which provides up to 88,000 dollars per year to any retired players who has been diagnosed with dementia or Alzheimer's disease.[247] Moreover, Goodell defended the NFL's efforts by explaining that the league has developed a number of benefits for retired players, including: (1) joint replacement surgery programs; (2) cancer screening; (3) spinal care; (4) assisted living; (5) discount cards for prescription drugs; and (6) growing pension plans that extend retrospectively to retired players.[248] In further defense of the NFL's efforts to curtail the long-term brain injuries, Commissioner Goodell stated that:

> If I have had more than one concussion, am I at increased risks for another injury? Answer: Current research with professional athletes has not shown that having more than

241. *See* CARROLL & ROSNER, *supra* note 222, at 248.
242. *Id.* at 251.
243. *Id.* at 251–52.
244. *Id.* at 252.
245. *Id.*
246. *Legal Issues Relating to Football Head Injuries (Part I & II): Hearings Before the Comm. on the Judiciary H. of Rep.*, 111th Cong. (2000) [hereinafter *Head Injury Hearings*]; CARROLL & ROSNER, *supra* note 222, at 252.
247. *Head Injury Hearings*, *supra* note 246, at 29 (statement of Commissioner Roger Goodell).
248. *Id.*

> one or two concussions leads to permanent problems if each injury is managed properly. It is important to understand that there is no magic number for how many concussions is too many.[249]

This statement would invite a firestorm of criticism, most notably from Congresswoman Linda Sánchez, who expressed concern that:

> The NFL sort of has this kind of blanket denial or minimizing of the fact that there may be this, you know, link. And it sort of reminds me of the tobacco companies pre-1990's when they kept saying no, there is no link between smoking and damage to your health or ill health effects.[250]

Beyond merely a barrage of admonishments, the hearing also had its fair share of veiled threats against the NFL.[251] Perhaps the most scathing threat came from Congresswoman Maxine Waters, whose husband played in the NFL for six seasons.[252] In her closing remarks, Congresswoman Waters stated, "I think it is time for the Congress of the United States to take a look at your antitrust exemption. I think that you are a, what, $8 billion organization who have not taken seriously your responsibility to the players."[253]

The aftermath of the hearing was stunning as the NFL was suddenly considered the voice supporting concussion reform.[254] Within a month of the hearing, Commissioner Goodell announced a series of policies that would impose more stringent concussion guidelines that were designed to promote the overall safety and well-being of all NFL players.[255] Among the policies implemented during the next two NFL seasons were posters, television commercials, and independent medical examiners on every NFL sideline.[256]

While the NFL's policies are a necessary step in quelling the concussion epidemic that has overtaken the professional sports world,

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249. *Id.* at 116.
250. *Id.* at 116 (statement of Representative Sánchez); CARROLL & ROSNER, *supra* note 222, at 252.
251. CARROLL & ROSNER, *supra* note 222, at 252.
252. *Id.*
253. *Head Injury Hearings*, *supra* note 246, at 95 (statement of Representative Waters); CARROLL & ROSNER, *supra* note 222, at 252–53.
254. CARROLL & ROSNER, *supra* note 222, at 252–53.
255. *Id.* at 253–54.
256. *Id.* at 254–56, 263–65.

the NFL's financial stability is far from secure.[257] As of June 21, 2013, 4,400 retired professional football players have joined in 263 lawsuits filed against the NFL.[258] The implication from these lawsuits is that there is no foreseeable end to those retired players who will seek compensation from the NFL for long-term effects of injuries sustained during their NFL career.[259] Coupling this reality with the holding in *Matthews,* the financial liability that could soon follow is one that the NFL may be unable to handle.[260]

B. A Brief Foray into Asbestos Litigation[261]

Asbestos litigation is the longest-running form of mass tort litigation prevailing in the United States.[262] The litigation first arose as a result of employees' long-term exposure to asbestos, which is often attributed to a number of failures by employers.[263] Because the history of asbestos litigation is so well-established, it provides a strong contribution to the evolution of all mass civil litigation.[264]

Asbestos was widely used in industrial, work, and residential locales in the early 1970's primarily because of its strength, durability, and cost-friendly characteristics.[265] Dr. Irving Selikoff of the Mount Sinai School of Medicine in New York is credited with first elucidating the injuries resulting from asbestos exposure, which can include: (1) mesothelioma, (2) other cancers, (3) asbestosis, and (4) pleural plaques or thickening.[266] A primary difficultly in dealing with asbestos litigation is the long latency periods associated with such injuries.[267] Specifically, it can take between twenty and forty

257. Rovell, *supra* note 1.

258. Nathan Fenno & Luke Rosiak, *NFL Concussion Lawsuits*, WASH. TIMES, June 21, 2013, http://www.washingtontimes.com/footballinjuries/.

259. Rovell, *supra* note 1.

260. *See infra* Part IV.

261. This comment will only examine asbestos litigation insofar as it is a sound analogue to symptoms or injuries that may not manifest during the course of employment. For a more detailed analysis into general asbestos litigation, the reader is encouraged to consider a number of illustrative sources. *See, e.g.*, STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION (RAND Corp. 2005) (providing one of the most comprehensive description to date on asbestos litigation).

262. *Id.* at xvii. Through 2002, approximately 730,000 individuals have filed an asbestos-related claim in the United States. *Id.* at 70.

263. *Id.* at xvii.

264. *Id.*

265. CARROLL ET AL., *supra* note 261, at 11.

266. *Id.* at 12–14.

267. *See id.* at 15.

years between the first exposure to asbestos and subsequent disease manifestation.[268] The long latency periods that are associated with asbestos injuries necessitated that applicable legal doctrines evolve accordingly.[269] For example, one of the most significant obstacles facing claimants in the early years of asbestos litigation was the applicable statute of limitations.[270] Initially, most legislative regimes established that the limitations period for an asbestos-related claim began at the time of initial exposure.[271] Because of the long latency period of such injuries, the natural result was to bar the majority of claims.[272] In response, legislatures began to adopt the "discovery doctrine," wherein the limitations period on an asbestos-related claim would not begin until the claimant knew or should have known of the injury.[273]

The development of asbestos injury litigation has also had a profound effect on litigation of workers' compensation law.[274] Specifically, courts have generally established that, where an employee's injury arises out of and in the course of employment, and the injury is compensable by the governing workers' compensation regime, the workers' compensation remedy is the sole source of redress.[275] This necessarily means that an employer is immune from an independent action filed by the injured employee.[276] Adhering to such a system is consistent with the stated goals of workers' compensation systems, namely to provide an injured employee with expeditious and predictable redress without the need to establish fault on the part of the employer.[277] Because of the lengthy latency period associated with asbestos-related injuries, the sole source remedy applies regardless of the employee's current employment status and even extends to preclude any independent actions filed by an employee's surviving spouse.[278] A recognized exception to this rule is known as the "dual capacity doctrine," which allows an injured

268. *Id.*
269. *Id.* at 24–25.
270. *Id.* at 25.
271. *Id.*
272. *See id.*
273. *See id.*
274. *See generally* 60 AM. JUR. *Trials* §§ 39–40 (1996) (examining the relationship between asbestos litigation and workers' compensation laws).
275. *Id.* § 39.
276. *Id.*
277. *Id.*
278. *Id.*

employee to essentially "'pierce[]'" the workers' compensation bar" when the employer fraudulently concealed the risk of injury.[279]

With an understanding that asbestos-related claims *do* belong within the applicable workers' compensation regime, the far more vexing issue is establishing the elements of causation, which is especially difficult because of the lengthy latency period of such injuries.[280] To put it succinctly, in asbestos-related cases, causation is established through two main components, namely (1) "proof of risk" and (2) "proof of medical causation."[281] Essentially, this requires a plaintiff to establish the necessary elements within each component.[282] Regarding the "proof of risk," a claimant is called to establish four primary elements: (1) identification of defendant; (2) identification of a product containing asbestos; (3) demonstration of exposure to such a product; and (4) demonstration of duration of exposure.[283] Regarding "proof of medical causation," a claimant must establish three primary elements: (1) proof that exposure to the product "'can cause'" the injury suffered by claimant; (2) proof that such exposure "'did cause'" claimant's injury; and (3) proof that an external cause was not the "'sole cause" of claimant's injury.[284] While establishing these elements may seem to be a daunting task, proof of causation has been steadily accomplished at state and federal trials across the United States.[285]

IV. ELUCIDATING THE AMBIGUOUS STATE OF AFFAIRS FACING BOTH THE NFL AND ITS PLAYERS IN LIGHT OF THE HOLDING IN *MATTHEWS*

As a result of the holding in *Matthews*, the Ninth Circuit implicitly impacted the future of all workers' compensation claims in the NFL, affecting both the players, as employees and potential claimants, and

279. *Id.* § 40; *see, e.g.*, Johns-Manville Prods. Corp. v. Contra Costa Superior Court, 612 P.2d 948 (Cal. 1980) (holding that exceptional circumstances, such as the fraudulent concealment of health risks, may impute independent liability upon an employer, even though the employee's injury is otherwise compensable under the governing workers' compensation regime). This is a particularly interesting exception in light of accusations made against the NFL, which charged the league with concealing the true nature of long-term injuries among former players. *See supra* Part III.A.

280. 60 AM. JUR. *Trials* § 41.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

the NFL itself, as a liable employer.[286] In order to truly bring these difficulties to light, subpart A will address those issues facing current and former NFL players,[287] and subpart B will address those issues facing the NFL as a potentially liable employer.[288] Finally, subpart C will reinforce the need for legislatures to ensure that NFL players are statutorily protected within workers' compensation regimes, while also ensuring the financial viability of the NFL for the years to come.[289]

A. Issues Facing Current and Former NFL Players

In *Matthews*, the Ninth Circuit held that Bruce Matthews failed to show that his claim was compensable under California's workers' compensation regime only because he did not allege any specific injury in California, nor did he allege a need for medical services therein.[290] In so holding, the court established that a player who makes a prima facie showing that the claimed injury occurred in California may bring the player within the states' statutory regime for workers' compensation, which in turn would allow a court to vacate an arbitration award as a matter of establish state policy.[291]

1. The Potential Obstacles Arising from *Matthews*

On the one hand, the holding in *Matthews* could feasibly present obstacles for players seeking benefits within a state's statutory workers' compensation regime.[292] A player must make a prima facie showing that the claimed injury occurred in the state in which the player is seeking workers' compensation benefits.[293] The ability of a player to make the showing required by the *Matthews* court could be complicated by the fact that the NFL is truly a national enterprise, engaging twenty-two states and the District of Columbia.[294] While some injuries may plainly arise when a player is engaging a certain state, it is equally clear that some injuries may arise as the result of repeated trauma or impact, and as such, may not immediately

286. Rovell, *supra* note 1.
287. *See infra* Part IV.A.
288. *See infra* Part IV.B.
289. *See infra* Part IV.C.
290. Matthews v. NFL Mgmt. Council, 688 F.3d 1107, 1113 (9th Cir. 2012).
291. *Id.* at 1114.
292. *See id.* at 1113–14 (holding that a professional football player must make a prima facie showing that the alleged injury occurred in the state in which the player is claiming benefits).
293. *Id.*
294. *See supra* note 22 and accompanying text.

manifest throughout the course of a specific game or season.[295] Moreover, the adverse effects of certain injuries, such as head trauma, may have a latency period that is so lengthy as to extend well-beyond the end of a player's career.[296] It therefore follows that the task of making a prima facie showing that an injury occurred in a certain state could arguably be extremely difficult, if not impossible.[297]

2. The Foreseeable Benefits of *Matthews*

While one could postulate that *Matthews* could present a number of difficulties to potential claimants, it is more likely that the holding actually acts to benefit NFL players.[298] Specifically, such players may now seek to set aside otherwise binding arbitration awards by claiming that a specific injury occurred in a state, such as California, which has established public policy that will set aside arbitration awards and allow an employee to claim additional benefits under the state's statutory workers' compensation regime.[299]

Matthews certainly aligns with the majority view of those scholars who advocate for a professional athlete's seemingly unfettered access to workers' compensation systems.[300] An athlete should not be barred from workers' compensation benefits merely because of a "trilogy of fallacies" suggesting that all athletes are (1) handsomely rewarded, (2) protected by long-term contracts, or (3) otherwise barred from benefits because they choose to assume the risk of injury.[301] Moreover, it is clear that the vast majority of judicial decisions establish that a player is meant to be included within governing workers' compensation regimes.[302] Even in those limited situations in which a court has excluded a player from benefits under

295. *See supra* Part III.A.

296. *See supra* notes 244–45 and accompanying text.

297. As will be made clear, the potential limitation may be a hurdle that is easily overcome by effective pleading on the part of the claimant. *See infra* Part IV.A.2.

298. *See Matthews*, 688 F.3d at 1113–14 (denying benefits to a former player *only* because he failed to allege a specific injury arising in the state of California) (emphasis added).

299. *See* CAL. LAB. CODE §§ 2804, 3600(a)(1), 5000 (West 2011) (establishing a clear rule that an employee who is otherwise eligible for California benefits cannot be deemed to contractually waive those benefits, and likewise, an employer who is otherwise liable for such benefits cannot establish liability through a contract).

300. *See supra* Part II.B.3.

301. Carlin & Fairman, *supra* note 34, at 117–18.

302. *See supra* Part II.B.1.a.

the governing regime,[303] subsequent scholarly critiques have not hidden the fact that such decisions are plainly erroneous and poorly reasoned.[304]

Matthews also offers protection to those former players who have developed long-term deficits due to injuries sustained through the course of the players' career.[305] Despite the contrary view that former players may struggle to make the showing sufficient to seek benefits under a state's workers' compensation regime,[306] it is far more likely that skillful pleading will allow a former player's claim to survive any motion to dismiss.[307]

A former player must first be able to show that repeated trauma throughout the player's' career caused long-term deficits, such as dementia.[308] The player will have to do so in three ways, namely: (1) establishing a causal link between concussions and long-term deficits; (2) satisfying the causation requirements under the governing workers' compensation regime; and (3) presenting expert testimony to show that employment exposed the player to greater risks than average, everyday life.[309] Notwithstanding the NFL's early reluctance to acknowledge any relationship between repeated brain trauma and subsequent long-term deficits, it is practically beyond debate at this point that there is such a relationship, which necessarily makes the task of proving causation much easier than it once was.[310]

After establishing causation, a player must then be able to classify long-term deficits as either an injury or occupational disease under the governing workers' compensation regime, which will enable the claim to survive a motion to dismiss.[311] Except for rare judicial

303. *See, e.g.*, Palmer v. Kan. City Chiefs Football Club, 621 S.W.2d 350, 356 (Mo. Ct. App. 1981) (interpreting the state's workers' compensation regime to protect against accidental injury, which is statutorily defined to mean those injuries that result from unexpected events in the usual course of employment, but "which does not contemplate that the deliberate collision between human bodies constitutes an accident or that injury in the usual course of such an occupation is caused by an unexpected event.").

304. Carlin & Fairman, *supra* note 34, at 119.

305. *See* Matthews v. NFL Mgmt. Council, 688 F.3d 1107, 1113–14 (9th Cir. 2012) (providing that, as long as a former player can make a sufficient showing that an injury occurred in a specific state, the former player may seek benefits therein).

306. *See supra* Part IV.A.1.

307. *See* Modery, *supra* note 70, at 269–74 (explaining how players suffering the long-term effects of head trauma injuries can successfully prove causation and coverage within a state's workers' compensation regime).

308. *Id.* at 270.

309. *Id.*

310. *See supra* Part III.A.

311. *See* Modery, *supra* note 70, at 272.

decisions that are considered anomalies in legal circles,[312] it is generally established that such deficits will be considered injuries within the governing workers' compensation regime.[313] Moreover, the general rise of "discovery rule" doctrines, which saw a great rise in prevalence due to asbestos litigation, the limitations period on a player's claim will only begin when the player knows or should know of the resulting deficits.[314] Accordingly, it is clear that the holding in *Matthews* certainly presents NFL players with an array of benefits that far outweigh any potential difficulties.[315]

B. Issues Facing the National Football League

While the outlook is altogether bright for current and former NFL players who seek workers' compensation benefits following *Matthews*,[316] the holding operates to threaten the NFL's entire financial structure.[317] As a result of *Matthews*, claimants in an inherently dangerous profession may seek to avoid the enforcement of negotiated arbitration clauses and hold the NFL liable for injuries traced to specific games. Moreover, because the very nature of the NFL requires "employees" to "work" in almost every state,[318] *Matthews* could open the floodgates of litigation for players claiming injuries in a number of specific states. Finally, because the nature of football-related injuries may take years to fully manifest, the NFL could be open to this flood of litigation not only from current and recently retired players, but also from an array of long-retired players as well.

Essentially, even though Bruce Matthews lost in his claim for workers' compensation benefits in California,[319] his failure shed light on the interplay between former NFL players and workers' compensation law, which sets the stage for future litigants to successfully make such claims. The Ninth Circuit clearly established that Matthews did not fail because his contract stated that any claims were to be governed by Tennessee law; rather, Matthews only failed

312. *See, e.g.*, Pro-Football, Inc. v. Tupa, 197 Md. App. 463, 481, 14 A.3d 678, 688 (2011), *aff'd*, 428 Md. 198, 51 A.3d 544 (2012).
313. *See* Modery, *supra* note 70, at 269–70.
314. *See supra* Part III.B.
315. *See supra* Part IV.A.1–2.
316. *See supra* Part IV.A.2.
317. Rovell, *supra* note 1.
318. *See supra* note 22 and accompanying text.
319. *See* Matthews v. NFL Mgmt. Council, 688 F.3d 1107, 1113–14 (9th Cir. 2012) (denying workers' compensation benefits to Bruce Matthews).

because he did not allege a specific injury in the state of California.[320] Had he done so, the court could have invoked the public policy set forth in California law,[321] which allows courts to set aside otherwise binding "choice of law" contractual provisions and award workers' compensation benefits under the governing regime.[322] In short, *Matthews* has opened the door for any number of former NFL players to show that a tangible injury was incurred in California, which may allow the player to override an arbitrator's award, and otherwise binding contractual provisions, and seek benefits under California's favorable workers' compensation regime.[323] It is this reality that exposes the NFL to a very real and very significant threat of financial turmoil, as the changing types of workers' compensation claims filed could result in NFL teams incurring liabilities that approach millions of dollars annually.[324]

C. A Call for Resolution

Football is an inherently dangerous sport, yet the call of courts and scholars alike is clear: Professional athletes, and particularly NFL players, belong within statutory workers' compensation regimes.[325] While few scholars have addressed the threat that unfettered access to such systems could have on the liable employing enterprises,[326] the reality is that uncontrolled access to benefits could bring financial ruin to the NFL.[327] Accordingly, this comment urges legislatures and all those involved to work towards an equitable resolution to ensure both the continued safety of all NFL players and the continued viability of the NFL and its affiliates.

This comment previously examined the profound impact that asbestos injury litigation has had on the overall system of compensation under statutory workers' compensation regimes.[328] Specifically, reviewing courts have consistently held that the

320. *Id.*

321. *See* CAL. LAB. CODE §§ 2804, 3600(a)(1), 5000 (West 2011 & Supp. 2013) (establishing a clear rule that an employee who is otherwise eligible for California benefits cannot be deemed to contractually waive those benefits, and likewise, an employer who is otherwise liable for such benefits cannot establish liability through a contract).

322. *Id.*

323. *See* Rovell, *supra* note 1 (stating that California is a favorable jurisdiction for former players because it is the only jurisdiction that provides for cumulative trauma cases).

324. *Id.*

325. *See supra* Part II.B.3.

326. *See supra* Part II.B.3.

327. Rovell, *supra* note 1.

328. *See supra* Part III.B.

workers' compensation remedy is intended to be the sole source of redress for an injured employee.[329] Such holdings align with a central premise underlying workers' compensation law, which is to compensate those employees who are injured in the course of their employment.[330] With this in mind, it is easier to accept that professional athletes belong within the worker's compensation framework, yet there is continuing debate as to the best way to resolve the conflict between professional sports and workers' compensation law.[331] While there may never be a perfect solution, this comment aligns with Roquemore's call for providing a single federal system to resolve all workers' compensation claims filed by professional athletes.[332] As it stands now, NFL teams are facing financial uncertainty and have no idea what the future will bring.[333] Adopting a single federal system to resolve all workers' compensation claims filed by professional athletes would bring uniformity, predictability, and efficiency to an otherwise unpredictable system that sometimes seems excessive and sometimes seems inequitable.[334] The need for such a uniform federal system is clear because of the very nature of the NFL, namely that its structure requires players to engage twenty-two states, as well as the District of Columbia,[335] all of which have their own unique statutory regime for workers' compensation.[336] Beyond this, players do not simply engage one jurisdiction during the course of their career; rather, the format of NFL scheduling, as well as the possibility that a player may frequently change teams, requires players to travel to an array of different jurisdictions.[337] Finally, the nature of the sport itself subjects its players to the inherent risks for the very injuries that workers' compensation regimes were created to address.[338] In short,

329. *See supra* notes 273–74 and accompanying text.
330. *See supra* Part II.A.
331. *See supra* Part II.B.3.
332. Roquemore, *supra* note 194, at 841.
333. Rovell, *supra* note 1.
334. *See* Roquemore, *supra* note 194, at 848–52 (providing a list of benefits that a single federal system could bring to the conflict between professional sports and current workers' compensation claims).
335. *See supra* note 22 and accompanying text.
336. *See supra* Part II.B.1.
337. *See supra* note 22 and accompanying text.
338. *See supra* Part II.A (stating that the statutory regime of workers' compensation law was created to avoid various doctrinal defenses, such as "assumption of risk," which purport to preclude injuries sustained by employees in the course of inherently dangerous professions, and provide benefits to all injured employees).

a single federal system is perhaps best able to effectuate the true purpose of workers' compensation benefits, which is to provide economic stability to injured employees.[339] Until such a time as a resolution can be found, both the NFL and its players will be continually entrenched in the labyrinth of varying workers' compensation regimes, and the NFL should certainly expect a number of former players to seek cumulative trauma benefits in a state in which they infrequently engaged many years, if not decades, ago.[340]

V. CONCLUSION

Professional football is, like all contact sports, inherently dangerous, where players willfully subject themselves to repeated trauma on a weekly basis.[341] Despite the risks facing all professional football players, nothing prevents them from seeking benefits under statutory workers' compensation regimes—nor should it.[342] That being said, the availability of such compensatory benefits creates a looming threat to the continued financial viability of the NFL.[343] The liability from workers' compensation claims may sometimes be minimal, but the proliferation of long-term deficits, which may not manifest until long after a player's career has ended,[344] threatens to increase the total liability of NFL teams from thousands of dollars to millions of dollars annually.[345]

This comment seeks to elucidate the ambiguous state of affairs facing both NFL players, as potential claimants,[346] and the NFL itself, as a potentially liable employer.[347] Specifically, the first goal of this comment is to highlight the development of workers' compensation law and its interplay with the world of professional sports,[348] as well as the rise of long-term deficits in former NFL players.[349] This comment hopes to highlight the impact that *Matthews* will have on the aforementioned interactions, while advocating for legislative resolution that will ensure both the security of professional football

339. NACKLEY, *supra* note 31, at 1.
340. Roquemore, *supra* note 194, at 854–55.
341. Modery, supra note 70, at 281.
342. Rovell, *supra* note 1.
343. *Id.*
344. *See supra* Part III.A.
345. Rovell, *supra* note 1.
346. *See supra* Part IV.A.
347. *See supra* Part IV.B.
348. *See supra* Part II.
349. *See supra* Part III.A.

players and the continued financial viability of the NFL.[350] Until that time, the state of affairs facing the NFL and its players is the same as the mental state of a concussed player: cloudy and uncertain.

*Thomas J. McQueeney**

350. *See supra* Part IV.C.

* J.D. Candidate, University of Baltimore School of Law, 2014. This comment is dedicated to my parents, John and Kathy McQueeney, and my brother, Christopher McQueeney. I would also like to thank Professor J. Closius for his insight and guidance during the drafting process.