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Squeeze Play: Workers' Compensation and the Professional Athlete

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I. INTRODUCTION

A worker injured in the scope of his employment faces not only the pain of and worry over the injury itself, but also the concomitant financial worries of the temporary or permanent inability to continue working. Foremost among these concerns are the payment of medical bills, maintenance of ongoing financial obligations during recuperation, and the possibility that injury may prevent a return to the old job. Luckily for most workers, there is a program designed to protect injured employees from the financial catastrophe that could accompany an on-the-job injury. The workers' compensation system is designed to help the injured worker who suffers an occupational disability. Workers' compensation provides medical benefits for rehabilitation, temporary income benefits to replace lost wages during recovery and, if permanent disability occurs, impairment benefits to compensate for the loss of future earnings. Throughout the states, all of these benefits are available on a relatively speedy basis through an administrative agency without most of the cost, delay, and uncertainty of a tort suit. For most employees, workers' compensation is the safety net providing protection after an occupational injury. From the employer's perspective, the workers' compensation system provides predictability and limitation of its liability to employees injured on the job.

Unfortunately, this protection is sometimes stripped from one particular class of workers—the professional athlete. The pro athlete increasingly finds himself the victim of a squeeze play. Courts, legislatures, and team owners are challenging player access to workers' compensation benefits. Mired in misconceptions about the applicability of workers' compensation to professional athletes,

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those trying to limit athletes' access have succeeded in some jurisdictions. This article focuses on the bases and merits of these misguided restrictions.

To provide background for an understanding of these restrictions, Part II describes the historical development of the workers' compensation system. It explores the mechanics of the system with emphasis on those characteristics which impact coverage of the pro athlete. Part III examines the two primary ways professional athletes' access to workers' compensation is affected. In that regard, both statutory treatment and contractual restrictions are considered. Part IV discusses the alleged tension between the goals of the workers' compensation system and treatment of the pro athlete. Critical of unwarranted restrictions to athlete access, this article identifies the fallacies employed by proponents of limitation. Where ambiguity exists in either statutory or contractual restrictions, suggestions for interpretation consistent with the laudable fundamental goals of workers' compensation are presented. Hopefully, this thorough comparison between workers' compensation and its application to the pro athlete will encourage a more thoughtful approach to coverage.

II. ADVENT OF WORKERS' COMPENSATION[1]

A. *Purpose of the Workers' Compensation System*

The workers' compensation system[2] is a statutory creation designed to compensate workers for occupational disabilities. Prior to the enactment of these laws, employer liability was governed by the common law principle that an employer was liable only for accidents that were the result of the employer's own negligence.[3] To recover, an injured worker was forced to prove that the injuries

1. This article uses the term "workers' compensation" and is intended to include other authors' and legislatures' preference for the terms "workman's compensation," "workmen compensation," "worker's compensation," or "workers compensation." The reader should understand that we are talking about the same statutory system, regardless of the nomenclature.

2. The workers' compensation system is not a "system" per se. Rather, each of the 50 states and the District of Columbia has its own statutory scheme. Still, there are sufficient similarities to refer to the aggregate as a system. For a concise comparison of each of the state workers' compensation laws see U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS (1994).

3. *See* U.S. CHAMBER OF COMMERCE, *supra* note 2, at vi (describing the negligence principle as it applied prior to the advent of workers' compensation); 75 TEX. JUR. 3d *Work Injury Compensation* § 10 (1991) (labeling modern workers' compensation laws as a radical departure from common law concepts of negligence).

were the direct result of the employer's negligent acts.[4] Moreover, the employee was forced into the judicial forum with all the accompanying costs, delays, and uncertainties to compete against a well-funded employer.[5]

As it became apparent that the judicial remedy acted too harshly upon the injured worker, states began enacting workers' compensation laws in the early twentieth century.[6] In creating workers' compensation, states hoped to achieve a trilogy of objectives. First, workers' compensation was designed to guarantee reasonable income to the injured worker, regardless of fault.[7] In essence, this creates a form of strict liability where the employer is charged with responsibility for workers' injuries that arise out of employment without regard to comparative or other forms of negligence.[8] This effectively eliminates the old common law employer defenses, such as contributory negligence, which served to bar employee recovery in tort.[9] In exchange, the employer's liability for the injury is strictly limited. The employer is not liable for any punitive damages, and its liability for actual damages is often fixed, depending on the type and severity of the injury.[10] This gives the employer predictability that it did not have under the

4. The practical result of this burden was that plaintiffs were denied recovery. *See* Mark R. Whitmore, Note, *Denying Scholarship Athletes Worker's Compensation: Do Courts Punt Away a Statutory Right?*, 76 IOWA L. REV. 763, 768 (1991) (noting that prior to workers' compensation, 80% of all industrial accident claims failed or left the plaintiff uncompensated).

5. *See* U.S. CHAMBER OF COMMERCE, *supra* note 2, at vi (characterizing the legal system as slow, costly, and uncertain); Whitmore, *supra* note 4, at 768-69 (claiming plaintiffs' difficulties in the courtroom stem from employers' tort defenses).

6. New York is credited as the first state to pass a workers' compensation statute. By 1921, all but a few states had enacted such laws. This swift adoption has led Professor Keeton to proclaim that "no subject of labor legislation ever has made such progress or received such general acceptance of its principles in so brief a period." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 573 (5th ed. 1984).

7. *See* ARTHUR LARSON, 1 THE LAW OF WORKMEN'S COMPENSATION § 2.00-2.10 (1990) (explaining the connection with workplace injury instead of fault as the test for compensation); U.S. CHAMBER OF COMMERCE, *supra* note 2, at vi (listing compensation regardless of fault as the first main objective of workers' compensation); *see generally* AMERICAN LAW INSTITUTE REPORTER'S STUDY, 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 105-127 (1991) [hereinafter ENTERPRISE RESPONSIBILITY].

8. *See* Ronald G. Ehrenberg, *Workers' Compensation, Wages and the Risk of Injury*, *in* NEW PERSPECTIVES IN WORKERS' COMPENSATION 71, 72 (John F. Burton, Jr. ed., 1988) (characterizing workers' compensation as a form of no-fault insurance); KEETON, *supra* note 6, at 573 ("Workers' compensation is thus a form of strict liability.").

9. Professor Keeton colorfully describes these common law defenses as the "three wicked sisters"—contributory negligence, assumption of risk, and the fellow servant doctrine. KEETON, *supra* note 6, at 573.

10. *See infra* notes 23-26 and accompanying text.

common law.

Just as workers' compensation seeks to guarantee recovery to the injured worker as an important substantive objective, it is also designed to pursue a vital procedural purpose. In addition to guaranteeing compensation, the system tries to provide this in a single, efficient administrative remedy.[11] This goal is paramount, since the important substantive objective of workers' compensation fails if the statute is poorly administered.[12]

Safety enhancement is a third objective of workers' compensation. Workers' compensation affects workplace safety in two independent ways. First, the reporting provisions of workers' compensation statutes make employers aware of the specific employee injuries. This identification encourages frank study of accident causes and prevention.[13] Further, since workers' compensation imposes the costs of employee accidents on the employer, the system creates a financial incentive for the employer to prevent injuries.[14] Presumably, a firm makes safety decisions based upon the costs and benefits of additional safety.[15] Injury prevention and workplace safety can thus be enhanced by placing predictable financial responsibility for accidents on the employer.[16]

B. The Mechanics of Workers' Compensation

To implement these three laudable goals, the states have created their own independent workers' compensation statutes. While each state's workers' compensation law has its own unique fea-

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11. *See* U.S. CHAMBER OF COMMERCE, *supra* note 2, at vi (noting the objective of workers' compensation as providing a single remedy to reduce court delays, costs, and workloads found in time-consuming personal injury litigation); *see generally* JOSEPH W. LITTLE ET AL., WORKERS' COMPENSATION 399-418 (3d ed. 1993).

12. *See* LITTLE, *supra* note 11, at 399 (stressing the importance of administration in achieving the goals of workers' compensation); U.S. CHAMBER OF COMMERCE, *supra* note 2, at 37 ("Without an effective delivery system, many of the problems associated with the common law and employer liability would remain.").

13. *See* LITTLE, *supra* note 11, at 405 (describing the notice provisions of workers' compensation statutes as allowing employers the opportunity to investigate and mitigate harm from accidents); U.S. CHAMBER OF COMMERCE, *supra* note 2, at 2 (highlighting how a workers' compensation program promotes preventative services by insurance agencies, state agencies, and employers).

14. RICHARD B. VICTOR ET AL., WORKERS' COMPENSATION AND WORKPLACE SAFETY: SOME LESSONS FROM ECONOMIC THEORY v (1982).

15. *See* VICTOR, *supra* note 14, at vi (describing the conceptual framework that firms make safety decisions based upon cost-benefit analysis).

16. *See id.* at vii (concluding as a general proposition that the conventional wisdom that workers' compensation creates financial incentives for safety is correct); U.S. CHAMBER OF COMMERCE, *supra* note 2, at 2 (arguing a second major role of workers' compensation is to create a monetary incentive to employers to improve their safety records).

tures, it is possible to identify commonalities.[17]

1. Application to Employment Injuries

It is vital to identify what should be obvious at the outset. Workers' compensation is designed to provide recovery solely for work-related injuries and illnesses.[18] The compensation program is not intended to cover all health problems of the employee.[19] To achieve this limitation, compensation statutes generally limit recovery to those injuries that "arise out of and in the course of employment."[20] While this language does not guarantee universal application and coverage for all types of employee injuries,[21] it does serve to limit and focus the remedy available. Moreover, unlike a tort system of recovery, workers' compensation provides only for the financial harms accompanying injury, not the pain and suffering of the injured worker.[22]

2. *Quid Pro Quo* and the Exclusive Remedy

It is not surprising that employers would not instinctively embrace a workers' compensation system unless it provided them with an incentive. What has emerged is best described as a *quid pro quo*. Employees are entitled to relatively swift and certain compensation for their injuries without having to prove the employer was at fault. In exchange for this benefit, employees give up their common law right to sue the employer in tort.[23] By waiving

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17. This brief explanation of the components of the workers' compensation system is not intended to be comprehensive. Rather it is designed to highlight features of the system that impact coverage of professional athletes. For a complete examination of workers' compensation issues, consult the seminal multi-volume treatise by Professor Larson. *See* ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION (1990).

18. *See* Whitmore, *supra* note 4, at 767 ("The main purpose of worker's compensation laws is to provide employees a guaranteed remedy for injuries arising in the course of serving their employers."); U.S. CHAMBER OF COMMERCE, *supra* note 2, at 1 ("Another basic objective for workers' compensation is to provide compensation for all work-related injuries and diseases.").

19. U.S. CHAMBER OF COMMERCE, *supra* note 2, at 2.

20. *See* LARSON, *supra* note 7, § 6.10 (describing the "arising out of" test under workers' compensation statutes); U.S. CHAMBER OF COMMERCE, *supra* note 2, at 2 ("'Typically the statute limits compensation benefits to 'personal injury caused by accidents arising out of and in the course of employment.' "); *see e.g.*, TEX. LAB. CODE ANN. § 406.031 (Vernon 1994) (describing liability for compensation when the injury arises out of and in the course and scope of employment).

21. This has particular importance for coverage of professional athletes. Some courts have limited application of state workers' compensation by defining athletes' injuries as non-accidents. *See infra* notes 66-73 and accompanying text.

22. ENTERPRISE RESPONSIBILITY, *supra* note 7, at 114.

23. *See* LARSON, *supra* note 7, § 65.11 (explaining the basic rule of exclusivity); John

common law tort actions, workers' compensation becomes the exclusive remedy for employee relief.[24] This system is more advantageous to the employee than a tort action for damages, since it provides fixed compensation on the happening of an injury during the course of employment, without the onerous burdens of litigation.[25] Similarly, the employer benefits from tort immunity and the creation of statutorily-capped benefits.[26]

Complementing the exclusivity of remedy is often an anti-waiver provision. This solidifies the bargain between employers and employees, by prohibiting express waivers or contractual provisions designed to compromise workers' rights under the system.[27] This is in recognition of the superior bargaining position of the employer.[28] The combination of exclusivity and anti-waiver provisions places the issue of workers' compensation squarely before the statutorily-created administrative agency.

D. Worrall & David Appel, *Some Benefit Issues in Workers' Compensation, in* WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY, AND EFFICIENCY 1, 3 (John D. Worrall & David Appel eds., 1985) (describing the system as a *quid pro quo* because employees get swift payment and employers get immunity from suit); Whitmore, *supra* note 4, at 770-71 (noting the trade-off as one of universal coverage and a cost of waiving tort suits and accepting the statutory compensation); John F. Burton, Jr., *Introduction, in* NEW PERSPECTIVES IN WORKERS' COMPENSATION 1, 23 (John F. Burton, Jr. ed., 1988) (describing the well-known *quid pro quo*).

24. *See* Burton, *supra* note 23, at 23 ("The exclusiveness of the compensation remedy is a universal feature of American compensation law."); 75 TEX. JUR. 3d *Work Injury Compensation* § 83, at 168 (1991) (noting that generally coverage under the workers' compensation statute is the exclusive remedy). Some states even include exclusivity of remedy provisions in the statute itself. *See e.g.*, IND. CODE ANN. § 22-3-2-6 (Burns 1992) (citing that rights and remedies of employees are exclusive under workers' compensation statute); TEX. LAB. CODE ANN. § 408.001(a) (Vernon 1994) ("Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage . . . .").

25. *See* 75 TEX. JUR. 3d *Work Injury Compensation* § 10, at 48-49 (1991) (describing the advantages of the program to employees).

26. *See* Whitmore, *supra* note 4, at 770-71 (assessing the benefits to the employer).

27. *See* LITTLE, *supra* note 11, at 413 (describing how many state statutes specifically prohibit waiver of rights); *see e.g.*, IND. CODE ANN. § 22-3-2-15 (Burns 1992) (prohibiting contracts, agreements, whether written or implied, rules or other devices from relieving the employer of obligations under the statute); N.Y. WORKERS' COMPENSATION LAW § 33 (McKinney 1993) (prohibiting assignment or release of compensation or benefits); OKLA. STAT. ANN. tit. 85 § 47 (West 1992) ("No agreement by an employee to waive his right to compensation under this act shall be valid."); TEX. LAB. CODE ANN § 406.035 (Vernon 1994) ("Except as provided by this subtitle, an agreement by an employee to waive the employee's right to compensation is void."); WASH. REV. CODE § 51.04.060 (West 1990) ("No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.").

28. *See* LITTLE, *supra* note 11, at 413 (categorizing anti-waiver provisions as rooted in concern for employer exploitation).

3. Creation of an Administrative Agency

Facilitating the exclusivity of remedy is an administrative agency[29] to process claims and resolve disputes surrounding workers' compensation. The administrative agency strives to ensure that both employers and employees are aware of their rights and obligations and comply with the system.[30] This role is vital since most workers' compensation claims are uncontested.[31] Additionally, the agency keeps accident records and compiles data and statistics useful in tracking the progress of improved workplace safety.[32] The agency must also conduct the daily supervision of compensation awards, often over long periods of time. Finally, workers' compensation boards are the forum for resolution of disputes.[33]

The advantages of an administrative remedy, as opposed to a judicial one, are clear. Courts are not equipped to handle the day to day issues of workers' compensation efficiently. They simply lack the resources to perform the many tasks required to ensure prompt claim processing, payment, continuous follow-up, statistical compilation, and the like.[34] Even in the area of contested cases, administrative resolution is superior. The use of informal and expeditious administrative procedures encourages prompt resolution of disputes.[35] This is enhanced by the extensive experience of the workers' compensation boards in handling disputes. Consequently,

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29. These administrative agencies have a myriad of different names. Arizona has an Industrial Commission. Kentucky uses a Workers' Compensation Board. Massachusetts has a Department of Industrial Accidents. Texas has a Workers' Compensation Commission. Despite the name, each agency serves the same functions. For a complete list of each of these state workers' compensation agencies, see U.S. CHAMBER OF COMMERCE, *supra* note 2, at 55 (Chart XVI: Directory of Administrators).

30. *See* LITTLE, *supra* note 11, at 399 (listing the main purpose of administrative agencies as informational); U.S. CHAMBER OF COMMERCE, *supra* note 2, at 37 (describing a principal area of administration as supervision of compliance with statutory requirements).

31. *See* LITTLE, *supra* note 11, at 402 ("In 70 to 90 percent of the cases of work-connected injury or disease, liability is not disputed either as to matters of fact or questions of law.").

32. U.S. CHAMBER OF COMMERCE, *supra* note 2, at 37 (listing collection of data and evaluation as a principal administrative area).

33. *See* LITTLE, *supra* note 11, at 399 (identifying additional functions of the administrative agency under workers' compensation laws).

34. *See id.* at 400 (claiming that court administration is inferior to agency administration because courts are not equipped to handle all aspects of workers' compensation effectively).

35. *See* ENTERPRISE RESPONSIBILITY, *supra* note 7, at 118 (indicating that specialized administrative tribunals resolve workers' compensation issues more informally, expeditiously and economically); LITTLE, *supra* note 11, at 404 (noting the superiority of administrative agencies in resolving contested issues).

workers' compensation through an administrative agency is both faster and cheaper than litigation.[36] Not surprisingly, the judicial role in workers' compensation is generally limited to appellate review of the record to ensure proper application of the law to the facts.[37] In so doing, the courts generally pay great deference to the expertise and discretion of the administrative factfinder.[38]

4. Benefit Classification Scheme

A final common characteristic of workers' compensation is a benefit classification scheme. Worker injuries are carefully classified and compensated according to the type of injury and the benefit sought. Typically, claims made by injured workers fall into four distinct categories.[39]

First, there are temporary disability benefits. These most frequently comprise temporary total disability claims,[40] but temporary partial disability benefits are often provided for as well. Temporary disability claims result from injuries that, in the short term, prevent the employee from being able to work but from which full recovery and return to employment is expected.[41] There is often a waiting period prior to receiving temporary benefits.[42] The benefit itself is usually specified as a fraction of preinjury earnings, commonly two-thirds.[43] These benefits are designed to compensate the injured worker for the income stream lost during the temporary disability.

A second component of the compensation scheme is the impairment benefit. These are designed to compensate for permanent partial or total disabilities. Unlike temporary benefits, these are designed to compensate the injured employee for injuries that are expected to result in some permanent physical impairment, limita-

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36. *See* ENTERPRISE RESPONSIBILITY, *supra* note 7, at 119 ("Nevertheless, at least in aggregate terms WC is an administratively faster and cheaper system than tort litigation.").

37. *See* LITTLE, *supra* note 11, at 412 (describing the limits of judicial review in most states).

38. *See* LITTLE, *supra* note 11, at 412.

39. *See generally* Ehrenberg, *supra* note 8, at 72-74 (describing different categories of benefits); Worrall & Appel, *supra* note 23, at 4-6.

40. Temporary total disability claims are by far the most frequent type of claim. Ehrenberg, *supra* note 8, at 73; U.S. CHAMBER OF COMMERCE, *supra* note 2, at 20.

41. Worrall & Appel, *supra* note 23, at 4.

42. For a comparison of waiting periods see U.S. CHAMBER OF COMMERCE, *supra* note 2, at 32 (Chart IX: Waiting Period for Income/Medical Benefits).

43. *See* C. Arthur Williams, Jr., *Minimum Weekly Workers' Compensation Benefits, in* WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY, AND EFFICIENCY 89, 90 (John D. Worrall & David Appel eds., 1985) (describing the operation of disability payments); Ehrenberg, *supra* note 8, at 72 (claiming the common benefit is set at two-thirds).

tion, or loss of earning capacity.[44] Total disability benefits are often calculated in a fashion similar to temporary benefits.

Calculation of partial impairment benefits is divided into "scheduled" and "nonscheduled" disabilities.[45] In the case of a scheduled injury, state law specifically lists a maximum amount payable for the loss of use of a specific body member.[46] With nonscheduled injuries, states often base compensation on a wage-loss replacement percentage.[47] Some state schemes calculate partial disabilities using an impairment rating—the percentage of permanent impairment of the whole body from the compensable injury.[48]

Regardless of the method of benefit calculation, there is an inherent difference between temporary benefits and impairment compensation. Temporary benefits do not address the actual physical injury, but instead are designed to compensate the injured worker for current income lost during recovery. On the other hand, impairment benefits for permanent partial or total disability provide purely prospective relief. They compensate the injured worker for the future loss of bodily functions and wage earning capacity.[49] This critical distinction highlights the means by which workers' compensation strives to provide the injured worker with not only temporary compensation pending rehabilitation, but also prospective compensation for the permanent loss of earning capacity.[50]

A third benefit category provides for the payment of medical expenses related to the injury. These are often unlimited and intended to encourage the physical recovery of the worker.[51] A final benefit category of most compensation schemes is death benefits. These are claims arising from fatal injuries or diseases. Commonly,

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44. *See* Worrall & Appel, *supra* note 23, at 4-5 (describing permanent disability payments); Ehrenberg, *supra* note 8, at 72-73 (distinguishing temporary and permanent disability payments).

45. *See* U.S. CHAMBER OF COMMERCE, *supra* note 2, at 20.

46. For a concise comparison of scheduled benefit calculations see U.S. CHAMBER OF COMMERCE, *supra* note 2, at 27 (Chart VII: Income Benefits of Scheduled Injuries).

47. U.S. CHAMBER OF COMMERCE, *supra* note 2, at 20.

48. *See* 75 TEX. JUR. 3d *Work Injury Compensation* § 246, at 554 (1991) (explaining impairment ratings).

49. *See* Gerald Herz & Robert C. Baker, Jr., *Professional Athletes and the Law of Workers' Compensation: Rights and Remedies*, *in* LAW OF PROFESSIONAL AND AMATEUR SPORTS 15-1, 15-17, at § 15.04 (Gary A. Uberstine ed., 1991) (explaining the prospective nature of permanent disability payments and contrasting with temporary ones).

50. As discussed in detail below, this distinction is critical when considering the issue of statutory and contractual set-offs of benefits by professional team owners against previously-paid salary. *See infra* notes 148-159 and accompanying text.

51. *See* Worrall & Appel, *supra* note 23, at 4 ("Workers' compensation provides for virtually unlimited payment of medical benefits.").

both burial and survival benefits are available.[52] Generally, these claims account for only a small share of the workers' compensation scheme.[53]

III. Interplay Between Workers' Compensation and the Professional Athlete

In contrast to the other employees, workers' compensation impacts the professional athlete in two distinct ways. First, state workers' compensation statutes vary greatly in their specific treatment of professional athletes. Subpart A examines these statutory distinctions. Beyond statutory differences, a second major influence affects the athlete. The professional athlete's employment contract with the team often includes specific provisions concerning workers' compensation. These are the subject of subpart B. As shown below, owners have tried to use both of these devices to limit the athlete's ability to collect benefits. It is the opinion of the authors that such limitations are inherently unfair and grounded in meritless arguments.[54]

A. Statutory Treatment of Professional Athletes

There are five basic ways states handle professional athletes and workers' compensation. Despite this comprehensive treatment, workers' compensation in general, and pro athlete treatment in specific, is a very frequent target of legislative change. Consequently, new methods of coverage could emerge in any legislative session. Thus, the practitioner must be ever mindful that the compensation law is only as valid as the latest legislative session update or appellate court decision.

1. Silence

While many states have specific statutory provisions concerning professional athletes,[55] the vast majority of states do not include separate provisions for athletes. In the absence of special provisions, courts[56] and commentators[57] alike correctly presume

52. *See* Worrall & Appel, *supra* note 23, at 5 (describing death benefits).
53. *See* Worrall & Appel, *supra* note 23, at 5.
54. *See infra* Part IV.
55. *See infra* subsections III(A)(2)-(5).
56. *See infra* notes 59-65 and accompanying text.
57. *See* Herz & Baker, *supra* note 49, at § 15.02[1] ("Generally, there is no dispute that professional athletes employed by professional athletic clubs are employees and that their injuries are compensable."); John C. Weistart & Cym H. Lowell, The Law of Sports

professional athletes are included under state workers' compensation programs. Professor Larson illustrates the extent of this presumption when he proclaims that "[i]njuries in such sports are so routinely treated as compensable in the great majority of jurisdictions that they seldom appear in reported appellate decisions."[58]

When courts are called upon to determine the applicability of workers' compensation to the professional athlete, they routinely find the statute covers the injury. *Bayless v. Philadelphia National League Club*[59] is illustrative. Patrick Bayless sued the Philadelphia Phillies National League Baseball Club for personal injuries he suffered while employed as a pitcher in the Phillies minor league farm system.[60] Rather than filing a workers' compensation claim, Bayless brought a common law tort action against the club. The club responded, contending that Bayless, as the club's employee, fell within the ambit of workers' compensation, and was thus, barred from prosecuting his suit.[61] Bayless argued that the Pennsylvania Workmen's Compensation Act did not apply to "high priced athletes."[62] In rejecting this contention the court opined that the Act applied to "all employees regardless of their earnings."[63] If Bayless were precluded, "then hundreds and possibly thousands of low as well as high priced athletes on Major and Minor League Teams would be deprived of the humanitarian benefits and protection the Act provides."[64] The court concluded that a professional baseball team is a business operating for profit or gain within the meaning of the compensation act. This presumption of inclusion is generally confirmed by other courts that have consid-

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§ 8.13, at 1009 (1979) ("It seems clear that an athlete who is a member of a professional athletic team will frequently be an 'employee' for purposes of the workmen's compensation statutes, except in those jurisdictions where professional athletes are specifically excluded from coverage."); 82 AM. JUR. 2d *Workers' Compensation* § 137 (1991) ("Professional sports may be considered businesses subjecting employers to workers' compensation provisions in some instances."); Workers' Compensation Business Management Guide (CCH) ¶ 3775 (1993) ("Professional sports injuries arise in the course of employment.").

58. LARSON, *supra* note 7, § 22.21(b).

59. 472 F. Supp. 625 (E.D. Pa. 1979), *aff'd*, 615 F.2d 1352 (3d Cir. 1980).

60. *Bayless*, 472 F. Supp. at 627.

61. *Id.* It is ironic that now team owners are attempting to limit their players' benefits by having them determined under workers' compensation statutes (and thus limited by the imposed compensation barriers) and then suing in court to recover these benefits under a theory of breach of the contractual provisions calling for setoff discussed below. *See* Dallas Cowboys Football Club, Ltd. v. Banks, No. 94-00247-J, now pending before the 191st Judicial District Court of Dallas County, Texas.

62. *Bayless*, 472 F. Supp. at 631.

63. *Id.*

64. *Id.*

ered the issue.[65]

While there is a consensus for inclusion of professional athletes in workers' compensation programs, there is some contrary authority that athletes do not fall within the ambit of the system. The seminal expression of this erroneous point of view[66] is *Palmer v. Kansas City Chiefs Football Club.*[67] Gery Palmer was an offensive guard employed by the Kansas City Chiefs. He was injured during the course of a scheduled game when a defensive lineman pushed him into an "off balance posture."[68] The Missouri Industrial Commission awarded Palmer compensation for his back injury based upon a determination that the injury was the result of an abnormal strain.[69] The court of appeals reversed rejecting the concept that the injury was "abnormal." The court found the off balance posture was "not an unexpected occupational event, but rather as customary as not."[70] The court further slammed the door on athlete compensation when it concluded that the enactment of the state workers' compensation program "simply does not contemplate that the deliberate collision of bodies constitutes an accident or that injury in the usual course of such an occupation is caused by an unexpected event."[71] While at least one other inter-

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65. *See* Metropolitan Casualty Ins. Co. of New York v. Huhn, 141 S.E. 121, 125-26 (Ga. 1928) (holding a professional baseball player is covered under the state workers' compensation act); McGlasson v. Workmen's Compensation Appeal Board, 557 A.2d 841, 841-43 (Pa. Commw. Ct. 1989) (affirming a workers' compensation award to a Philadelphia Eagles player who suffered a career ending injury); Brinkman v. Buffalo Bills Football Club, 433 F. Supp. 699, 702 (W.D.N.Y. 1977) (holding that a workers' compensation claim is the exclusive remedy for a football player injured during play); Knelson v. Meadowlanders, Inc., 732 P.2d 808, 810, 814 (Kan. Ct. App. 1987) (affirming a workers' compensation award for a professional hockey player); United States Fidelity & Guar. Co. v. Indemnity Ins. Co. of N. Am., 271 F.2d 955, 956 (5th Cir. 1959) (affirming a district court finding that the Texas workers' compensation system applies to professional baseball players). Note that the Kansas position is now confirmed by the statute as well. *See infra* notes 75-77 and accompanying text. The Texas position has been altered by the new elective procedure. *See infra* notes 92-98 and accompanying text.

66. The *Palmer* decision has been roundly criticized. Professor Larson has been especially vocal in his disdain for the reasoning of the court. *See* LARSON, *supra* note 7, § 22.21(b) (criticizing the *Palmer* decision and its fallacious reasoning); Workers' Compensation Business Management Guide (CCH) ¶ 3775 (1993) (outlining criticisms). This article will consider the fallacies surrounding judicial restriction of workers' compensation in subparts IV(A)-(B).

67. 621 S.W.2d 350 (Mo. Ct. App. 1981).

68. *Palmer*, 621 S.W.2d at 352. For a more complete description of how Palmer was bested by his opponent, Larry Hand, see 621 S.W.2d at 352-54.

69. *Id.* at 352.

70. *Id.* at 356.

71. *Id.* Missouri now deals with the professional athlete directly with its workers' compensation statute. *See infra* note 100 and accompanying text.

mediate appellate court has been swayed by the *Palmer* opinion,[72] the majority position is for inclusion of professional athletes under the workers' compensation system.[73]

2. Statutory Inclusion

An alternative to judicial determination of workers' compensation coverage is direct statutory treatment of professional athletes.[74] Statutory inclusion is one option. Kansas, for example,

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72. *See* Rowe v. Baltimore Colts, 454 A.2d 872, 878 (Md. Ct. Spec. App. 1983). The *Rowe* panel concluded that a "professional football player is engaged in an occupation in which physical contact with others is not only expected, commonplace, and usual, but is a requirement." *Id.* The court then held:

> Whenever a person engages in an occupation requiring violent physical contact with others similarly inclined, he must expect that injury may arise therefrom. Therefore, we hold that an injury sustained by a professional football player as the result of legitimate and usual physical contact with other players, whether under actual or simulated game conditions, cannot be said to be an "accidental injury" within the meaning of the Maryland Workmen's Compensation Law.

Id. (citing *Palmer).*

73. *See supra* notes 58-65 and accompanying text. *But see* WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW § 14.1, at 260 (1990) (claiming the approach in *Rowe* is probably the way other states courts would interpret state workers' compensation statutes and professional athletes). While the majority position is that workers' compensation applies, the injury still must be one arising out of employment. *See* Wilson v. Detroit Hockey Club, Inc, 483 N.Y.S.2d 819 (N.Y. App. Div. 1984), *aff'd*, 489 N.E.2d 252 (N.Y. 1985). In *Wilson*, a coach for the Adirondack Red Wings, a Detroit Hockey Club farm team, died while jogging near his home during the off season. The court reversed a death benefit award on the grounds that maintaining good physical condition was not a condition of his employment. *Wilson*, 483 N.Y.S.2d at 820.

74. Whenever workers' compensation statutes deal directly with professional athletes, there is a definitional problem. Most statutes use the term "professional athlete," yet offer no definition whatsoever. *See e.g.*, KAN. STAT. ANN. § 44.508(1)(b) (1993) (including professional athletes in the definition of workers, but offering no definition); LA. REV. STAT. ANN. § 1225(D) (West Supp. 1994) (providing a set-off of workers' compensation benefits for professional athletes without defining 'professional athlete'); MICH. COMP. LAWS ANN. § 418.360 (West 1985) (denying benefits to professional athletes with salaries greater than 200% of the state average weekly wage, yet failing to define 'professional athlete'); MO. ANN. STAT. § 287.270 (Vernon 1993) (providing full credit to employers of professional athletes for contract benefits paid without defining professional athlete concept).

When states do try to define the term they often fair no better. Consider the limited definition adopted by the Texas legislature. Their workers' compensation program requires election by professional athletes. The statute defines professional athlete as one employed by the National Football League, National Basketball Association, American League of Professional Baseball Clubs, or the National League of Professional Baseball Clubs. TEX. LAB. CODE ANN. § 406.095(c) (Vernon 1994). While they hit the big ones, apparently the recent additions of professional hockey and soccer teams escaped their drafting. This leaves the anomalous result that the provision applies to some professional athletes and not others.

Ensuring that no such anomaly occurs in Florida, their statute uses a broad brush to ensure inclusion. The law imposes restrictions on "professional athletes." Just in case one wonders who is included it elaborates that the pool includes "boxers, wrestlers, baseball, football, basketball, hockey, polo, tennis, jai alai, and similar players, and motorsports teams

makes their workers' compensation program applicable to professional athletes. The Kansas law defines "workman or employee or worker" as "any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer."[75] Leaving no doubt about the role of the athlete, the statute continues: "Such terms shall include but not be limited to . . . professional athletes . . . ."[76] Hence, the statute codifies workers' compensation protection for athletes.[77]

3. Statutory Exclusion

In contrast to the Kansas approach, some states, lobbied heavily by sports team owners, have excluded professional athletes from their workers' compensation programs.[78] This often takes the form of a blanket exclusion as found in the Florida statute.[79] In defining the coverage of the workers' compensation program, the Florida statute states that employment does not include service performed by professional athletes.[80] Despite the general concept

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. . . ." FLA. STAT. ANN. § 440.02(15)(c)(3) (West 1991).

This is by no means an exhaustive list of possible definitions. Some talk in terms of employees of "professional sports franchise." *See* OHIO REV. CODE ANN § 4123.56(C) (Anderson Supp. 1993). Others speak in terms of "organized professional athletics." *See e.g.*, MASS. ANN. LAWS ch. 152, § 1(4) (Law. Co-op 1989); W. VA. CODE § 23-2-1(b)(6) (1993). This comparison of statutory definitions illustrates yet another problem encountered when states try to restrict workers' compensation benefits from a certain class of employees.

75. KAN. STAT. ANN. § 44.508(1)(b) (1993).

76. *Id.*

77. The Kansas courts are in accord. *See* Knelson v. Meadowlanders, 732 P.2d 808 (Kan. Ct. App. 1987) (affirming a workers compensation award to an injured hockey player). Kansas is not the only state making specific provisions for pro athlete coverage. New York, while silent on general application to professional athletes, makes a special provision for the inclusion of jockeys in their workers' compensation program. *See* N.Y. WORKERS' COMPENSATION LAW § 2 (McKinney 1993) (defining "employee" to include jockeys).

78. *See* CHAMPION, *supra* note 73, at 257 ("Some states, for example, are so uncivilized that they specifically exclude professional athletes from coverage.").

79. Florida is not alone in excluding athletes from their workers' compensation program. *See also* MASS. ANN. LAWS ch. 152, § 1(4)(B) (Law Co-op 1989) (excepting professional athletes from coverage). Rather than having a blanket exclusion, some states specifically exclude certain professional athletes. Rhode Island takes this approach with professional hockey players. *See* R.I. GEN. LAWS § 28-29-15 (Supp. 1993) (exempting professional ice hockey players, coaches and trainers employed by a professional ice hockey club, including but not limited to National Hockey League and American Hockey League). Washington excludes professional jockeys. *See* WASH. REV. CODE ANN. § 51.12.020 (West Supp. 1994) (excluding jockeys participating in or preparing horses for race meets). Other countries sometimes pursue similar exclusions. *See* Hayden Opie & Graham F. Smith, *Professional Team Sports and Employment Law in Australia: From Individualism to Collective Labor Relations?*, 2 MARQ. SPORTS L.J. 211, 223 (1992) (describing the general exclusion of professional athletes from the Australian workers' compensation system).

80. *See* FLA. STAT. ANN. § 440.02(15)(c)(3) (West 1991).

of universal coverage associated with workers' compensation, Florida courts have upheld this express statutory limitation.[81] Even when confronted with constitutional challenges, the statute has thus far been upheld. In holding the exclusion does not violate the equal protection provision of the Fourteenth Amendment, the Florida Court of Appeals found that the provision bore a reasonable relationship to the legislative purpose.[82]

Statutory exclusions can create difficult issues in their application. Again Florida is illustrative. While the Florida statute specifically denies coverage to professional athletes, the judiciary has balked at consistent application. Consider *Miles v. Montreal Baseball Club*.[83] Arthur Miles, a professional baseball player with the Montreal Expos' organization was injured while attending a press party under Club directive. Instead of being interviewed, Miles dove into the Intercoastal Waterway and struck bottom; he was paralyzed.[84] The judge of industrial claims denied workers' compensation under the Florida statute. The appellate court reversed.[85] The court posited an intriguing dichotomy. Initially, they noted that had Miles been injured while playing baseball, his occupation, he would be denied coverage under the statute. However, the press party was not the " 'kind of work or labor associated with' playing baseball, but an additional activity imposed upon him by the employer and to the employer's substantial benefit."[86] Consequently, Miles was entitled to workers' compensation benefits despite the language of the statutory exclusion. The end result in Florida is that a professional athlete is not covered by workers' compensation when he is engaged in his primary occupation, how-

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81. *See* Rudolph v. Miami Dolphins, Ltd., 447 So. 2d 284 (Fla. Dist. Ct. App. 1983) (affirming the exclusion of a professional football player from the workers' compensation program).

82. *See Rudolph*, 447 So. 2d at 291

> ("We cannot say that the legislature's exclusion of this voluntary, though highly dangerous, activity from the worker's compensation act fails to bear some reasonable relationship to a legitimate state purpose and is so completely arbitrary and lacking in equality of application to all persons similarly situated as to violate the cited constitutional provisions.").

The *Rudolph* opinion is the only judicial discussion addressing the constitutionality of a professional athlete exclusion. The only other court which had the opportunity to address the issue declined on procedural grounds. *See* Ohio v. Cincinnati Bengals, No. 92AP-1273, 1993 WL 271011, at *7 (Ohio Ct. App. July 15, 1993).

83. 379 So. 2d 1325 (Fla. Dist. Ct. App. 1980).

84. *Miles*, 379 So. 2d at 1325-26.

85. *Id.* at 1326.

86. *Id.*

ever, he may be covered when participating in ancillary activities.[87]

Aside from blanket exclusion, a separate way of restricting access to workers' compensation is through functional exclusion. Michigan takes this approach. Unlike Florida, Michigan does not specifically define athlete labor out of coverage. Instead, the Michigan statute proclaims that a person who suffers an injury arising out of and in the course of employment as a professional athlete shall be entitled to weekly benefits.[88] However, the statute then restricts coverage to only those athletes making less than 200% of the state weekly wage.[89] Comparing the current average weekly wage with average professional athlete salaries (and virtually any other professional salary), this amounts to functional exclusion.[90]

4. Election Method

An alternative method of restricting access of professional athletes to workers' compensation is through an election method. This approach takes two forms. In West Virginia, employers engaged in "organized professional sports" are not required to subscribe to the workers' compensation fund, but they may elect to participate.[91]

By contrast, the Texas scheme allows the athlete to make the election. Professional athletes in the National Football League, National Basketball Association, and major league baseball have the option to receive either benefits under the workers' compensation system or injury benefits under their contract or collective bargaining agreement.[92] The injured athlete must make the elec-

87. This result has not escaped the eyes of other commentators. *See* LARSON, *supra* note 7, § 22.21(b), at 5-105 (describing the paradox of denying compensation to athletes doing their job, but compensating Miles).

88. MICH. COMP. LAWS ANN. § 418.360 (West 1985).

89. *Id.*

90. Michigan's state average weekly wage for 1995 was $554.22. The average salary for an N.F.L. player is approximately $650.000. *See* Bill Brubaker, *In NFL Supplements Complement with Steroids Banned, Some Players Turn to Pills, Powders to Get Ahead*, THE WASH. POST, Jan. 22, 1995, at d1; Michael Wilbon, *Redskins a Bit Confused on Dues and Don'ts*, THE WASH. POST, Dec. 26, 1993, at d1. The average salary for a professional baseball player is nearly $1.2 million per year. *See* Mark Maske, *Baseball Feels Some Optimism, Bargaining Resumes with Season at Stake*, THE WASH. POST, Sept. 8, 1994, at a1; Christine Brennan, *No Longer Fun and Games, Sports is Labor*, THE WASH. POST, Aug. 24, 1994, at c1. The average salary for an N.B.A. player is $1.6 million. *See* Leon Hochberg, *NHL Rejects Proposal*, THE WASH. POST, Oct. 12, 1994, at b1. The average salary for an N.H.L. player is $525,000. *See* Michael Wilbon, *The Puck Stops Where?*, THE WASH. POST, Sept. 22, 1994, at b1.

91. W. VA. CODE § 22-2-1(b)(6) (1993).

92. TEX. LAB. CODE ANN. § 406.095 (Vernon 1994).

tion within 15 days of the injury.[93] The right to accept contract benefits is contingent upon the contract benefits being equal to or greater than benefits available under workers' compensation.[94]

Despite the election feature, the Texas statute is designed to take athletes out of the workers' compensation program. The Texas provision was originally adopted in 1991. The original bill exempted professional athletes from the system altogether provided they had equivalent contract benefits.[95] The proposed statute would have allowed voluntary coverage by employers, however, benefits paid to athletes would then be subject to dollar reductions for any contract injury benefits paid.[96] The House bill analysis reflects their motivation. "The purpose of the bill is to add athletes serving under contract for hire or collective bargaining agreement to the list of employees . . . exempted from the act in order to reduce expenses of major league sports franchises."[97] While the ultimate bill passed by the legislature did not completely exempt athletes, the version adopted was forged in an environment of hostility to athlete coverage.[98] The end result is a type of functional exclusion of coverage whenever contract benefits are greater than workers' compensation benefits.

5. Set-Off States

The most recent attack upon professional athletes' workmen's compensation coverage is through the use of a set-off. Under this method, athletes are covered by workers' compensation, but employee benefits are reduced on a dollar for dollar basis by any contract benefits paid to the injured athlete. The most recent state to

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93. The Texas Workers' Compensation Commission has established both the time period for notice and the wording of employer notification. *See* 28 TEX. ADMIN. CODE § 112.401 (West 1994) (Tex. Workers' Compensation Comm'n).

94. TEX. LAB. CODE ANN. § 406.095(a) (Vernon 1994). *See also* HOWARD L. NATIONS & JOHN C. KILPRATRICK, TEXAS WORKERS' COMPENSATION LAW § 2.21[6] (1994) (describing the election procedure for professional athletes). The Texas Workers' Compensation Commission has established rules to determine whether benefits under contract are equivalent. *See* 28 TEX. ADMIN. CODE § 112.402 (West 1994) (explaining the determination of equivalent benefits for professional athletes). For example, medical benefits would not be considered equal if the employer's liability for health care is limited or terminated in any way by the contract or collective bargaining agreement. *See id.* § 112.402(a)(2).

95. *See* Tex. S.B. 428, 72nd Leg., R.S. (1991).

96. *Id.*

97. HOUSE COMM. ON BUSINESS AND COMMERCE, BILL ANALYSIS, Tex. S.B. 428, 72nd Leg., R.S. (1991).

98. For a concise treatment of the issues surrounding passage of the bill, see HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS, S.B. 428 (May 22, 1991) (comparing arguments in favor and in opposition of passage).

adopt the set-off approach is Louisiana. In 1993, the Louisiana legislature adopted a provision that compensation benefits payable to the professional athlete are to be reduced on a dollar for dollar basis if the injured athlete receives any wages or benefits.[99] Missouri uses the set-off to allow employers of professional athletes to take full credit for wages or benefits paid to the employee after injury.[100] Ohio combines the Louisiana and Missouri approaches. First, any payment under contract of hire is deemed an advanced payment of workers' compensation benefits.[101] Then the employer is reimbursed for the total amount of payments out of any award of compensation.[102] The end result is to reduce the benefits of a professional athlete by the amount the player received while under contract.

B. Contract Restrictions

Legislative restrictions on professional athletes' workers' compensation benefits are not the only issue in universal coverage. Player contracts and collective bargaining agreements can also sometimes affect access to benefits. For example, it has been held that where a contract calls for benefits greater than the minimum statutory injury benefits, the owners cannot rely on the lesser statutory standard as a means of providing less than the contract requires.[103] Thus, the negotiations and terms of player contracts takes on greater significance. Here, four major agreements are considered.

1. National Football League

Professional football is the most important area for workers'

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99. LA. REV. STAT. ANN. § 1225(D) (West Supp. 1994). The Louisiana law is sweeping in its coverage. It applies to benefits payable under any provision of workers' compensation. Likewise benefits are reduced by virtually any payment. The statute lists: any wages or benefits, collective bargaining agreement, contract, severance pay, injured reserve pay, termination pay, grievance or settlement pay, worker's compensation benefit, or "[a]ny other payment made to the professional athlete by the employer pursuant to any contract or agreement whatsoever." *Id.*

100. MO. ANN. STAT. § 287.270 (Vernon 1993) ("[E]mployers of professional athletes under contract shall be entitled to full credit for wages or benefits paid to the employee after the injury including medical, surgical or hospital benefits paid to or for the employee or his dependents on account of the injury, disability, or death, pursuant to the provisions of the contract.").

101. OHIO REV. CODE ANN. § 4123.45(C) (Anderson Supp. 1993).

102. *Id.*

103. *Tampa Bay Area NFL Football, Inc. v. Jarvis*, No. 94-3411, 1996 WL 20865, at *1-2 (Fla. Dist. Ct. App. Jan. 23, 1996).

compensation claims for two reasons. Initially, more workers' compensation claims occur with pro football players than other athletes.[104] Additionally, football players are often occupationally injured,[105] ensuring workers' compensation benefits in most states.[106] Consequently, examination of the NFL Player Contract is a good springboard for analysis.

Two provisions of the standard NFL Player Contract might affect workers' compensation. Paragraph 9 relates to the Club's responsibility for contract payment after injury. If the player is injured, the club must pay "such medical and hospital care during the term of this contract as the Club physician may deem necessary."[107] In addition, the Club will continue to pay the yearly salary to the player during the season of injury only and for no subsequent period.[108]

Paragraph 10 deals directly with workers' compensation. Under this provision,

> [a]ny compensation paid to the 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 temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workmen's compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workmen's compensation.[109]

The combination of these contractual provisions yields the following result. The injured professional football player is compensated for the remaining season. Following the season of injury, the Club has no contractual obligation to continue salary payments. If

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104. *See* PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 740 (1993) (noting that football has been the main contributor of workers' compensation claims).

105. *See* Timothy K. Smith, *Players Charge NFL with Trying End Run on Disability Benefits*, WALL ST. J., Dec. 7, 1992, at A1 (arguing 65% of retiring football players leave with some kind of permanent disability); Kevin B. Blackistone, *Byrd's Paralysis Spotlights NFL's Poor Disability Plan*, DALLAS MORNING NEWS, Dec. 20 1992, at 4B (citing a Ball State University report that 72% of pro football players now suffer injuries requiring surgery). Some estimates claim that all professional football players will sustain a serious compensable injury. WARREN FREEDMAN, THE LAW AND OCCUPATIONAL INJURY, DISEASE, AND DEATH 9 (1990) (claiming all will sustain an injury); *Workers' Comp: More Athletes Seek Benefits*, TRIAL, June 1988, at 87 (citing National Football League Players Association statistics that indicate every player will sustain an injury).

106. *See supra* notes 55-65 and accompanying text (noting presumed inclusion of athletes).

107. Paragraph 9, NFL Player Contract.

108. *Id.*

109. Paragraph 10, NFL Player Contract.

the player receives any workers' compensation benefits, a club might try to argue that it is entitled to reimbursement.[110]

However, workers' compensation boards that have correctly construed this contractual language have properly limited its application such as occurred in *Harty v. San Francisco 49ers*.[111] John Harty injured his right foot in 1983 and his left foot in 1986, while employed as a professional football player for the San Francisco 49ers. The 49ers organization sought credit for any disability benefit due to Harty. The California Workers' Compensation Appeals Board rejected this interpretation of the contract provision. Focusing on the language of Paragraph 10, the appeals board noted the provision applied to any compensation paid to the player "for a period" during which he is entitled to benefits. The board stressed that

> [t]he parties inclusion of the phrase *for a period*, for which compensation is paid to player, *at a time when* the player is entitled to temporary disability and permanent disability, clearly indicates that the parties intended that the employer's credit applied only to *periods* that compensation is paid for under the contract, and at the same time there is liability for workers' compensation benefits.[112]

The well-reasoned rationale behind this interpretation was to prevent double payment for a single injury.[113] Consequently, the appeals board found that only Harty's 1983 and 1986 salaries were subject to credit and only by those benefits due during the same period of time as a result of the two injuries.

Because of the "for a period" language of Paragraph 10, workers' compensation boards also correctly limit the applicability of set-off to temporary benefits only. Consider the District of Columbia worker's compensation decision of *Wonsley v. Pro Football,*

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110. *See* Pittsburgh Steelers Sports, Inc. v. Workmen's Compensation Appeal Board (Erenberg), 604 A.2d 319 (Pa. Commw. Ct. 1992), *pet. for allowance of appeal denied*, 609 A.2d 170 (Pa. 1992). This case involved the Pittsburgh Steelers' appeal of an order of the Workmen's Compensation Appeal Board granting benefits to former player Richard M. Erenberg. The Steelers' organization sought credit against those benefits for $65,000 paid under the injury protection payment provisions of the collective bargaining agreement. *Id.* at 321. Reading the injury protection payment terms of the collective bargaining agreement *in pari materia* with Paragraph 10, the court held that the $65,000 payment was in lieu of workmen's compensation. *Id.* at 323. Consequently, the Steelers were held to be entitled to a massive 180 week credit for this payment. *Id.*

111. Case no. SFO 0315399, California Workers' Compensation Appeals Board (July 11, 1991).

112. *Harty*, WCAB 0315399, Opinion on Decision, at 6 (emphasis in original).

113. *Id.* at 7.

Inc.[114] While playing for the Washington Redskins, Otis Wonsley received multiple injuries to his knee, ankle, thumb, wrist, and neck. Wonsley was paid $65,000 for the 1987-88 contract year. The employer sought credit under Paragraph 10 against any awards made to Wonsley. Relying on the "plain and unambiguous" language of the provision, the board concluded that the credit extends only to temporary benefits due during the term of the contract.[115] The board specifically excluded all permanent benefits from credit. "[A]n award of permanent disability benefits is an award for prospective relief and [] no credit is permitted against benefits for permanent or prospective benefits since these benefits do not compensate for a period during which claimant is employed."[116] We believe this is a correct interpretation of Paragraph 10.[117]

2. National Basketball Association

The NBA Uniform Player Contract also includes provisions concerning workers' compensation benefits. As with the NFL contract, paragraph 20(c) entitles a player injured during performance of services to receive his full salary for the season in which the injury occurred.[118] Additionally, the Club will pay reasonable hospitalization and medical expenses, provided the Club selects the

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114. H&AS No. 87-811, District of Columbia Workers' Compensation Order (1988).

115. *Wonsley*, H&AS No. 87-811, Compensation Order, at 7.

116. *Id.* The identical result was recently reached by the District of Columbia compensation commission. *See* Stuart Anderson, et al. v Pro Football, Inc., H&AS Nos. 87-301 et al., Decision of the Director (Mar. 3, 1995). The Director specifically held that paragraph 10 of the Player's Contract was limited to compensation paid during the period of the contract. As such, any claim by the club for credit only applies to the compensation payable during the contract period. *Id.* at 7. Furthermore, any potential credit could only apply to temporary disability benefits. All permanent disability benefits provide prospective relief, and hence, are "not compensation for a period during which the player is employed or under contract." *Id.*

117. The applicability of contractual credits is often resolved through arbitration. These arbitration decisions universally follow the position that the wording and intent of Paragraph 10 is only to prevent a player from "double-dipping" and receiving more than 100% of their original salary. *See* National Football League Players Ass'n (Steve August) v. National Football League Management Council (Seattle Seahawks) (1985) (Kagel, Arb.); National Football League Players Ass'n (Joe Norman) v. National Football League Management Council (Seattle Seahawks) (Jan. 5, 1989) (Kagel, Arb.). As such, arbitration awards allow credit solely for temporary disability payments made during the period of contract. *See* Carl Mims v. Washington Redskins (Aug. 3, 1993) (Stark, Arb.) (allowing offset for $3,373.44 of undisputed temporary disability benefits); Navy Tuiasosopo v. Los Angeles Rams (July 29, 1992) (Volz, Arb.) (allowing offset of $1568 because there was no finding of permanent disability based on injuries).

118. Paragraph 20(c), National Basketball Association Uniform Player Contract. A copy of the NBA contract can be found in LAW OF PROFESSIONAL AND AMATEUR SPORTS § 7.09, at 7-24 to 7-32 (Gary A. Uberstine ed., 1991).

hospital and doctor.[119] Paragraph 6(b) limits the Club's obligations reducing them by "any workmen's compensation benefits (which, to the extent permitted by law, the Player hereby assigns to the Club) . . . ."[120] These provisions differ from the football contract in that, among other things, they do not specify the types of benefits the clause affects. Additionally, the contract notes that state law might limit the right of the Club to the benefits.

3. Professional Baseball Clubs

While the professional baseball uniform player contract is silent about workers' compensation,[121] the issue is addressed in their latest collective bargaining agreement. Article IX(E) deals with termination pay on injury. If a player is injured during the scope of employment, the player is entitled to receive the unpaid balance of his full salary for the year in which the injury was sustained.[122] These payments are then reduced by "workmen's compensation payments received by the Player as compensation for loss of income for the specific period for which the Club is compensating him in full."[123] By its own language, this contractual set-off appears to be limited to only temporary disability payments, since permanent payments are prospective and hence not within the specific period in which the club is compensating the injured player. This is similar to the conclusion reached by most courts and arbitrators in interpreting the language of the NFL Player Contract.

4. National Hockey League

In contrast to the other sports, the National Hockey League Standard Player's Contract is silent concerning workers' compensation. If the player is injured during the course of employment, the club will pay reasonable hospitalization, medical expenses, and

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119. Paragraph 6(b), National Basketball Association Uniform Player Contract.

120. *Id.* Paragraph 20(c) also reiterates this reduction for workers' compensation benefits.

121. *See* The National League of Professional Baseball Clubs Uniform Player's Contract. A copy of this contract is available in PAUL C. WEILER & GARY R. ROBERTS, 1993 STATUTORY AND DOCUMENTARY SUPPLEMENT TO CASES, MATERIALS AND PROBLEMS ON SPORTS AND THE LAW 90-96 (1993).

122. Article IX(E), Basic Agreement Between the American and National Leagues of Professional Baseball Clubs and the Major League Baseball Players Association (1990-1993). An edited version of the agreement can be found in WEILER & ROBERTS, *supra* note 121, at 55-59.

123. *Id.*

doctor bills provided the hospital and doctor are approved by the club.[124] The contract further provides that approval will not be unreasonably withheld.[125] Paragraph 5(d) concerns salary payment. As with the other professional athletic contracts, salary to the injured player is limited to the term of the contract.[126] There is no provision, however, requiring reduction of the salary by any workers' compensation benefits received.

IV. Tension Between Workers' Compensation and Treatment of the Professional Athlete

A. *The Fallacious Foundation of Restriction*

Attacks upon professional athletes' coverage under workers' compensation usually stem from the misconception that somehow the system was not intended for professional athletics.[127] This misconception is based on a trilogy of fallacies. First, professional athletes are sometimes perceived to be paid so well that workers' compensation benefits are unnecessary. The reality is that while some players are extremely well-paid, many are not.[128] In particular, the average journeyman in the NFL is often paid the league minimum, exposed to higher probability of severe injury, and subject to shorter than average careers. Regardless, the size of the professional athlete's salary should be irrelevant to a right of access to workers' compensation. State workers' compensation programs do

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124. Paragraph 5(c), National Hockey League Standard Player's Contract. A copy of the NHL contract can be found in Joseph M. Weiler, *Legal Analysis of the NHL Player's Contract*, 3 Marq. Sports L.J. 59, 80-83 (1992).

125. *Id.*

126. Paragraph 5(d), National Hockey League Standard Player's Contract.

127. Professor Larson describes this as "a sort of vague man-in-the-street notion that somehow workers' compensation doesn't fit professional sports." Larson, *supra* note 7, § 22.21(b), at 5-106; *see also* Tim Reeves, *Workers' Comp for Athletes is a Bruising Issue*, Pittsburgh Post-Gazette, Feb. 14, 1993, at A1 (quoting William Titelman, Steeler lobbyist, as proclaiming workers' comp was not designed for people like this).

128. Robert C. Berry & Glenn M. Wong, Law and Business of the Sports Industries 42 (1986) ("[T]he truth is that many talented athletes never quite make it. For them, the financial rewards are slim. They perhaps make a comfortable living, for a short time, but life-long security they do not have."); House Research Organization, *supra* note 98, at 40 ("Because they are perceived to be overpaid, professional athletes are being singled out among all other professionals for exclusion from the workers' compensation program."). The results of a four-month investigation by Newsday found that many players have less protection than factory workers injured on the job. "Players are often left without financial and medical assistance from the NFL because the debilitating effects of their injuries do not show up until after the league-set deadline of three years after retirement for filing a claim." Bob Glauber, *Delay of Game; Who Pays for Pro Football Injuries Long After Playing Careers Are Over?*, Newsday, Sept. 8, 1992, at 110.

not exclude other employees based upon their salaries.[129] Highly paid corporate officers and lawyers are included under workers' compensation. Excluding athletes because of a mistaken belief that they do not need protection is contrary to the principle of universal coverage embodied in workers' compensation.

A second fallacy that sometimes supports the misconception is that players are all under long-term guaranteed contracts. This is simply false. Extremely few professional athletes have long-term, guaranteed contracts.[130] Consequently, most players who are injured receive only their salary for that year.[131] There is rarely long-term employee security in professional sports.[132] This misconception does not withstand scrutiny.

A final component of the fallacious argument that professional athletes should not receive workmen's compensation is the concept of assumption of risk. This is the belief that the player is responsible for his own injury because he voluntarily agreed to participate in the game with the knowledge that he may be injured.[133] However, one of the primary reasons states created workers' compensation in the first place is to avoid this very common law defense.[134] Workers' compensation is designed to protect people engaged in dangerous occupations.[135] If it is appropriate to exclude professional athletes, the same analysis can be used to exclude other dangerous occupations, such as coal miners or construction workers.[136] When taken to this logical conclusion, it is clear that this fallacy, along with its companions, does not support denial of coverage to professional athletes.

B. Judicial Restriction Unwarranted

Nowhere have these myths of the professional athlete had a

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129. *See* LARSON, *supra* note 7, § 22.21(b), at 5-106 (describing the irrelevance of salary amount).

130. HOUSE RESEARCH ORGANIZATION, *supra* note 98, at 40.

131. *See* LARSON, *supra* note 7, § 22.21(b), at 5-106 to 5-107 (dispelling the myth of long-term contract and explaining the one year pay-off); *see also* subpart III(B) (describing the salary due to injured professional players.

132. *See* Reeves, *supra* note 127, at A1 (noting the average NFL career is a brief 3 ½ years).

133. *See* Blackistone, *supra* note 104, at 4B (describing the misconception); LARSON, *supra* note 7, § 22.21(b), at 5-107 (labeling this notion as preposterous since it implies the player intended to injure himself).

134. *See supra* notes 8-10 and accompanying text.

135. Professor Larson correctly notes that while sports are rough, everything about the game from forbidden practices to preventative gear is designed to reduce injuries. LARSON, *supra* note 7, § 22.21(b), at 5-107.

136. Blackistone, *supra* note 104, at 4B.

clearer expression than in those judicial decisions which have restricted application of workers' compensation to professional athletes, such as *Palmer* and *Rowe*.[137] The *Palmer* opinion is illustrative.[138] The court noted that injury was a normal incident of a professional football game. Despite protective equipment, football remains "a dangerous pastime fraught with expectation of injury."[139] The court concluded that the Missouri workers' compensation program simply did not contemplate injury in the usual course of such an occupation.[140] It is clear from the court's own language that the restriction stems from the assumption of risk fallacy. Professor Larson has labeled this decision as both "wrong" and "preposterous."[141] In a scathing indictment of the court's poor reasoning,[142] Larson concludes that the opinion is "unworthy of a legally-trained mind to substitute this kind of superficial reaction for an accurate analysis that simply accords professional athletes the same protection under compensation law as is enjoyed by everyone else who works for a living."[143] Professor Larson is, of course, correct. To deny coverage to professional athletes is merely to acquiesce to the fallacies.

C. Statutory Restriction Inappropriate

1. Special Interest Legislation

In reality, statutory restrictions, whether blanket exclusions or set-offs, are really examples of special interest legislation for club owners. Team owners have been the major force behind these laws.[144] Their motivation is to increase profitability for the team.

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137. For more complete treatment of these cases see *supra* notes 65-72 and accompanying text.

138. The *Rowe* opinion uses similar reasoning. *See Rowe*, 454 A.2d at 878. The Maryland legislature has tempered the judicial result in *Rowe* by amending the workers' compensation statute to prohibit denial because of the degree of risk associated with employment. *See id.*; LARSON, *supra* note 7, § 22.21(b), at 5-103 to 5-104 n.26.2.

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

140. *Id.*

141. LARSON, *supra* note 7, § 22.21(b), at 5-104, 5-107.

142. In fact, except for the initial paragraph of the section, Larson's entire treatment of the professional sports issue is a five page critique of the *Palmer* decision. His four major indictments include: (1) it is the only surviving opinion that denies coverage to athletes; (2) it is the only case in history where employees have not been protected for doing their job; (3) it is the only case to find traumatic injuries non-accidental; and (4) it is the example of resurrection of the assumption of risk defense. *See* LARSON, *supra* note 7, § 22.21(b), at 5-103 to 5-107.

143. *Id.* at 5-107.

144. *See* Garrison Wells, *Broncos Balk at Players' Big Workers' Comp Costs*, THE DENVER BUSINESS J., Dec. 18, 1992, at 1 (noting that managers and owners are lobbying to

Some states hungry for the prestige of obtaining or retaining major professional sports franchises have been accommodating. Where legislatures have passed these laws, it is clear that they were doing so with the express intent of helping this special interest group. Texas is a good example. The bill analysis for the Texas provision specifically states that the purpose is "to reduce the expenses of major league sports franchises."[145] While there is dispute about the size of team workers' compensation payments,[146] it still remains that it is another economic motivation, often described as "team greed,"[147] that has led to these statutory changes. Whatever the motivation, restrictions on the application of workers' compensation to professional athletes remain unjustified.

2. Set-Off Problem

While a blanket exclusion of professional athletes from state workers' compensation programs is inconsistent with the general objectives of a compensation scheme, workers' compensation is a statutory right and state legislatures are free to make even unwise and unfair restrictions. An additional problem, however, comes into play when states use the set-off method of restriction. Unless the statute explicitly applies to permanent benefits, these statutes should be construed as applying solely to temporary benefits. Application to permanent benefits is inconsistent with workers' compensation.

Recall that the workers' compensation system is designed to differentiate between different types of claims. Temporary benefits provide an income stream to replace lost earnings during rehabilitation. On the other hand, permanent disability payments are prospective relief compensating for future loss.[148] The rationale be-

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reform workers' compensation laws); Glauber, *supra* note 128, at 110 (describing team lobbying efforts); Smith, *supra* note 104, at A1 (highlighting the quiet lobbying efforts of team owners).

145. HOUSE COMM. ON BUSINESS AND COMMERCE, BILL ANALYSIS, Tex. S.B. 428, 72nd Leg., R.S. (1991); *see also* HOUSE RESEARCH ORGANIZATION, *supra* note 98, at 40 (characterizing opponents of the bill as recognizing that it is simply a special interest bill for wealthy sports teams).

146. One estimate is that teams pay between $ 1 million and $ 3 million per season for workers compensation benefits. Glauber, *supra* note 128, at 110. Other estimates exist. *See* Reeves, *supra* note 127, at A1 (claiming the Pittsburgh Steelers pay only $ 225,000 per year in coverage); Wells, *supra* note 144, at 1 (stating that the Broncos pay $1.2 million per year in workers' compensation costs).

147. *See* Smith, *supra* note 104, at A1 (quoting William George, president of Pennsylvania AFL-CIO, as describing the attempts as unabashed greed).

148. *See supra* notes 40-50 and accompanying text (describing the differences between temporary and permanent disability payments).

hind the set-off is to allow an employer a credit if he has continued to pay the employee his regular wage in order to prevent a double recovery.[149] Without the credit, an injured worker would purportedly receive double compensation—both the regular salary and the duplicative temporary benefit.

The same is not true with permanent benefits. The general rule is that the employer is not entitled to credit against awards for permanent disability.[150] This is because such payments are prospective in nature. Consequently, there is no credit because they do not compensate for anything the employer paid the employee during the period of employment. Permanent benefits take the form of a one time, lump sum payment for partial or total disability. It makes no sense to allow a set-off credit in this situation since there has not even arguably been any double compensation[151]. Understanding this distinction, set-off statutes should be construed consistent with these general principles. If a statute uses general language, such as "compensation" or "benefits," the reasonable construction given to these terms should be to temporary benefits only. This is consistent with the general credit rule.[152]

D. Scope of Contractual Set-Offs Should Be Limited

Just as the scope of statutory set-offs should be limited to temporary benefits, contractual set-offs should also be interpreted in is limited manner. Unless so limited, such restrictions would ignore the intent of such set-offs and undermine several of the fundamental purposes of workers' compensation. For several reasons, the only reasonable construction of these contract provisions is to

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149. *See* Herz & Baker, *supra* note 49, at 15-16 (explaining the rationale for employer credits).

150. *Id.* at 15-17.

151. *See id.* at 15-17 (noting that any claim by an employer for credit against a permanent disability schedule should be vigorously challenged because of the distinction of prospective relief). Professor Larson agrees

> When the statute allows a fixed award for 105 weeks for the loss of specified fingers, there is no authorization for any kind of reduction for that award under any circumstances. It would obviously be wrong to try to set off specific past weeks of earnings against some part of the fixed period of benefits assigned to the loss of a particular member. Whatever the reason, the courts have uniformly denied credit on a schedule award for post-injury wages paid by the employer.

LARSON, *supra* note 7, § 57.46.

152. However, using this construction is difficult if the statute specifically identifies permanent benefits as susceptible to set-off. *Compare* TEX. LAB. CODE ANN. § 406.095 (Vernon 1994) (using concept of "weekly benefits") *with* OHIO REV. CODE ANN. § 4123.56(C) (Anderson Supp. 1993) (applying set-off to payments made under temporary disability compensation, partial disability, permanent total disability, and death benefits).

apply them solely to temporary benefits.

First, the general analysis regarding applicability of employer credits comes into play. Employers who have bargained for contractual credits have done so on the basis that a credit for temporary benefits is necessary to avoid double compensation. If an injured player receives both temporary workers' compensation benefits and his full salary under contract, a player might increase his income due to injury. Such potential "double-dipping" is prevented with an offset of temporary benefits. A very different situation exists, however, with permanent disability payments. These payments do not compensate for wage loss, but for prospective loss of bodily function. These are for prospective relief and credit to owners should be eschewed.[153]

This narrow approach is the one contemplated by the wording of the baseball collective bargaining agreement. It only allows for credit for workers' compensation payment "received by the Player as compensation for *loss of income for the specified period for which the Club is compensating him in full.*"[154] Likewise, the NBA player contract can be interpreted consistent with this position since it both uses the general concept of "any workmen's compensation benefits," and includes the clause that such benefits are only assigned as permitted by law.[155]

Similarly, the same narrow reading is appropriate for the NFL player contract. Although the contractual set-off state that it applies to "temporary total, permanent total, temporary partial, or permanent partial disability" benefits, it only provides for such a set-off if the player's salary is paid "for a period during which he is entitled to workmen's compensation benefits."[156] This limiting language has been consistently interpreted by both workers' compensation boards[157] and arbitrators[158] as limiting the set-off provision of the contract to temporary benefits only. The rationale is simple and correct: permanent disability benefits providing prospective relief are not related to the time period during which a player is drawing salary. It is an award for loss of bodily function and is unrelated to any time period covered by the contract. As such, it is

153. *See supra* notes 148-52 and accompanying text (explaining the consensus among commentators on the narrow applicability of set-offs).

154. Article IX(E), Basic Agreement Between the American and National Leagues of Professional Baseball Clubs and the Major League Baseball Players Association (1990-1993).

155. Paragraph 6(b), National Basketball Association Uniform Player Contract.

156. *Id.*

157. *See supra* notes 111-17 and accompanying text.

158. *See supra* note 117.

proper to interpret the reach of this contractual set-off as being limited to temporary benefits.[159]

Even if the actual language of the NFL Player Contract did not limit its reach solely to temporary benefits, other doctrines should void any possible applicability to permanent benefits. First, a contrary interpretation would be at odds with the anti-waiver provisions of state compensation statutes. These provisions prohibit even express waiver of workers' compensation rights by employees.[160] If the contract could be even read as applying to permanent benefits, this is exactly the type of employer over-reaching such provisions were designed to prevent.[161]

Another contract doctrine also bolsters pro athlete resistance to any proper set-off of permanent benefits—unconscionability. This doctrine provides that a court can refuse to enforce a provision of a contract that its deems unconscionable.[162] It allows the court to scrutinize the fundamental fairness of the contract; the terms must fairly proportion the rights and duties of the contracting parties.[163] While the concept is somewhat amorphous, the essence of the rule is to prevent unfair oppression or surprise.[164] This is exactly the result if teams are entitled to players' permanent disability awards. When a Club tries to enforce the contractual set-off provision against permanent benefit compensation, they are essentially claiming ownership of the player's shoulder or knee. This type of employer over-reaching is the very essence of unconscionability. As a result, a player confronted with an attempted set-off of a permanent disability award can find addi-

159. This position is not only consistent with workers' compensation board and arbitrator decisions, but also with other legal interpretations of the contract. *See* Letter from John R. Wasberg, Assistant Attorney General, Attorney General of Washington 1 (Mar. 26, 1992) (on file with author) (interpreting Paragraph 10 to exclude permanent partial disability benefits).

160. *See supra* notes 24-28 and accompanying text (discussing anti-waiver provisions).

161. The State of Washington is an example. Washington has an anti-waiver provision. WASH. REV. CODE § 51.04.060 (West 1990) ("No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void."). The Attorney General's office takes the position that this statutory provision prohibits set-off of permanent partial disability benefits paid to players. *See* Letter from John R. Wasberg, Assistant Attorney General, Attorney General of Washington 1 (Mar. 26, 1992) (on file with author).

162. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (describing the doctrine of unconscionable contracts).

163. Gary A. Uberstine, *Enforceability of Agreements*, *in* LAW OF PROFESSIONAL AND AMATEUR SPORTS § 9.03[1][c][i][D] (Gary A. Uberstine ed., 1991).

164. JOHN D. CALMARI & JOSEPH M. PERILLO, CONTRACTS § 9-40, at 406 (3d ed. 1987).

tional shelter in this affirmative defense.[165]

Finally, public policy mandates against enforceability of contractual set-offs against permanent benefits. Allowing such set-offs is directly contrary to the *quid pro quo* purpose of workers' compensation.[166] If teams can recoup these benefit payments, they end up with the best of both worlds. They have statutory immunity from tort suit, plus they receive reimbursement for the permanent workers' compensation payments.[167] If this is a permissible outcome for professional athletic contracts, all employers would simply include such a provision in their employment contracts. This would disintegrate the very core of the exclusivity of remedy forged at the beginning of the century by granting the employer the full benefit of the workers' compensation system - limited liability, predictability, reduced costs - while completely depriving the employee of both the common law right to sue and the very benefits the system is designed to provide. Obviously, this is not a desirable public policy result. Contractual set-offs should be limited for this reason alone.

Finally, allowing a contractual set-off would create a disincentive to improve workplace safety. Creating a financial incentive for employers to enhance safety is one of the core features of workers' compensation.[168] The realization that a team may have to pay lifetime permanent disability benefits for sending an injured player back into a game promotes safety. If these benefits can be completely recouped by the team at minimal expense, the safety incentive disappears.[169] In an occupation where injury rates exceed seventy percent,[170] public policy should void contractual provisions that create a disincentive to workplace safety.[171]

E. Post-recovery Suits Should Be Prohibited

A new, pernicious development in workers' compensation issues for the professional athletes is the filing of a post-recovery

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165. The defense of unconscionability applies to professional athletic contracts. *See* Uberstine, *supra* note 163, at § 9.03[1][c][i][D].

166. *See supra* notes 23-28 and accompanying text (discussing the *quid pro quo* of workers compensation).

167. *See* Smith, *supra* note 104, at A6 (explaining how the set-off thwarts the premise of workers' compensation).

168. *See supra* notes 13-16 and accompanying text (describing the safety incentive).

169. *See* Smith, *supra* note 104, at A6 (noting that one of the most serious problems with the set-off is safety disincentive).

170. *See supra* note 104.

171. These public policy arguments have equal force in limiting statutory set-offs to only temporary benefits.

suit. After a former player has received permanent workers' compensation benefits, the club brings suit on a contract provision seeking reimbursement of the workers' compensation benefits. A recent example of such a cynical tactic is the Dallas Cowboys.[172] In two separate actions,[173] the Cowboys organization sued former players on their contracts seeking reimbursement of disability payments that these players received. The most recent suit involves an attempt to recover $900,000 from sixteen former players.[174] Some of these worker's compensation settlements have been earmarked for specific future surgeries.[175] The Cowboys' motivations are apparently greed and intimidation, despite the fact that the bulk of the former players ended their careers before the new ownership even gained control of the Cowboys.[176] If successful, the Cowboys' action will discourage current and former players from filing disability claims.

The former players were victorious in the first lawsuit. In *Ankrom v. Dallas Cowboys Football Club, Ltd.*,[177] the Cowboys sued former player Scott Ankrom for compensation benefits he received following his departure from the club. The Cowboys, who had not protested the compensation award to the commission, intervened after the insurance carrier settled. The Cowboys claimed a contractual right to recover Ankrom's permanent disability benefits based upon paragraph 10 of the NFL Player Contract. The court of appeals dismissed the Cowboys' claim for failure to exhaust its administrative remedies. Specifically, the court held that the club was required to pursue its claim for a credit or offset before the Workers' Compensation Commission.[178] Consequently, the court

172. Richard A. Oppel & Doug Bedell, *Profit-driven Builds Fiscal Champs*, THE DALLAS MORNING NEWS, Jan. 30, 1994, at 1A, 20A; *Dallas Cowboys Seek $900,000 from Former Players*, CCH Workers' Compensation Business Management Guide Newsletter, Feb. 11, 1994, at 1.

173. The first lawsuit was Ankrom v. Dallas Cowboys Football Club, Ltd., 900 S.W.2d 75 (Tex. App.—Dallas 1995, writ denied).

174. *See* Ed Werder, *Suit Stuns Former Cowboys*, THE DALLAS MORNING NEWS, Jan. 12, 1994, at 28A (describing the most recent suit). The suit was brought against Tony Hill, John Dutton, Michael Downs, Doug Cosbie, Gordon Banks, Benny Barnes, Doug Donley, Todd Fowler, Felix Hooven, Keith Jones, Phil Pozderac, Mike Renfro, Herb Scott, Tony Slaton, Dom Smerek, and Glen Titensor. Hall of Famers, Tony Dorsett and Randy White, could have been included but were not. *See* Gary Cartwright, *Vain Glory*, TEXAS MONTHLY, June 1994, at 113. It should be noted that one of the authors, Mr. Carlin, and his law firm represent the defendant players in this action.

175. *See* Cartwright, *supra* note 174, at 113 (noting insurance settlements earmarked for surgeries).

176. Werder, *supra* note 174, at 28A.

177. 900 S.W.2d 75 (Tex. App.—Dallas 1995, writ denied).

178. *Id.* at 78.

did not reach the merits of the contractual claim. Nonetheless, the court's dismissal lends support for the proposition that administrative agencies are the appropriate forum for resolving workers' compensation disputes.[179]

While the outcome of the second lawsuit is still pending, jurisdictional problems and system exclusivity mandate player victory.[180] The entire concept of these post-recovery suits directly conflicts with the jurisdictional objective of having workers' compensation claims fully resolved in an administrative forum. The administrative agency is simply the superior forum to resolve these disputes.[181] The agencies have the requisite expertise to resolve just such disputed claims. To allow an end-run around the administrative agency will stifle the very advantage of efficiency workers' compensation strives to achieve.

Further, allowing prosecution of post-recovery suits such as these, flies against the goal of exclusivity. The foundation of the workers' compensation system is based upon the *quid pro quo*.[182] Both employees and employers enjoy the legislative compromise which balances the swift and certain compensation for the injured employee against the employer's tort immunity and capped benefits. A post-recovery suit thwarts this exclusive, efficient remedy by forcing the athlete to litigate strictly limited claims and then permitting the employer to recoup those benefits a completely different forum. In fact, if a player tried to sue on his contract for benefits, he would be barred by the exclusivity provision of the state statute.[183] A double standard that permits a club to do the very thing that a player can not is impermissible.

V. Conclusion

Recent efforts by some states endeavor to restrict pro athlete

179. *See id.* at 80.

180. Additionally, all of the arguments against enforcement of the contractual set-offs have equal force against the post-recovery suit. *See supra* notes 153-72 and accompanying text.

181. *See Workers' Comp: More Athletes Seek Benefits*, Trial, June 1988, at 87 (noting that the workers' compensation system provides a more efficient and economical way of compensating the injured athlete); *see also supra* notes 34-38 and accompanying text (describing the superiority of an administrative remedy over a judicial one).

182. For complete discussion of the *quid pro quo* see *supra* notes 23-26 and accompanying text.

183. *See* Brinkman v. Buffalo Bills Football Club, 433 F. Supp. 699, 702 (W.D.N.Y. 1977) (holding a player suit for breach of contract for failing to provide medical care was barred by the New York State Workmen's Compensation Law); *accord* Rivers v. New York Jets, 460 F. Supp. 1233, 1238 (E.D. Mo. 1978).

access to workers' compensation benefits are unwarranted. From its inception, the workers' compensation system has served many desirable goals. Few can object to the desirability of certain, prompt, and reasonable compensation for occupational injuries. As was clear at the beginning of the century, this can best be achieved through an administrative remedy, rather than the slow and costly judicial process. An equally important by-product of this system is the creation of incentives for employers to improve workplace safety. All of these objectives are jeopardized by squeezing the pro athlete from workers' compensation coverage.

While most states include athletes in their workers' compensation system, the growing trend is toward restriction through either statutory exclusion or benefit set-offs. These statutory methods of exclusion are premised on various fallacies concerning the income of professional athletes, their contract status, and their assumption of the risk of injury. Workers' compensation is, of course, a creation of state legislatures. While they are free to craft the system as they wish, more careful scrutiny of the justification for pro athlete restriction is necessary. Where ambiguity exists under current state statutes, the wisest course is to interpret such statutes consistent with the general principles of universal access. At the very least, statutory set-offs should apply solely to temporary benefits, not permanent ones.

Likewise, contractual restrictions, which have some vitality in the context of temporary benefits, have pushed into the domain of permanent impairment benefits. Applicability of contractual set-offs to permanent benefits is clearly inappropriate. Those trying to strip these benefits from players deliberately ignore the fundamental distinction between the purpose of temporary and permanent benefits to further their avarice. Hopefully, these attempts will be foreclosed by those having a more sophisticated understanding of the nature and purpose of workers' compensation becoming involved in the negotiation and drafting of specific contractual terms in professional athlete's contracts to prohibit these ongoing restriction efforts. Because an employer must abide by its contract if it provides benefits in excess of statutory limits, the players can be protected through specific prohibition against recoupment or limitation of injury benefits.