

SUPER BOWL HERO TO BANK ACCOUNT ZERO*

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I. INTRODUCTION

Every Sunday from September through January, millions around the United States congregate at their favorite National Football League ("NFL") stadiums or around the television, rooting the squad they support on to victory.¹ Often donning their favorite player's jersey, these fans support the NFL unconditionally, funneling millions of dollars into the coffers of the league, its owners, and its players through advertising, merchandising, television, and ticket sales revenue.² The athletes competing each Sunday, who include some of the very best athletes the world has to offer, exert maximum effort in pursuit of victory. For the current generation of NFL players, the physical sacrifice of playing football comes with lucrative financial rewards. In contrast, others whose playing careers took place in a different generation, before NFL revenues grew astronomically (in the late 1980s and early 1990s), earned significantly less money, such that some players worked a second job in the off-season. Without the sizable nest egg some active or recently retired players have built up, older NFL retirees are left in a situation whereby the physical problems associated with years of playing football, in combination with ever-rising health-care costs, leave the retiree and his family in challenging, and sometimes dire, financial predicaments.

A. *Mike Webster*

Mike Webster's story is indicative of the struggles faced by former NFL players in retirement. A Hall of Fame Center who spent the majority of his career with the famed Pittsburgh Steelers of the 1970s, Webster was the picture of consistency, toughness, and ferocity.³ Webster went multiple seasons without missing a play while honing his craft in an era where the head slap, a blow to the head used by the defensive player to throw the offensive player (Webster) off balance, was the norm.⁴ Though this technique was

¹ See ESPN.com, NFL Attendance – 2007, <http://sports.espn.go.com/nfl/attendance?year=2007> (last visited Feb. 1, 2008). See also Wikipedia.com, NFL on Television, http://en.wikipedia.org/wiki/NFL_on_television (last visited Feb. 1, 2008) (articulating both the history and growth of NFL network television contracts).

² See Mark Maske & Thomas Heath, *NFL's Economic Model Shows Signs of Strain*, WASH. POST, Jan. 8, 2005, at A1 (articulating that "the clubs also receive equal portions from a 12 percent royalty on every NFL-branded piece of merchandise").

³ Pro Football Hall of Fame, Mike Webster, Class of 1997, http://www.profootballhof.com/history/release.jsp?release_id=612 (last visited Feb. 1, 2008).

⁴ See Cy Smith, *In There Own Words: Mike Webster*, <http://gridirongreats.org/content/WebsterBySmith.aspx> (last visited Feb. 1, 2008) (ex-

later abolished, its prevalence during Webster's career, in combination with the constant pounding he personally took, left Webster susceptible to severe head and body trauma.⁵

After Webster's career ended, his life was mired in business, financial, and personal turmoil and failure.⁶ During this retirement period, Webster applied for disability benefits from the NFL based on depression causally related to multiple instances of serious head trauma.⁷ After being denied active total and permanent disability benefits initially and on appeal, Webster took his case to federal district court, per the terms of the NFL Collective Bargaining Agreement ("CBA").

B. Risk of Injury

The physical toll that football takes on the bodies of its participants is extreme.⁸ Although the average NFL career lasts only three and a half seasons, the physicality of the game leaves many competitors both physically and mentally disabled. These ailments range from serious joint pain resulting from persistent use, to early onset dementia relating to serious head trauma.⁹ Pension and disability plans exist to protect the futures of those who have contributed to the NFL's immense success. These plans pay out benefits to qualifying NFL retirees, providing financial support during the latter years of a retiree's life.¹⁰ Qualifying for the Bert Bell NFL Pension Plan only requires participation in a predetermined number of NFL seasons. This is an objective standard that is simple to establish. However, qualification is merely the baseline to participate fully in the program and guarantees only the minimum protections offered by this type of pension plan.

Decisions of the NFL Supplemental Disability Plan (as compared to the Bert Bell NFL Pension Plan) are difficult, complicated, and subjective. Retired players take issue with both the funding of the program and how these funds are dispersed. Of greater concern to retired players, however, is the actual qualifying determination.¹¹ If a player has not been granted supplemental

plaining the head slap: "For example, the "head slap" (invented by Roosevelt Grier, but perfected by Deacon Jones of the (then-Los Angeles) Rams "Fearsome Foursome") was until 1977 part of a defensive linemen's standard moves.").

⁵ *Id.*

⁶ *Jani v. Bell*, 209 Fed. Appx. 305, 311-12 (4th Cir. 2006).

⁷ *Id.*

⁸ Jonathan Cluett, *Football Injuries*, ABOUT.COM, Nov. 27, 2004, <http://orthopedics.about.com/cs/sportsmedicine/a/football.htm>.

⁹ See NFL Player's Association, FAQs,

<http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=237&pid=0&type=1> (Feb. 1, 2008) (answering questions about the average length of an NFL career (roughly three and a half seasons) and what resources are available through the NFLPA).

¹⁰ See generally Know Your Pension, <http://www.knowyourpension.org/index.aspx> (last visited Feb. 1, 2008).

¹¹ See generally *Oversight of the NFL Retirement System: Hearing Before the S. Comm. on Commerce*

disability benefits based on his application or through an appeal, one option remains. A player that is still denied benefits after exhausting his internal appeals can file suit in federal court.¹² This option has generated poor results for retirees over the course of many years. One exception to these poor results was in 2006, when the United States Court of Appeals for the Fourth Circuit affirmed a district court ruling reversing the decision by the NFL's Supplemental Disability Plan to deny total and permanent disability benefits retroactively to Mike Webster.¹³

C. Jani v. Bell

Sunny Jani, administrator of Mike Webster's estate, sued for wrongful denial of benefits under the Employment Retirement Income Security Act of 1974.¹⁴ Webster's estate brought his claim against the Bert Bell/Pete Rozelle NFL Pension Plan and the NFL Supplemental Disability Plan contending that the plans wrongfully denied him the lucrative active disability benefits to which he was entitled, given the nature of his injuries and his full vesting status within the NFL Pension Plan.¹⁵

To date, Mike Webster (via his estate) is the only applicant to successfully litigate a reversal of a benefits decision in federal court.¹⁶ In December of 2006, the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the District of Maryland, Northern Division's grant of summary judgment for Webster.¹⁷ Although this victory is significant for the retroactive benefits Mike Webster's family received, it carries greater wholesale importance. To NFL retirees disgruntled with a system they feel is filled with red tape, controversial decisions, and unclear objectives, Webster's success brought with it hope that change was possible.¹⁸ For this reason, *Jani v. Bell* has brought the plight of many retired NFL players to the forefront, leading to significant bargaining between the NFL Player's Association, NFL ownership, and those retired players who take issue with their union's representation of their interests.¹⁹

Science and Transportation, 110th Cong. (2007) (statement of Brent Boyd, Former NFL Football Player, Minnesota Vikings).

¹² See *Jani*, 209 Fed. Appx. at 313.

¹³ See *Jani v. Bell*, No. 04-1606, 2005 U.S. Dist. LEXIS 44331 (M.D.N.D. Nov. 7, 2005).

¹⁴ 29 U.S.C. §§ 1001-1003 (2006).

¹⁵ See *Jani*, 209 Fed. Appx. at 307.

¹⁶ *Id.*

¹⁷ *The National Football League's System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 16 (2007) (statement of Douglas Ell, Plan Counsel, Bert Bell/Pete Rozelle NFL Retirement Plan).

¹⁸ See Juliet Macur, *Ditka's Impassioned 'Fix It' Sets Hearing's Tone*, N.Y. TIMES, Sept. 19, 2007, at D3.

¹⁹ See generally Gridiron Greats, www.gridrongreats.org (last visited Feb. 1, 2008).

D. *Beyond Jani v. Bell*

Evaluating the merits of *Jani v. Bell*, and further synthesizing it with NFL pension and disability plans, gives rise to the notion that some sort of significant change is needed. As public awareness increased recently, the issues surrounding the crisis ripened, eventually reaching the doorstep of an interested Congress.²⁰ Congressional hearings to address retirees' grievances and to consider both counter-arguments and potential changes to the system took place. These hearings opened the door for future hearings intended to assist and foster negotiation and cooperation between the parties responsible for agreeing to a new NFL Collective Bargaining Agreement.²¹

However, addressing the contentious arguments surrounding the current state of the NFL pension and disability plans requires more than a simple, cursory look at the dollars and cents at play. As is the case in most complex negotiations, factors beyond money, such as respect, fairness, adequacy, efficiency, and due process, are in play and must be appropriately considered. Collective bargaining is the vehicle by which change must occur, but to understand what changes to make, an examination of how the NFL disability plan has reached its present state, as well as how it compares to a similar, collectively bargained agreement in a contact sport, must be undertaken. The National Hockey League ("NHL") presents a favorable sport for comparison purposes; while its level of physicality does not parallel football, it produces many similar dangers posed to the league's players.²² In examining the similarities and differences between the NHL Collective Bargaining Agreement and the NFL CBA, differing points of emphasis appear, affording great insight into potential places the NFL CBA can head in the future. An equitable settlement, properly considering both sides while protecting retirees and the fiscal discipline of the Plan, will restore relations between a league and the retired players who played an integral role in its success.

E. *Overview*

Part II will examine the history of the NFL Pension and Disability Plan. Part III goes through the filing procedure. Part IV

²⁰ See generally *Oversight of the NFL Retirement System: Hearing before the Senate Committee on Commerce Science and Transportation*, (2007), available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=453a85ee-b12c-41cf-ae6c-f3235655bc75.

²¹ The Congressional hearings took place on September 18, 2007. *Id.*

²² See generally *NHL COLLECTIVE BARGAINING AGREEMENT* (2005), <http://www.nhl.com/cba/2005-CBA.pdf>. See also Social Security Administration, Social Security Online: The Official Website of the U.S. Social Security Administration, available at <http://www.ssa.gov> (last visited Feb. 1, 2008).

defines and considers ERISA procedures and how they apply to the National Football League. Part V constitutes a brief examination of case law regarding the NFL disability policy, focusing on the pertinent issues addressed. Part VI examines *Jani v. Bell*, highlighting the impact that this groundbreaking case has on bringing the NFL disability issue to the forefront and breaking the barrier against retired NFL players seeking benefits in federal court. Part VII compares the NFL Plan to the NHL Plan, reviewing their major similarities and differences while evaluating their merits. Part VIII provides an analysis of where the Plan currently is, a comparison of the Plan to other professional organization's disability policies, and a presentation of what changes may be collectively bargained into the new labor agreement.

II. HISTORY OF THE PLAN

In 1961, John F. Kennedy created the President's Committee on Corporate Pension Plans due to a concern that employers were failing to adequately protect the pension plans of their employees.²³ No pension plan existed in professional football until 1962.²⁴ Although player efforts to unionize contributed to the creation of a pension plan, national sentiment had already begun to turn in favor of protecting the futures of employees prior to unionization efforts.²⁵ This led the NFL to create its first disability and pension benefits plan.

A. Creation

Upon agreement between the players and owners, the Bert Bell NFL Retirement Plan ("Plan") was formed. This Plan provides benefits retroactively to individuals who played in 1959 and on; however, it excludes those who played prior to 1959.²⁶ This was an enormous financial step, since protecting retirees was not nearly as commonplace in the early 1960s as it is today. The plan guaranteed retired players' future financial security, opening up new avenues of subsistence for players who historically re-entered the workforce in retirement.

²³ Thomas B. Ridgley, *The Report of the President's Cabinet Committee on Private Pension Plan Regulation: An Appraisal*, 63 MICH. L. REV. 1258 (1965).

²⁴ NFL Players Association, *History of Retirement and T&P Benefits for NFL Players*, available

at http://www.nflpa.org/pdfs/NewsAndEvents/History_of_the_NFLPA%E2%80%99s_Retired_Player_Benefits.pdf (last visited Feb. 1, 2008) (on file with the author).

²⁵ See Pension History: United States, <http://medicine.jrank.org/pages/1307/Pensions-History-Pension-history-United-States.html> (last visited Feb. 1, 2008).

²⁶ The players who played prior to 1959 were thus called "pre-59ers." See History, *supra* note 24, at 1-2.

B. Growth

Through collective bargaining eight years later, the Plan as initially created was massively revised, putting into place a structure that generally remains intact today.²⁷ The 1970 plan was comprised of a monthly pension based on time served rather than salary earned. A player was granted one year of accrued service if that player received a salary for three or more games in that particular football season.²⁸ Once a player reached the age of fifty-five, the monthly pension began and was dispersed to those with a minimum of five accrued seasons.²⁹ Yet the money was not paid out equally to each player. Rather, the amount paid was in the form of a single life annuity, paid monthly, with the amount wholly dependant on the number of accrued seasons earned.³⁰ Actuarial math deduced the average life expectancy of each recipient and the present value of the pension, thus calculating what the monthly benefit is. Recipients could choose how their payments would be dispersed and whether their surviving spouse would be cared for upon death. This determination significantly alters, and complicates, the actuarial calculation of the monthly payment.

Subsequently, the NFL Player's Association ("NFLPA") expressed a desire to have more flexibility in the dispersal of their pension payments. Accordingly, an agreement was reached providing for new options.³¹ One option presented to the players was to receive payments beginning at the age of forty-five, a full ten years before payment generally begins.³² The players selecting this option received a check for only 45% of what their check would have been had they waited until the age of fifty-five to collect.³³ Although requested by the NFLPA, this financially flexible option proved detrimental when the player did not properly understand the financial ramifications of his decision.³⁴

A second option given to the players was to receive the bulk of their payments prior to the age of sixty-two, at which time the men would become eligible for Federal Social Security benefits.³⁵ This option afforded players the opportunity to receive larger payments from the age of forty-five until sixty-two, and then at sixty-two to receive a nominal payment from the Plan in addition

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1-2.

³² *Id.* at 2.

³³ *Id.*

³⁴ *Id.*

³⁵ See Social Security Administration, *supra* note 22. See also History, *supra* note 24, at 3-4.

to their federal benefits.³⁶ This payment option served the desire of the players to have a steady flow of income beginning shortly after their retirement and continuing until death.³⁷ Although the player would never receive the "double" payment he is entitled to at the age of sixty-two (Pension and Social Security contingent on sufficient payment into the system), he would generate a single payment each month for a longer period of time.

The 1977 Collective Bargaining Agreement reduced the number of accrued vested seasons required to receive benefits from five to four.³⁸ Additionally, a third option was added allowing players to receive their pension benefits earlier. The new option allowed retirees to obtain a 25% lump sum payment one year after retirement. Though positive on the surface, this lump sum option came at the cost of reducing all future payments by 25%.³⁹ Though CBA changes afforded the players significantly more options by which to utilize their pension funds, these opportunities came with risks difficult for the average individual to comprehend. Without sound financial advice, or an understanding and respect for financial planning, poor decisions could render an individual without the pension funds necessary to subsist later in life.⁴⁰

Looking forward, many of the retired players now arguing for increased benefits previously selected an option that provided them their earned benefits earlier; thus, they feel they are not receiving adequate compensation and cannot subsist on their pensions.⁴¹ This situation is not one that can be fairly fixed on a retroactive basis. Their past choices haunt their futures and, although they contend they were not made aware of the dangers of these options, or that future bargaining would retroactively increase benefits, they must live with the choices they have made.

Over the following twelve years, there were no major changes to the Plan. However, a major shift occurred in 1989 when the NFL owners elected to create their own plan, the Pete Rozelle NFL Player Retirement Plan.⁴² This plan was similar to the Bert Bell Plan except that it was run completely by NFL owners and was devoid of any player trustees or representatives.⁴³ All Pete Rozelle Plan decisions were made by the owners, infuriating players who now lacked any voice.⁴⁴ The formation of the Pete Rozelle Plan

³⁶ See History, *supra* note 24, at 3-4.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Many players have lost all of their money very quickly after their playing career. *Id.*

⁴¹ See generally NFL Players Association, NFLPA White Paper, available at http://www.nflpa.org/whitepaper/NFLPA_White_Paper.pdf (last visited Feb. 1, 2008) (on file with the author).

⁴² See History, *supra* note 24, at 4.

⁴³ *Id.*

⁴⁴ *Id.*

did not discontinue operation of the Bert Bell Plan. Rather, the two plans coexisted, administering payments to different segments of players depending on what years they were vested participants and their retirement dates.⁴⁵ As expected, administrative difficulties and mounting tensions were prevalent and movement began towards a less contentious and more efficient single system for the distribution of pension and disability payments.

C. Current Plan Structure

The 1993 Collective Bargaining Agreement saw the consolidation of the two plans into its present form: the Bert Bell/Pete Rozelle NFL Player Retirement Plan.⁴⁶ Along with the consolidation, negotiations between ownership and the NFLPA produced increases in the amount a retired player had earned in each accrued season of play, reduced the number of accrued seasons needed to partake in the Plan from four to three, and retroactively included those players who played in 1959 or before and had never received benefits.⁴⁷

Additionally, new negotiations took away all three of the early pension opportunities offered to players who retired after 1993, further protecting the former players by eliminating predatory options.⁴⁸ Disarming the retirees of their choice to take an early pension initially appears to be a concession by the players; however, this facial view of the change is short-sighted and misses the obvious benefit. Ridding the Plan of these early payout options brought greater fiscal discipline and eliminated a major point of contention between the parties.⁴⁹ Presently, most retirees who selected the early payment option are more disheartened with the pension program than those who did not, or could not, take advantage of that option.⁵⁰

No major overhaul to the NFL Pension system has occurred since 1993, though minor changes have occurred each time a new CBA is negotiated.⁵¹ New agreements took effect in 1998, 2002, and 2006, with the largest change coming out of the new agreements, creating a steady increase in the amount each accrued season earns a player per month after the age of fifty-five.⁵² The sizable increase agreed upon comes from funds paid by active players. In 2006, active players had their salaries reduced by an

⁴⁵ *Id.*

⁴⁶ *Id.* at 5.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See NFLPA White Paper, *supra* note 41.

⁵¹ See History, *supra* note 24, at 5.

⁵² *Id.* at 5-6.

average of \$50,000 per player for a total of \$96.5 million dedicated solely to pensions. An additional \$20 million reduction in player salaries goes towards the NFL's Supplemental Disability Plan benefits.⁵³ This increase has greatly assisted retired players, as those who have been retired for many years have seen their benefits increase by more than 300%.⁵⁴ However, those similarly situated retired players who elected to alter their pension plans through an early payout suffered tremendously, unaware the future would bring with it a huge increase in the value of payouts.⁵⁵ By opting to receive their benefits earlier, these retirees have not reaped the generous rewards that collective bargaining offers.

Although the NFL Pension and Disability plans are the largest programs administered to retired players, the past fifteen years have seen the creation of other programs beneficial to both active and retired players. In 1993, the NFL created the NFL Player Second Career Savings Plan, a two-for-one match of contributions made by players to a 401(k).⁵⁶ Players can contribute as much as \$20,000, beginning in their second season, to assist in their retirement savings, and the minimum owner contribution to the program is \$3,600.⁵⁷ The creation of this program, the first 401(k) in professional sports, aids forward-looking players who want to protect their fiscal futures.⁵⁸ Owner sponsored and supported, the NFL 401(k) mimics other 401(k) funds found throughout the U.S.⁵⁹

D. Recent Additions to the Plan

The "88" Plan was created on February 1, 2007 to provide increased financial benefit to players demonstrating dementia or other brain-related ailments.⁶⁰ The program provides up to \$88,000 per year to retired players placed in an in-treatment facility managing their care.⁶¹ This money is meant to relieve the burden placed on the families of retirees suffering from crippling

⁵³ See *The National Football League's System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 110th Cong. 3* (2007) (statement of Douglas Ell, Plan Counsel, Bert Bell/Pete Rozelle NFL Retirement Plan).

⁵⁴ *Id.*

⁵⁵ See History, *supra* note 24, at 2.

⁵⁶ *Id.* at 8.

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 1.

⁵⁹ See Jenny McKinney & Patrick McKinney, *How a 401k Plan Works*, <http://www.newsletterarchive.org/2007/12/13/277924-About+Retirement+Planning%3A+All+About+Retirement+Planning> (last visited Feb. 1, 2008).

⁶⁰ See Alan Schwarz, *Wives United by Husbands Post-N.F.L. Trauma*, N.Y. TIMES, Mar. 14, 2007, at A1.

⁶¹ *Id.*

mental afflictions related to their football careers.⁶² Additionally, up to \$50,000 can be awarded to players suffering from similar head trauma injuries but who are cared for in their home rather than in an in-treatment facility. The nature of head trauma generally requires "all hands on deck" and around-the-clock care.⁶³ Accordingly, money from the "88" Plan provides financial protection to families often in need of their income earning potential.⁶⁴

On September 26, 2007, the Plan announced the formation of a toll-free hotline to assist retired players with medical and financial problems.⁶⁵ Although a small gesture, it signifies some level of commitment to positive change in the system. One major concern, despite positive steps to the contrary, is the impression among high profile retired players that their own union is solely concerned about active players.⁶⁶ This sentiment exists because retired members of the NFLPA have not, in their own opinion, received adequate assistance from the union.⁶⁷ Given this, retired players are left wondering why they now receive so little considering their contributions toward building the NFL: without their blood, sweat, and tears, today's active players would be making substantially less. Consequently, many retired players argue that they have some moral entitlement to a greater cut of NFL revenues.

It is unquestioned that the NFL and NFLPA have increased the Plan's funding exponentially over the last twenty plus years, from \$88 million in 1982 to the over \$1.1 billion currently in place as of 2007.⁶⁸ Additionally, retirees have benefited from the creation of numerous programs, such as tuition assistance, annuities, severance pay, continuing family health insurance, and the aforementioned 401(k) program.⁶⁹ However, the core issue is whether the NFL is taking care of its retired players who have physically suffered as a result of their dedication and contribution to making the game what it is today. Fewer than 35% of applicants to the disability program are initially approved.⁷⁰ Though the numbers

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Rick Maese, *NFL Neglect of Mackey Belongs in Hall of Shame*, BALT. SUN, Dec. 27, 2005, at D1.

⁶⁵ Michael O'Keeffe, *NFL Creates Toll-Free Hotline for Ex-Players in Need*, NYDAILYNEWS.COM, Sept. 27, 2007, http://www.nydailynews.com/sports/football/2007/09/27/2007-09-27_nfl_creates_tollfree_hotline_for_explaye-3.html.

⁶⁶ ESPN.com, *Report: DeLamielleure Targeted by Head of NFL's Union*, June 5, 2007, <http://sports.espn.go.com/nfl/news/story?id=2893714>.

⁶⁷ *Id.*

⁶⁸ *The National Football League's System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 110th Cong. 2 (2007)* (statement of Dennis Curran, Senior Vice President, National Football League).

⁶⁹ See NFLPA White Paper, *supra* note 41.

⁷⁰ See *The National Football League's System for Compensating Retired Players: An Uneven Playing*

receiving payouts was sizable when looking at the number of applicants, this is a self-selecting group encompassing only those who applied. The players successful in their applications received \$20 million in total payouts, a significant sum both in sheer amount and per-person payout.⁷¹ However, it is difficult to fathom that one of the most dangerous games, a sport full of violent collisions at high speeds with frequent body exposure, leaves such a small percentage of its participants disabled, particularly in considering that there are many thousands of players who never apply to the disability program. The question then must be asked: If there are more disabled retired players, why are they not receiving benefits? Who is to blame? What can be done to alter the system in a fiscally responsible manner, while protecting retirees in serious need of the assistance they were guaranteed.

III. FILING PROCEDURE

A. Generally

The completion of a formal written application is the first step in the NFL Supplemental Disability Plan's benefit process.⁷² The application process is both long and arduous. Although challenging, the paperwork is far from unique and compares favorably with the requirements of the U.S. government disability plan, Social Security Disability ("SSD").⁷³ Concerns about fraud infiltrating disability systems generally are high; since a physician recommending total and permanent disability unilaterally makes the determination, there is an inherent fear that without due care and diligence prior to the dispersal of funds, improper payouts may occur.⁷⁴

Once the NFL forms are properly filled out and submitted, the retiree is sent to a local physician pre-approved by the Plan.⁷⁵ This neutral physician, approved by all six members of the Plan Board (three player and three owner representatives) provides a written report stating the medical condition of the player, any dis-

Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 110th Cong. 3 (2007) (statement of Douglas Ell, Plan Counsel, Bert Bell/Pete Rozelle NFL Retirement Plan) at 16.

⁷¹ *Id.* at 12.

⁷² NFL COLLECTIVE BARGAINING AGREEMENT (2006), http://www.nflpa.org/CBA/CBA_Complete.aspx.

⁷³ See Social Security Administration, *supra* note 22.

⁷⁴ Kieran Crowley and Leonard Greene, *Easy Ticket to Ride the Gravy Train*, NYPOST.COM, Oct. 28, 2008,

http://www.nypost.com/seven/10282008/news/regionalnews/easy_ticket_to_ride_the_gravy_train_135669.htm

⁷⁵ See *The National Football League's System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 14 (2007) (statement of Douglas Ell, Plan Counsel, Bert Bell/Pete Rozelle NFL Retirement Plan).

abilities present, and other standard medical information gathered from the exam.⁷⁶

B. Appeals

When a retiree files his application with the Bert Bell/Pete Rozelle Plan, the first benefits decision is made by the Disability Initial Claims Committee.⁷⁷ Since 2002, the federal government, through the Department of Labor, has mandated this separate, initial screening committee for disability claims.⁷⁸ Since 1993, 1052 applicants have submitted applications and been examined by the requisite physician, and 358 were approved.⁷⁹ Approval does not mean that the player received full total and permanent disability benefits. Rather, it simply signifies that some form of benefits was approved. Of the 675 applicants denied at the initial stage (nineteen were pending at the time of report), 223 appealed.⁸⁰

Any player dissatisfied with the initial finding of the Committee (or before 2002, the Plan Board) has the right to appeal to the full Retirement Board.⁸¹ A second examination by a new and neutral pre-approved physician is then required by federal law.⁸² Of the 223 retired players making this appeal from the initial finding made in their respective case, sixty-nine were subsequently approved.⁸³ However, since the Plan is comprised of six members, three player representatives and three ownership representatives, three-to-three deadlocks do occur.⁸⁴ The procedure for resolving deadlocks follows one of two potential paths. In nearly all cases (all but one over the last fourteen years), the issue is medical, and either side can elect to send the player to one of the Plan's top three physicians known as "Medical Advisory Physicians" ("MAP").⁸⁵ The examinations done by "MAP" physicians are binding on both sides.⁸⁶ In the other scenario, the deadlock is resolved by arbitration between the members of the Plan.⁸⁷

If an applicant is denied on appeal, his next option is to file suit in federal court.⁸⁸ Since 1993, 132 retirees have been denied on appeal (with twenty-two cases currently pending). Only one

⁷⁶ *Id.* at 14.

⁷⁷ *Id.* at 15.

⁷⁸ *Id.*

⁷⁹ *Id.* at 16.

⁸⁰ *Id.*

⁸¹ *Id.* at 15.

⁸² *Id.*

⁸³ *Id.* at 16.

⁸⁴ *Id.* at 15.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

matter, *Jani v. Bell*, successfully reversed in federal court a NFL retirement board decision.⁸⁹ In twenty-four other instances the Plan's decision was upheld, while seven suits are still pending.⁹⁰ Despite the low rate of success, the opportunity to sue in federal court provides the retired player with an open and objective forum. However, litigation rarely moves past the summary judgment phase due to the standard of review, which is abuse of discretion.⁹¹

C. Success and Timeliness

Although the opportunity to take an appeal to federal court is procedurally significant, it has proved practically insignificant. In sum, 40% of cases since 1993 have resulted in the payout of some benefits. However, this does not include the most lucrative benefits, but rather includes all possible benefits, some being relatively easy to achieve.⁹² Though significant, the most lucrative benefits are dispersed at an insignificant level given the brutality of the NFL.

The length of time it takes for the entire Disability Plan process to run its course has frustrated retirees waiting for official word on the status of their applications. Arguing that the length of time is too onerous, retirees contend that their fellow brethren are less inclined to enter the application process as they are unwilling, or unable, to withstand the lengthy ordeal associated with a benefits application.⁹³ In response to the frustration expressed by retired players, representatives of the Plan highlight the need for due process to ensure proper administration. These same fiduciaries also point out that the Department of Labor requires lengthy procedures and that, additionally, the numerous doctor visits slowing the process increase the success of claims rather than compromising them.⁹⁴ However, when dealing with an individual's livelihood, the argument that red tape is actually due process is disconcerting since every minute lost is costly. Although a potentially accurate portrayal of the system, the number of successful appeals, and specifically the number of successful lawsuits, more accurately presents what is likely to occur as the applicant's claim moves forward.

⁸⁹ *Jani v. Bell*, 209 Fed. Appx. 305, 313 (4th Cir. 2006).

⁹⁰ *The National Football League's System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 16 (2007) (statement of Douglas Ell, Plan Counsel, Bert Bell/Pete Rozelle NFL Retirement Plan).

⁹¹ See *Jani*, 209 Fed. Appx. at 313.

⁹² *Id.*

⁹³ See *Oversight of the NFL Retirement System: Hearing Before the S. Comm. on Commerce Science and Transportation*, 110th Cong. (2007) (statement of Brent Boyd, Former NFL Football Player, Minnesota Vikings). See also *Oversight of the NFL Retirement System: Hearing Before the S. Comm. on Commerce Science and Transportation*, 110th Cong. (2007) (statement of Daryl Johnston, Former NFL Player, Dallas Cowboys).

⁹⁴ *Id.*

IV. ERISA

A. Generally

To qualify under the Employee Retiree Income Security Act ("ERISA"), the reviewing and denial of benefit claims must meet several broad standards. ERISA guidelines dictate that a "benefit plan . . . provide adequate written notice to every participant and beneficiary whose claim for benefits has been denied."⁹⁵ This notice provides some due process to the applicant, while specifically delineating the specific reasons a denial is issued.⁹⁶ Secondly, ERISA dictates that each denied applicant have an equitable review of their claim by an appropriate fiduciary.⁹⁷ Additionally, all decisions must be made in accordance with the terms of the plan agreed to by all involved, and this plan must fall within the ERISA statute.⁹⁸ Finally, on January 1, 2002, the Department of Labor revised the regulations governing claims procedure, requiring at least two levels of mandatory review and inserting additional general procedural requirements.⁹⁹

B. ERISA as Applied to the National Football League

The NFL Retirement Plan and the NFL Supplemental Disability Plan satisfy the ERISA claims procedure. Both the Initial Claims review and the full board review provide the denied applicant written acknowledgment of denial along with "specific reason for the determination and reference to [the] specific plan provisions on which the determination is made."¹⁰⁰ The Disability Plan initially screens applicants through a Disability Initial Claims Committee made up of two voting members, one each from the NFLPA and the NFL Management Council. Moving beyond the initial screening, the full Retirement Board, comprised of six voting members, hears claims not initially accepted.¹⁰¹ These fiduciaries are appointed by each party of interest and have an equal vote in disability hearings and decisions.¹⁰² Finally, the NFL Disability Plan follows the guideposts laid out by the CBA, which was equitably produced through collaboration by both interested parties.¹⁰³ Thus, the NFL Plan satisfies ERISA requirements.

⁹⁵ See *The National Football League's System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 3 (2007) (statement of Martha Jo Wagner, Attorney, Venable LLP).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 7.

¹⁰¹ See NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 70.

¹⁰² *Id.*

¹⁰³ *Id.*

V. BEFORE *JANI V. BELL*

A. *Standard of Review*

To determine whether benefits have been properly denied, federal courts use an abuse of discretion standard.¹⁰⁴ For a retired player to overcome this burden, he must prove that the Board's finding was "arbitrary and capricious, unsupported by substantial evidence, instituted in bad faith, or erroneous on a question of law."¹⁰⁵ Substantial evidence must be provided by the fiduciary – here, the Plan – in order to justify a denial of benefits.¹⁰⁶ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁰⁷ This is quite broad, and allows the Plan or any similar fiduciary body significant leeway in making their determinations.¹⁰⁸

The abuse of discretion standard is a significant hurdle in a retired football player's quest to challenge the Plan's ruling on his disability application. Although no fiduciary can reject unanimous evidence, the Plan administrators have great freedom when interpreting the evidence, so long as their conclusions are reasonable.¹⁰⁹ Despite concerns over a fiduciary's primary objectives as controller of the Plan's funds, tremendous deference is given to the decisions made.¹¹⁰ Given this deference, a retired player is working from a difficult position in challenging the Plan's decision. Many actions brought by retired players against the Plan are dismissed via summary judgment for the defendant.¹¹¹ These legal actions are generally dismissed in this fashion because the Plaintiff – here, the retired player seeking benefits has not been able to overcome the abuse of discretion standard.¹¹²

B. *Additional Cases Beyond Jani v. Bell*

1. *Smith v. Bell*

In *Smith v. Bell*, Laurence Edward Smith appealed a district court's order granting summary judgment in favor of the Plan.¹¹³

¹⁰⁴ See *Smith v. Cont'l Cas. Co.*, 369 F.3d 412, 417 (4th Cir. 2004).

¹⁰⁵ See *Shishido v. SIU-Pacific District-PMA Pension Plan*, 587 F. Supp. 112, 116 (N.D.C.A. 1983).

¹⁰⁶ See *Jani v. Bell*, 209 Fed. Appx. 305, 313 (4th Cir. 2006).

¹⁰⁷ *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

¹⁰⁸ *The National Football League's System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 14 (2007) (statement of Cy Smith, Attorney, Zuckerman Spaeder LLP).

¹⁰⁹ See *Jani*, 209 Fed. Appx. at 314.

¹¹⁰ *Id.*

¹¹¹ See, e.g., *Smith v. Bell*, No. 96-56494, 1997 U.S. App. LEXIS 27918 (9th Cir. Oct. 7, 1997).

¹¹² *Id.*

¹¹³ *Id.* at *2.

Smith argued that his disability onset date was August 30, 1977. The Plan proffered evidence that the onset date was January 1, 1985.¹¹⁴ This difference is significant, as the earlier date would signify that Smith was injured while an active NFL player, thus entitling him to the more lucrative Active Benefits. This is in contrast to a player who suffers an injury while an active player, but does not become disabled from this injury until after his playing career is finished. The Plan did not contend that Smith was entitled to no benefits; rather, it contended that his disability onset date supported less lucrative benefits rather than full active benefits.¹¹⁵ The difference in opinion stems from an amended report by an examining physician. The physician in question initially documented Smith's total and permanent disability as occurring no earlier than 1985 however this date was changed to 1977.¹¹⁶ Relying on this, Smith believed he was entitled to active benefits for his total and permanent disability and any denial of these benefits would be "arbitrary and capricious."¹¹⁷ However, the Plan argued that the amendment made by the physician was unsupported by medical records and data, a factual assertion with which the court concurred.¹¹⁸ Given the discrepancy in medical information, the court held that it was not an abuse of discretion to deny Smith benefits.¹¹⁹

Smith is an example of process challenges in the disability context. Smith justifiably relied on the physician's amended examination report while the Plan found more validity in the physician's initial findings. When conflicting evidence is present, it is generally not an abuse of discretion to follow one piece of evidence over another.¹²⁰

The second principal issue in Smith's complaint highlights a major difficulty that applicants face: the timing of decisions. Smith asserted a claim that the Plan waited too long to decide on his claim and that this violation caused him substantial harm. The court denied this claim, citing the fact that the court concurred with the Plan that the onset date of his disability was 1985, well after he was denied benefits.¹²¹ Thus, this denial did not cause him any harm since he was not disabled. Timing of benefits decisions are of critical importance, as prompt decisions allow a player to move on, regardless of a positive or negative decision. Although due process is critical in any legal or quasi-legal proceeding, it

¹¹⁴ *Id.* at *3.

¹¹⁵ *Id.* at *4-5.

¹¹⁶ *Id.* at *3.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *4.

¹²⁰ See *Smith v. Bell*, 1997 U.S. App. LEXIS 27918 at *3.

¹²¹ *Id.*

must be balanced with equitable treatment of the party putting forth the claim.

2. *Youso v. Bell*

Yet another case highlighting the difficulties faced by retired players in overcoming an abuse of discretion standard is *Youso v. Bell*.¹²² In *Youso*, the court stated that it can not and will “not substitute our own weighing of the evidence for that of the administrator.”¹²³ This leaves the applicant in a difficult position. Despite the medical evidence potentially favoring the player, the district court and court of appeals are not in a position to review or overturn decisions unless they are deemed arbitrary or capricious. In fact, the *Youso* court stated that, “although we might come to a different conclusion if we were deciding this case, we are constrained by our standard of review.”¹²⁴ Although there was ample evidence supporting the Plan’s conclusion, the court’s inability to move beyond the abuse of discretion framework limited *Youso*’s substantive recourse.¹²⁵

Even though the decision in *Youso* was supported by both medical records and evidence, a neutral court could, and potentially would, come to a different conclusion regarding the applicant’s benefits claim. This frustrates retired NFL players who believe the system is unjust because the court simply signs off on nearly everything the Plan puts before it.¹²⁶ When a player feels, as one generally does here, that the Plan’s decision-makers are biased and act without the retired player’s best interests in mind, it creates a situation whereby retired players desire a more neutral final arbiter than a justice system that tacitly accepts the Plan’s decisions.

VI. *JANI V. BELL*

A. *Background*

Michael (“Mike”) Webster was a fifth round pick of the Pittsburgh Steelers in the 1974 NFL Draft.¹²⁷ A center by trade, Webster played his college football at the University of Wisconsin-Madison, and in 1976 “Iron Mike” took over as the Pittsburgh Steelers starting center.¹²⁸ Webster continued his role with the

¹²² *Youso v. Bell*, No. 98-1914, 1999 U.S. App. LEXIS 131 (8th Cir. Jan. 5, 1999).

¹²³ *Id.* at *3.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Gridiron Greats, *supra* note 19.

¹²⁷ Wikipedia.com, Mike Webster, http://en.wikipedia.org/wiki/Mike_Webster (last visited Feb. 1, 2008).

¹²⁸ *Id.*

Steelers for 150 consecutive games, a period of ten full seasons.¹²⁹ This streak of consecutive games played coincided with the Steelers winning four Super Bowl championships, and Webster being named an All-Pro seven times and a member of the Pro Bowl nine times.¹³⁰ His illustrious career ended with a short stint playing for the Kansas City Chiefs, starting at offensive center in 1989, while finishing as a backup in 1990.¹³¹ Webster subsequently retired in March of 1991 having played 245 games at center, the most ever at the position.¹³² Incredibly, Webster did not miss a single offensive down during a six year stretch of his career.¹³³ In 1997, Iron Mike Webster received the highest honor a professional football player can receive: election into the Pro Football Hall of Fame in Canton, Ohio.¹³⁴

The offensive center lines up over the football, snapping it between his legs to the quarterback. At the moment the ball goes through the center's legs and reaches the quarterback safely, the center's responsibility quickly changes. The center must now block an opposing player located in his vicinity, ensuring the safety of whoever has the ball. This leaves the center vulnerable to consistent and violent bodily harm.¹³⁵

B. Medical History

Mike Webster first sought medical treatment for physical injuries in March 1991 and continued to do so until September 1995.¹³⁶ Towards the end of 1992, Webster was diagnosed with cancer of the lymph nodes by Dr. Stanley Marks, whose determination was based on the extreme swelling in both of Webster's lower extremities.¹³⁷ In January 1994, Webster visited a cardiovascular specialist who noted that Webster was capable of most physical activity.¹³⁸ However, in a follow-up visit to Dr. Marks in September of 1996, the doctor noted that Webster's "life has really deteriorated recently and he is living out of his car. . . . [H]e has problems with depression and obsessive compulsive behavior and is currently being treated with Ritalin and Paxil."¹³⁹

On the same day as he met Dr. Marks, Webster met with Dr.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Pro Football Hall of Fame, Mike Webster, *supra* note 3.

¹³⁵ See *Jani v. Bell*, 209 Fed. Appx. 305, 310 (4th Cir. 2006).

¹³⁶ See *id.* at 310-11.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 310.

Jerry Carter, a psychiatrist, for further evaluation.¹⁴⁰ This evaluation occurred because some of Webster's former teammates were aware he was recently sleeping in a train station and were concerned about his well-being.¹⁴¹ Webster described to Dr. Carter his reclusive life, highlighted by his sleeping in hotels and his car for over three years.¹⁴² Following this visit, Webster saw Dr. James Vodvarka, an internal medicine and osteopathic physician. Dr. Vodvarka believed Webster may be suffering from post-concussion syndrome.¹⁴³ Post-concussion syndrome commonly impacts NFL players and occurs due to brain trauma.¹⁴⁴

Dr. Vodvarka's diagnosis of post-concussion syndrome led Webster to retain an attorney to assist him in acquiring disability benefits from the NFL Supplemental Disability Plan. The attorney, Robert Fitzsimmons, referred Webster to Dr. Fred Krieg, a psychologist who later diagnosed Webster with "dementia resulting from his football-related head traumas."¹⁴⁵ Dr. Krieg observed that Webster tried extraordinarily hard to make himself appear well during the evaluation.¹⁴⁶ Despite Webster's attempts, Dr. Krieg still was steadfast in his belief that Webster was totally disabled and "unable to engage in any occupation or employment at this time."¹⁴⁷ Webster was embarrassed by his troubles and too proud to merely give in to his ailments; despite these efforts, his disability was readily apparent to his evaluating physicians.

Following Dr. Krieg's determination, Webster was reevaluated by Dr. Vodvarka, who found Webster totally and permanently disabled based on head injuries suffered during his playing career.¹⁴⁸ Additionally, Dr. Vodvarka openly stated that Webster "would have been able to prove total disability at the time he was released by the Pittsburgh Steelers."¹⁴⁹ Additionally, Dr. Jonathan Himmelhoch, a licensed psychiatrist, deemed Webster totally and permanently disabled due to brain injuries.¹⁵⁰ Examining the conclusions of numerous physicians, it appears that a consensus was in place. Nevertheless, the Plan disagreed and wanted more information.

The Plan requested that Webster be evaluated by a physician

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 311.

¹⁴⁴ Eric Legome, Postconcussive Syndrome,

<http://www.emedicine.com/emerg/topic865.htm> (last visited Feb. 1, 2008).

¹⁴⁵ *See Jani*, 209 Fed. Appx. at 310.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See Jani*, 209 Fed. Appx. at 311.

¹⁴⁹ *Id.* at 310-11.

¹⁵⁰ *Id.*

of their choice, Dr. Edward Westbrook.¹⁵¹ On June 21, 1999, Webster visited with the physician who filled out the appropriate paperwork.¹⁵² Westbrook concluded that Webster's injuries occurred at or prior to March of 1991, and that Webster was currently totally and permanently disabled.¹⁵³ Following this determination, Webster was awarded Football Degenerative Benefits. However, Webster's application for the more lucrative Active Benefits was tabled for another neutral physician's evaluation. Webster appealed this ruling by the Plan.¹⁵⁴

In response, the Plan contended that Dr. Westbrook's report did not indicate when Webster became totally and permanently disabled, but rather when his present disability occurred.¹⁵⁵ The Plan argued that without this precise knowledge, the most lucrative Active Total and Permanent Disability benefits were not appropriate.¹⁵⁶ In response, Webster submitted additional medical reports confirming that he was totally and permanently disabled as of March 1991.¹⁵⁷ Furthermore, Dr. Westbrook, the neutral physician approved and selected by the Plan, reiterated his findings and stated that he was "certainly disabled when he stopped playing football sometime in 1990."¹⁵⁸ This documented medical evidence was still deemed insufficient.

The Board continued to ask for more information, specifically requesting Social Security Administration and IRS records, as well as additional employment information.¹⁵⁹ The Plan hired a private investigator to inquire about Webster's prior employment history.¹⁶⁰ However, the private investigator concluded that Webster's few business ventures all failed.¹⁶¹ During the fall of 2002, at the time this investigation was conducted, Mike Webster died of a heart attack.¹⁶²

C. *The Plan's Decision*

Nearly six months after his death, on March 17, 2003, Mike Webster's application for Active Total and Permanent Disability Benefits was officially denied and the onset date of his disability was marked September 1, 1996.¹⁶³ The Plan stated that Webster

¹⁵¹ See *id.* at 311.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 312.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

had worked as a television broadcaster for two NFL games in 1991, was intimately involved in a few failed business ventures from 1992 to 1994, and was an assistant coach for the Kansas City Chiefs of the National Football League in 1994 and 1995.¹⁶⁴ Because this employment was considered gainful, the Plan proved Webster was not disabled when he retired from the NFL. The Plan stated that Webster was gainfully employed between the years 1991 and 1996 and thus was not totally and permanently disabled.¹⁶⁵ Additionally, the Retirement Plan Board contended that Dr. Marks' statement that Webster's life had deteriorated in 1996 proved that in 1993, at the date of his first visit to Dr. Marks, Webster's life was not in a deteriorating state. This finding relies on a series of presumptions not backed up by any tangible or credible evidence. The Plan completely ignored all other medical opinions submitted by Webster.¹⁶⁶

D. Webster's Appeal

Upon review of the facts, the Court of Appeals for the Fourth Circuit concluded that the Plan Board "offered no relevant medical or employment evidence to contradict the unanimous medical opinion of the examining experts, even though those opinions were open to challenge."¹⁶⁷ In failing to rebut the unchallenged medical testimony proffered by Webster's estate, the court found that the plan abused its discretion in denying Active Total and Permanent Disability Benefits to Webster's estate.¹⁶⁸ Although overcoming an abuse of discretion standard is generally difficult, both the factual circumstances of Mike Webster's life along with the medical testimony and records put forth by his estate, proved it insurmountable.¹⁶⁹

E. Significance

Although *Jani v. Bell* did not substantially change the way the judicial system examines claims against the Bert Bell Plan, the court's decision did ignite public interest in the plight of retired NFL Players.¹⁷⁰ As a marquee performer on the famed Pittsburgh Steeler teams of the 1970s, the public was drawn to Webster's struggle. Webster's star status drew attention to an issue that has

¹⁶⁴ Although a paid assistance coach, testimony proved that this work fell into a CBA exception of "fraternal" work. *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 317.

¹⁶⁸ *Id.*

¹⁶⁹ See The Boyd Plan, in *Oversight of the NFL Retirement System: Hearing Before the S. Comm. on Commerce Science and Transportation*, 110th Cong. (2007) (statement of Brent Boyd, Former NFL Football Player, Minnesota Vikings).

¹⁷⁰ See generally Gridiron Greats, *supra* note 19.

percolated for years.¹⁷¹

Jani v. Bell received significant press coverage, both in sports publications and in the mainstream media.¹⁷² This coverage led to further examination of prior, open, and potential NFL Supplemental Disability Benefits cases.¹⁷³ In examining these potential cases, media outlets were inundated with stories about the struggles of retired NFL players struggling to survive and receiving little help from the NFL.¹⁷⁴ Although many retired players made a healthy income during their playing days, their injuries now require extensive medical care.¹⁷⁵ This care is quite costly, particularly if the player is disabled to the point where he cannot even maintain a sedentary job (and thus is unlikely to have health insurance). Without NFL Supplemental Disability Benefits, the retired player is often left in a physically, mentally, and financially vulnerable position.

VII. NFL COMPARISON WITH THE NHL

The physical nature of the NFL is one of the most important factors contributing to the League's popularity. The physical contact that occurs during each play makes the NFL extraordinarily unique and thus a desirable form of entertainment to both the zealous fan and casual observer.¹⁷⁶ Although professional baseball, basketball, and soccer are extremely popular both domestically and abroad, they do not offer a favorable frame of reference for comparison with the NFL. However, one major sport does in fact offer a strong comparison to the NFL's physicality: the NHL.¹⁷⁷

Although the NHL does not have the consistent physical contact that is present in the NFL, there is substantial bodily contact throughout the game. This contact comes in the form of body-checking. Body-checking is body-to-body contact that occurs on the ice during the course of the game.¹⁷⁸ Similarly, professional hockey lends itself to the type of head injury similarly found in the NFL; thus, the sport necessitates a similarly-styled disability plan in place to protect athletes injured in the course of their contractual performance.¹⁷⁹

¹⁷¹ Greg Garber, *Sifting Through the Ashes*, ESPN.COM, Jan. 28, 2005, <http://sports.espn.go.com/nfl/news/story?id=1972289>.

¹⁷² *Id.* See Macur, *supra* note 18; see also Gridiron Greats, *supra* note 19.

¹⁷³ See, e.g., Brian Demarco, *Brian Demarco*, <http://www.gridirongreats.org/BrianDemarcoPage.html> (last visited Feb. 1, 2008).

¹⁷⁴ Dave Scheiber, *The Mysterious Death of Andre Waters*, ST. PETERSBURG TIMES, Dec. 11, 2006, at C1.

¹⁷⁵ See Demarco, *supra* note 173.

¹⁷⁶ See NFL Homepage, www.NFL.com (last visited Feb. 1, 2008).

¹⁷⁷ See NHL Homepage, www.NHL.com (last visited Feb. 1, 2008).

¹⁷⁸ *Id.* (presenting highlights of games, including physical contact in the form of body-checking).

¹⁷⁹ See Wikipedia.com, Pat LaFontaine, http://en.wikipedia.org/wiki/Pat_LaFontaine (last

A. NHL Disability Plan

The NHL Disability Plan structure differs from the NFL's Supplemental Disability Plan in one major way: when an applicant is determined to be totally and permanently disabled from an injury suffered as an active NHL Player, he is entitled to a lump sum payout.¹⁸⁰ This is in contrast to the standard procedure of the NFL Plan, which grants monthly payouts.¹⁸¹ The NHL's offered lump sum is not equal for every disabled player. Rather, the payout is based on what age the active player is when the injury occurs.¹⁸² This type of disability plan is in place to offer players who have more potential earning years in their career more valuable compensation; less-established or older players are entitled to less lucrative benefits more commensurate with their likely future earning potential.

Fully examining the NHL Disability Plan payouts brings to light the simplicity, and potential equality, of the age-based payouts. Players under twenty-one are entitled to a lump sum payout of \$300,000.¹⁸³ Those injured between the age of twenty-one and twenty-six get a payout of \$350,000.¹⁸⁴ When injured at age twenty-seven, the payout is \$300,000, but just one year later, at the age of twenty-eight, the payout for an NHL Player is \$220,000.¹⁸⁵ An individual aged twenty-nine receives a payout of \$150,000 from the NHL Disability Plan, while those NHL players age thirty or older are entitled to a lump sum payout of \$75,000.¹⁸⁶ Although these differential payouts range in average and thus do not necessarily provide adequate compensation to all athletes, the NHL CBA also has provisions for a lump sum disability payout of \$750,000 if a "serious" injury occurs, with this type of injury being defined as one causing "blindness, dismemberment, paralysis or brain damage."¹⁸⁷

The "serious" injury payment is a financially significant lump sum, despite being entirely in lieu of the other career-ending lump sum payments mentioned above. Although \$750,000 is lucrative, especially given that it is an upfront payment, it pales in comparison to even an average NHL annual paycheck. In 2004 through 2005, the average yearly salary for an NHL player was

visited Feb. 1, 2008). See also Wikipedia.com, Brett Lindros, http://en.wikipedia.org/wiki/Brett_Lindros (last visited Feb. 1, 2008).

¹⁸⁰ See NHL COLLECTIVE BARGAINING AGREEMENT, *supra* note 22, at 107.

¹⁸¹ *Id.* at 106.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 107.

\$1.46 million.¹⁸⁸ Additionally, just three years prior from 2001 through 2002, the average NHL salary was even higher, reaching above \$1.8 million.¹⁸⁹ However, it appears the NHL Disability Plan's differential payout structure, both in terms of age differences and injury severity differences, more adequately compensates an injured player as the system is more streamlined and payouts are more consistent and easier to obtain.

B. *Comparison between the NFL and the NHL*

In considering the adequacy of disability payouts, it is critical to examine the numbers in relation to the average salary of players in each league. Here, the NHL payout does not seem to adequately compensate the average player suffering from a career-ending and/or permanently debilitating injury. From a financial perspective, the average NHL player is substantially disadvantaged if he becomes totally and permanently disabled. The average player's earning power would far exceed what disability benefits would pay out, thus leaving the player in a significantly weaker financial condition.

Historically, lump sum payouts to retired NFL players are problematic. These payments are particularly troubling because family members or others may try and capitalize in some way on this new liquid asset. Additionally, without proper financial planning, this sum can be easily squandered. Though not all injuries that qualify for total and permanent disability affect retired players' mental faculties, each and every injury exacts a significant toll on the strength and well-being of the individual at issue, weakening their overall defenses. Even minor injuries accumulate, creating physical problems that often necessitate disability coverage.

One more caveat regarding the NHL disability system is that unlike the NFL Plan, NHL players sign fully guaranteed contracts in consideration for performance.¹⁹⁰ An NHL player signing a five-year contract will be paid each year, irrespective of injury.¹⁹¹ Although general contract law applies, and thus a contract can be voided under certain circumstances, none relate to any actions occurring in the normal course of contracted performance.¹⁹² Thus, a player is entirely protected and will receive a salary on the terms his contract specifies. The NHL disability policy builds on the

¹⁸⁸ See generally National Hockey League Players Association, www.nhlpa.com (last visited Feb. 1, 2008).

¹⁸⁹ See generally Wikipedia.com, 2004-05 NHL Lockout, http://en.wikipedia.org/wiki/2004-05_NHL_lockout (last visited Feb. 1, 2008) (articulating the complicated nature of the NHL labor strife and the resulting change in overall salary structure).

¹⁹⁰ See NHL COLLECTIVE BARGAINING AGREEMENT, *supra* note 22, at 40.

¹⁹¹ Usually, insurance is bought, buy-outs can be negotiated, etc., in order to limit the economic impact of a guaranteed contract. *Id.*

¹⁹² See generally NHL COLLECTIVE BARGAINING AGREEMENT, *supra* note 22.

guaranteed contract principle by providing a lump sum payment in addition to requiring that teams fulfill their end of the player contract, creating a situation where both contract performance and disability payment will occur.¹⁹³ However, a concern over future litigation led the NHL CBA to make disability benefits contingent on a player foregoing all claims against the team, NHL, any other teams, employees, and officials regarding salary or treatment.¹⁹⁴ This waiver of liability protects the NHL and its member teams when a serious injury occurs, while the player still maintains a right to the continued payment of his contracted salary.

In contrast to a contract being guaranteed, the NFL operates under a confusing and troublesome non-guaranteed contract system. Under this system, a player is guaranteed only a "signing bonus" when he enters into his performance contract.¹⁹⁵ A player signing a NFL contract will not be guaranteed the contracted yearly amount.¹⁹⁶ This stands in stark contrast to the NHL player, whose yearly salary is fully guaranteed. However, the NFL contract generally provides a signing bonus of fully guaranteed upfront money that is not subject to forfeiture due to actions within the course of performance.¹⁹⁷ For example, if the day after the contract is signed the NFL player injures his knee while playing and is totally and permanently disabled, he will not receive a single penny more of what is owed on his contract, but will keep his previously-collected signing bonus. Thus, the signing bonus, an often lucrative lump sum, is heavily relied upon since it is the only money truly guaranteed. Accordingly, the NHL's lump sum policy appears significantly better when considering that a player may have additional salary coming to him in the form of a contract, although this is not always the case, as a player's contract may expire shortly after the injury occurs. Guaranteed contracts provide additional protection to seriously injured NHL players.

C. Comparison of NFL and NHL Plan Processes

The final element to consider in comparing the NHL and NFL disability plans is the disability benefits application process.¹⁹⁸ The NHL Disability Plan authorizes any NHL team physician to determine whether a player is disabled and unable to contractually

¹⁹³ *Id.* at 107.

¹⁹⁴ *Id.*

¹⁹⁵ See HowStuff Works.com, How Does the NFL's Salary Cap Work?, <http://entertainment.howstuffworks.com/question644.htm> (last visited Feb. 1, 2008) (providing an explanation of the basic tenets of the NFL Salary Cap).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See NHL COLLECTIVE BARGAINING AGREEMENT, *supra* note 22, at 89.

perform.¹⁹⁹ If it is determined that the athlete is disabled, a form provided by the NHL is filled out by the physician and submitted to the affiliated NHL team and the NHL main office.²⁰⁰ If the physician determines the player is not disabled, the player can, within seventy-two hours of receiving the form, opt seek a second opinion.²⁰¹ This second opinion must occur within five days unless a showing of good cause is made to justify a delay.²⁰²

When a second opinion is requested, a new determination is made by the physician, and if the second physician concurs with the first physician's disability determination, that decision is final and binding upon both the player and the team.²⁰³ However, if the two medical examinations produce different results, the player and team are instructed to confer and agree to an examination by an independent physician to be performed as soon as reasonably possible.²⁰⁴ The independent examination occurs within five business days and a final and binding determination is then made.²⁰⁵ This ends the process with a conclusive result in a timely fashion.²⁰⁶

The NHL Disability Plan process differs greatly from the NFL's process, particularly in its formality. The NHL process has a finite number of steps. Though limited in nature, the NHL process does allow for second opinions and appropriate appeals that ensure appropriate due process without being temporally inefficient. Additionally, the language of the NHL CBA puts great emphasis on a speedy process.²⁰⁷ The NFL Plan is notoriously slow and lengthy, leaving players in the lurch for months or years waiting for initial answers, appeals, and proper physician paperwork.²⁰⁸ In contrast, the NHL process is more streamlined and caters to the time sensitivity of disability claims.²⁰⁹ Although temporal guidelines ease the difficulties related to serious injury, they do not eliminate all problems. Rather, temporal guidelines make the process more palatable for the injured player and his family, providing those involved with guidance and knowledge about what it will take to protect their financial future. The boldest statement in the NHL CBA articulating a commitment to speed states: "If ei-

¹⁹⁹ *Id.* at 90.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 106-07.

²⁰⁸ See generally *Oversight of the NFL Retirement System: Hearing Before the S. Comm. on Commerce Science and Transportation*, 110th Cong. (2007) (statement of Brent Boyd, Former NFL Football Player, Minnesota Vikings). See also *Jani v. Bell*, 209 Fed. Appx. 305 (4th Cir. 2006).

²⁰⁹ See NHL COLLECTIVE BARGAINING AGREEMENT, *supra* note 22.

ther the Club or the Player fail timely to comply with any of the requirements set forth in this Section 17.7, absent a showing of good cause, then such non-complying party shall be deemed to have acceded to the other party's position in such dispute."²¹⁰

NFL retirees claim to wait years for the benefits process to run its course.²¹¹ As one player, Brent Boyd, pronounced before Congress, the application process is bogged down by delays that cause the process to struggle to efficiently adjudicate and address benefits applications.²¹² In comparison, the NHL Plan is much more fluid, guided by a temporal framework agreed upon by all parties. Although eliminating delays is but one potential change to the NFL Plan, the transparency and guidance provided by a more streamlined process will lead to fewer disputes and greater overall acceptance.

VIII. FUTURE PROPOSAL

A wholesale change to the Bert Bell/Pete Rozelle NFL Retirement Plan and the NFL Supplemental Disability Plan can not occur overnight. The current structure has been in place for over thirty years with very few changes having ever occurred. However, the current Plan was collectively bargained for by both the NFL Players Association and the NFL Management Council. Given the structure of the National Football League, changes to benefit processes must be mutually agreed upon and entered into via new contractual agreements. The conduit for this change to occur is a new collective bargaining agreement negotiated between all interested parties. Though disparate interests may make this difficult, this significant change in policy must be bargained for.

The NFL is a billion dollar industry that has grown consistently throughout its existence.²¹³ Despite this growth, the NFL is financially stable.²¹⁴ Both the NFLPA and the NFL ownership are aware of the strong financial condition of the NFL; nevertheless, disagreements over the allocation of money are common. Bargaining between each entity does in fact occur, however, and both the NFLPA and NFL owners are looking to reevaluate the current system. Both parties are looking to alter the present system to better protect retired players struggling to subsist.

Currently, the federal government administers a plan providing benefits to individuals suffering from a significant disability that leaves them incapable of maintaining any paying job for at

²¹⁰ *Id.* at 90-92.

²¹¹ See generally *Jani*, 209 Fed. Appx. 305.

²¹² *Id.*

²¹³

See Forbes.com, NFL Team Valuations,

http://www.forbes.com/lists/2005/30/Revenues_1.html (last visited Feb. 1, 2008).

²¹⁴ *Id.*

least twelve consecutive months.²¹⁵ The SSD program requires an applicant to be disabled, whether physically, emotionally, or a combination of both.²¹⁶ The test to determine whether an individual is disabled does not consider whether the applicant can go back to the job they have lost or whether the applicant has found a job recently.²¹⁷ Instead, the SSD determination hinges on whether an applicant is physically or emotionally capable of performing a job that is generally available to the applicant in the workplace.²¹⁸ This standard is not black and white – factors to be considered are the training of the applicant, the applicant's ability to be trained, the severity of the physical and emotional injury, and whether the applicant will be capable of obtaining gainful employment in the future.²¹⁹ Furthermore, to obtain SSD benefits, an applicant must have a doctor confirm the disability.

Determining whether an individual is disabled is quite difficult and best left to a licensed physician. However, even physicians often have difficulty in determining whether an individual is actually disabled. In reaching a conclusion, which derives from a subjective weighing of factors, a physician must examine and evaluate numerous medical and non-medical issues. Despite this difficulty, the federal government requires a physician's determination of the presence of a disability for a player to be eligible to receive benefits.²²⁰ This pronouncement, along with other supplemental documentation, helps make up the initial SSD determination.²²¹

The Bert Bell/Pete Rozelle NFL Retirement Plan gives similar credence to medical evaluations determining the disability of an applicant. Though similar authority is given to medical evaluations, the Plan has the power to require further examinations if it is uncertain or uncomfortable with the initial evaluation. The NFL can request numerous opinions, thus creating an avenue for conflicting medical evidence to appear in an applicant's file. The NFL standard is significantly more challenging than the federal government standard. Many retired players qualify for SSD but have been denied equal benefits from the NFL. The presence of contradictory medical opinions, directly resulting from numerous evaluations, is one of the main reasons the NFL process is more difficult.

Despite unanimous and convincing medical evidence in his

²¹⁵ See Social Security Administration, *supra* note 22.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

favor, the NFL Supplemental Disability Plan found that Mike Webster was not disabled until years after his playing career was over. This determination foreclosed Webster from receiving the most lucrative Active Total and Permanent Disability Benefits.²²² One tactic used by the Plan in federal district court and in the court of appeals to challenge Webster's application was to proffer some contradictory bit of medical information and use this to show a broader lack of clarity among medical experts.²²³ In Webster's case, the bit of information used to contradict medical opinions was when Webster's injury occurred.²²⁴

Although quite often a clear majority of medical evidence strongly favors a retired player, there are generally instances in each case when a shred of evidence may be interpreted otherwise.²²⁵ In Mike Webster's case, the Plan contended that Webster's oncologist noted in 1996 that Webster's life "had really deteriorated recently."²²⁶ However, this physician, employed to treat Webster's cancer, failed to mention whether the injury occurred before 1996. The Plan contended that the failure to note this meant that the date of benefits should be 1996 rather than 1991.²²⁷ Three other mental health specialists, including the one chosen by the NFL Plan, believed the total and permanent disability began in 1991.²²⁸

The Plan's decision to ignore certain medical evidence while focusing on one piece of contradictory material typifies a tactic used by the Plan while highlighting the need for more definitive and uncontroverted medical evidence. With the opportunity to pass up or seek out medical opinions readily available, the Plan can elect to base its decision on what it determines to be the "strongest" piece of information, regardless of whether it is from the correct professional or is supported by other physicians.²²⁹ Given the standard of review, abuse of discretion, this finding by the full board is rarely overturned. A situation is thus created where controversial evidence can be used to deny, both before the Initial Claims Committee and the full Plan Board, a seemingly "strong" application.²³⁰ Only in Webster's case has this tactic backfired on the Plan, as the court ordered a reversal. In that case, however, the evidence in favor of Webster's Active and Total Per-

²²² See *Jani*, 209 Fed. Appx. at 311.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See *Jani*, 209 Fed. Appx. at 310.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 311-12.

²³⁰ *The National Football League's System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 15 (2007) (statement of Cy Smith, Attorney, Zuckerman Spaeder LLP).

manent Disability beginning in 1991 or earlier was overwhelming.

An additional concern presented by retirees is the substantial delays plaguing the Plan's decision-making process.²³¹ The Plan has very broad temporal guidelines in place, including a requirement that decisions be made at the next meeting of the full board if the application or appeal is received thirty days in advance.²³² However, the sheer lack of meetings by the Plan is problematic.²³³ The full Retirement Board meets only four times per year and this alone adds significant postponement of benefits decisions.²³⁴ Given the busy schedules of the Plan's trustees, the infrequency of meetings is understandable. However, it does not explain the need for all decisions to be made only at these in-person meetings. Meetings via the web or by telephone on a more frequent basis would not be overly burdensome and would add considerable speed to application decisions.

On top of the lack of meetings, new medical reports often take time for doctors to produce following an examination. These outstanding medical reports often push the full Board to delay its decision on an application until the next quarterly meeting.²³⁵ At each step in the process, whether it be the initial filing or appeal, outstanding records can substantially delay a proceeding for months if not years.²³⁶ In contrast, the NHL Disability Plan has strong temporal guideposts, leading to a binding decision within weeks.²³⁷ The pace of disability decisions, regardless of the ultimate outcome, eases the transition for retired players suffering from a disability.²³⁸ Movement towards quicker decisions must be negotiated into the next NFL CBA. Although imperfect, the above-mentioned idea suggesting the use of teleconferences or web conferences for Retirement Board meetings strikes a balance between the applicant's need for a speedier decision and the Plan's need to conduct a thorough review without imposing an overly burdensome obstacle on busy trustees.

In countering the argument that present delays are unnecessary and problematic, the Plan contends that no player is nega-

²³¹ *Id.* at 15-16.

²³² *Id.* at 15.

²³³ *Id.* See also National Football League Collective Bargaining Agreement, available at www.nflpa.org (last visited Feb. 1, 2008).

²³⁴ *The National Football League's System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 15 (2007) (statement of Cy Smith, Attorney, Zuckerman Spaeder LLP).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ NHL COLLECTIVE BARGAINING AGREEMENT, *supra* note 22, at 107.

²³⁸ *The National Football League's System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 15-16 (2007) (statement of Cy Smith, Attorney, Zuckerman Spaeder LLP).

tively impacted by delays in decision-making.²³⁹ “Regardless of when the process is completed, benefits can commence up to 42 months prior to the date the application is received by the Retirement Plan, depending on when the qualifying disability has arisen.”²⁴⁰ This argument is flawed in that it ignores the present need for financial resources. Although retroactive benefits are dispersed if a player’s benefit application is accepted, the period of waiting increases mental and emotional strain on the applicant, his family, and those around him, while also leaving the player without financial means necessary for survival. Although it is not feasible or efficient for a benefits decision to be made on the spot, unnecessary detours in the process must be eliminated, regardless of how the end result plays out. The NFL’s position, articulated by NFL Representative Dennis Curran, says to “rest assured, our paramount interest is to ensure that every application, in the fastest manner possible, receives the needed review for a correct decision.”²⁴¹ Announced before Congress, this pledge reinforces the NFL’s desire for efficient and effective decisions.²⁴² The NFL is open to change in the NFL Supplementary Disability Plan so long as due process is not sacrificed. Thus, pressure must be put on all parties involved to agree on stronger temporal guideposts within the benefits application process.

Changes to the current system can be made if they are done unilaterally by the NFL Management Counsel or the NFLPA and if they further the interests of each party involved. This is quite a difficult task, as one side can not unilaterally force the other to do anything. However, if one party chooses to spend money on the issue, this is not generally something another party can, or would want to, halt. At the October 2007 NFL Owners meetings in Philadelphia, the NFL further bolstered its efforts to support retired players by contributing \$10 million designated specifically for assisted living costs, cardiovascular screening procedures, and orthopedic replacement surgery.²⁴³ This money more than doubles the \$7 million previously earmarked at the July 2007 Owners meetings specifically targeted for common injuries and complaints raised by retired players.²⁴⁴ Although \$17 million is a significant sum, it comes to a mere \$531,250 donated by each owner in the

²³⁹ *The National Football League’s System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 4 (2007) (statement of Dennis Curran, Senior Vice President, National Football League).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 5.

²⁴² *Id.*

²⁴³ Michael O’Keeffe, *Mike Ditka: 10M Only a Start for Retired Players*, NYDAILYNEWS.COM, Oct. 28, 2007, http://www.nydailynews.com/sports/football/2007/10/28/2007-10-28_mike_ditka_10m_only_a_start_for_retired_.html.

²⁴⁴ *Id.*

thirty-two team league. This is the major complaint of the vocal retirees unhappy with the current system: when looking at the funds on a relative level, the size is small.²⁴⁵ However, when issuing press releases, these pre-emptive economic measures are good public relations tools that build public support.

Another complaint forged by retired players is that this funding is not attacking the core of the problem: fixing the plan and addressing head injuries.²⁴⁶ Although this is a valid argument, the above funding increases are concrete steps in the right direction that, at a minimum, generate greater assistance to retired players. Until active players are willing to collectively bargain a change in the pension and disability system, proactive efforts by owners are the only means available. Although this type of "donation" can be seen as a public relations ploy, it is still money directed at the problem.

Yet another critical problem facing the retired NFL player is a general lack of input and voice.²⁴⁷ Although the NFL Management Counsel and the NFLPA have implemented many new programs to assist players, a good portion of these programs only benefit active players rather than both active and retired players.²⁴⁸ Examples of active players benefiting from negotiated programs located in the CBA include matching of pre-tax contributions two-for-one, the NFL Player annuity program, five years of post-career medical coverage, health reimbursement accounts, and education plans.²⁴⁹ Although these are valuable assistance tools, they cater to active players, the entities to whom the NFLPA are most responsive.

The active players are vital to these programs, as they are the ones who fund them. Thus, it logically follows that those funding the programs would disproportionately benefit from them.²⁵⁰ However, with the rare exception, retired players are the individuals benefiting from the NFL Supplemental Disability Plan despite active players primarily funding it. Thus, the interests of those funding the program and those receiving the benefits are generally different. Given this, progress is more difficult and requires deft negotiation and compromise.

The major battle cry echoed by those in support of the current NFL pension and disability setup is that over the past fifteen

²⁴⁵ *Id.*

²⁴⁶ See Demarco, *supra* note 173.

²⁴⁷ See *Oversight of the NFL Retirement System: Hearing Before the S. Comm. on Commerce Science and Transportation*, 110th Cong. (2007) (statement of Daryl Johnston, Former NFL Player, Dallas Cowboys).

²⁴⁸ See NFLPA White Paper, *supra* note 41.

²⁴⁹ *Id.* at 23-25.

²⁵⁰ See *Oversight of the NFL Retirement System: Hearing Before the S. Comm. on Commerce Science and Transportation*, 110th Cong. (2007) (statement of Daryl Johnston, Former NFL Player, Dallas Cowboys).

years there has been tremendous growth.²⁵¹ NFL Commissioner Roger Goodell points out that for football-related Total and Permanent disability, annual payouts have increased “from \$48,000 in 1993 to \$224,000 [annually] today.”²⁵² Indeed, this is staggering growth. However, NFL revenues for the year 2006 were \$7.1 billion, which is billions higher than total revenue in 1993.²⁵³ When looking at disability benefits growth, it is important to consider it in the context of the NFL’s growth; examining advances in this light provides valuable perspective as to what percentage of general revenue and what percentage of new revenue is put towards retired players and their plight. Although the dollar change in benefits may in fact be significant, the percentage change in retiree spending may be small or even in the red. Statistics such as this can be manipulated for public relations benefits, which further complicates the negotiation process.

Greater outreach programs are one way to bridge the gap between retirees, the NFLPA, and the NFL Management Counsel.²⁵⁴ Although reaching out to find disabled, suffering, or struggling players would seem to directly contrast the normal functions of a disability trust, it is a productive option, as it would decrease the tension building among retirees while showing deference to those individuals that contributed to the NFL’s present success. Providing preliminary financial assistance, disability application tips, and a strong support system will assist many retired players during difficult periods of their post-career lives. Knowing that the NFL, the organization they committed their lives to, responds positively to them will garner goodwill and allow retired players to move forward in altering the Plan.

One other significant concern presented by retired players is the amount of money spent by the Plan on legal fees.²⁵⁵ Brent Boyd testified before Congress that the Plan spends \$3.1 million per year representing itself in claims against players and in disability benefits disputes.²⁵⁶ In contrast, baseball spent just \$170,000 for legal fees in the same year.²⁵⁷ Although larger legal fees in and of themselves mean little, particularly considering that there are sig-

²⁵¹ See *Oversight of the NFL Retirement System: Hearing Before the S. Comm. on Commerce Science and Transportation*, 110th Cong. (2007) (statement of Roger Goodell, Commissioner, National Football League).

²⁵² *Id.*

²⁵³ Armen Keteyian, *Disabling the NFL Players Union*, HOFMAG.COM, http://www.hofmag.com/index2.php?option=com_content&task=view&id=870&pop=1&page=0&Itemid=60.

²⁵⁴ See *Oversight of the NFL Retirement System: Hearing Before the S. Comm. on Commerce Science and Transportation*, 110th Cong. (2007) (statement of Daryl Johnston, Former NFL Player, Dallas Cowboys).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

nificantly more disability claims in football than baseball, the large difference in cost becomes disheartening when considering that only 121 players reported receiving disability benefits from the NFL Supplemental Disability Plan in 2006.²⁵⁸ This is a small number that highlights the vigor by which the NFL represents itself in these disputes.²⁵⁹

Groom Law represents the Plan and has assumed the role of legal counsel for many years.²⁶⁰ Although the firm has done quality legal work, some of the tactics used disappoint applicants. Though applicants are adversaries to Groom Law within the process, Groom Law is protecting a financial trust in which each retiree holds an interest.²⁶¹ Additionally, in representing the Plan and its trustees, Groom Law represents the NFLPA appointed fiduciary guardians.²⁶² Thus, players have a vested interest in the work done by the firm and the way in which it represents the Plan and the requisite parties. Although Groom Law does not have any interest in representing or protecting retired players seeking benefits, the complex relationship present has left retired players disillusioned. Coming to an agreement whereby more transparency regarding legal fees is present would lessen some of the discomfort many applicants and retired players have with the way in which their cases, and those of their fellow retired brethren, are treated.

NFL retirees subscribe to the theory that there are multiple problems with the disability policy that currently governs them; some of these issues are mentioned above, while others are less pertinent but still vitally important to the general scheme of retired players' benefits packages. The key element in creating positive change for the future will be to highlight what is needed to bring about an end to the current crisis. Negotiating for change regarding the most important issues will make addressing the smaller, less pertinent concerns easier. When this is done, positive, productive, and meaningful changes to the NFL Supplementary Disability Plan will occur. The future is promising, but filled with many potential potholes that could slow the process. An agreement on the most critical issues must come early within the collective bargaining process, affording all parties involved the opportunity to move forward and come to an agreement on the

²⁵⁸ *Id.*

²⁵⁹ The Plan spends over \$3 million dollars per year representing itself. *Id.*

²⁶⁰ *The National Football League's System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Dennis Curran, Senior Vice President, National Football League) at 1.

²⁶¹ See generally *Oversight of the NFL Retirement System: Hearing Before the S. Comm. on Commerce Science and Transportation*, 110th Cong. (2007) (statement of Brent Boyd, Former NFL Football Player, Minnesota Vikings).

²⁶² NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 70.

issues most important to each respective constituency.

IX. CONCLUSION

Moving forward, full transparency regarding all facets of the Plan is necessary. At the present time, meetings relating to the Plan are closed and votes are not publicized.²⁶³ Though publicizing votes may not always and unequivocally be in the best interests of the Plan, the information gained is valuable and does not create undue harm. Although the publication of these materials to NFLPA members (and retired players) may not alone create a more favorable climate for retirees, it will ease the disability application process by creating a greater comfort with the backroom, behind-the-scenes decisions made by the Plan. The retiree's contention is that if there is nothing to hide and no hidden agenda in place, secrecy and a lack of clarity is both unacceptable and unnecessary. While some information must be kept confidential, transparency and openness within the process will help bring about greater communication and acceptability within the process on the whole.

A good faith effort by all major parties involved, the NFLPA, the NFL Management Counsel, and NFL retirees, can lead to positive change. The system currently in place is not irreparable; through the collective bargaining structure in place, change will happen. It is up to the parties involved to determine what changes to implement and what goals to prioritize during the next round of collective bargaining. With proper foresight, and considerations of past mistakes as well as the future interests of all parties, some change can and likely will occur. Prior to the changes occurring, congressional hearings and further negotiations will begin to bridge the gap between the parties involved, bringing current problems to the forefront and subsequently setting the stage for successful negotiations. Although the structure has not currently been changed in any completely acceptable fashion, steps are being taken by all parties to move towards the solution needed to end the current crisis in place.

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²⁶³ The Boyd Plan, in *Oversight of the NFL Retirement System: Hearing Before the S. Comm. on Commerce Science and Transportation*, 110th Cong. (2007) (statement of Brent Boyd, Former NFL Football Player, Minnesota Vikings).

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