

From the Gridiron to the Golden State: NFL Players' Fight for Workers'

Kyle M. Tompkins

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment and Sports Law Commons](#)

Repository Citation

Kyle M. Tompkins, *From the Gridiron to the Golden State: NFL Players' Fight for Workers'*, 23 Marq. Sports L. Rev. 479 (2013)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol23/iss2/4>

This Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

FROM THE GRIDIRON TO THE GOLDEN STATE: NFL PLAYERS' FIGHT FOR WORKERS' COMPENSATION RIGHTS IN CALIFORNIA

KYLE M. TOMPKINS*

I. INTRODUCTION

Football is not only a physical and dangerous game, but it is also a hazardous profession for those who make a living playing the sport. After years of bone-crushing hits and blows to the head, countless retired National Football League (NFL) players are experiencing the effects of long-term, disabling injuries.

As a result, professional football players began filing workers' compensation claims in California because the system works to the advantage of professional athletes employed in other states by offering benefits not available in other states.¹ Slowly over time, hundreds of players with claims filed in California have received awards or settlements of over \$100,000 each as compensation for long-term injuries sustained while playing football.² Moreover, the current debate over the causal link between football head injuries and the onset of dementia-like diseases is likely to spur even more controversy over football injuries in the coming years.³

Take the unfortunate story of Ron Johnson. Once a feared running back on the gridiron at the University of Michigan and for the New York Giants, he is now only a shell of his former self.⁴ Johnson was diagnosed with Alzheimer's disease in 2008, and he now lives in an assisted living community

* Kyle M. Tompkins is a third-year law student at Marquette University Law School. Upon graduation in May 2013, he will earn a Certificate in Sports Law from the National Sports Law Institute. Kyle is a 2010 graduate of the University of Illinois at Urbana/Champaign, where he earned a B.A. in Political Science with a minor in International Studies. Kyle currently serves as the Executive Editor of the *Marquette Sports Law Review*.

1. Alan Schwarz, *Teams Dispute Workers' Comp Rights*, N.Y. TIMES, Apr. 7, 2010, at B11.

2. *Id.*

3. See Mark Noonan, *Minding Dementia's Impact on Workers' Comp*, RISK & INS. (Aug. 5, 2010), <http://www.riskandinsurance.com/story.jsp?storyId=494391032>.

4. William C. Rhoden, *Ex-Giant's Case Is a Window on N.F.L. Aid*, N.Y. TIMES, Sept. 19, 2011, at D1.

at the age of sixty-three because he cannot care for himself.⁵ The NFL's 88 Plan, which was designed to help those retired players suffering from dementia and other long-term disabilities, provides Johnson's family with \$7333 per month to help with the costs of the assisted living.⁶ However, his costs at the assisted living facility amount to over \$8000 per month when including his medications.⁷ During his playing career, Johnson was never diagnosed with a concussion, but it is widely believed that football contributed to his condition.⁸

Like Johnson, after many NFL players retire, they continue to suffer from long-term mental and physical injuries that become expensive to treat over many years,⁹ and players fail to receive adequate compensation. For instance, despite the blockbuster multi-million dollar, multi-year deals discussed in the media, most salaries are modest and short in comparison. The median salary of an NFL player in 2011 was \$770,000 with a median career length of 3.5 years.¹⁰ Although players do in fact receive a high salary, it is typically for a short length of time, and cumulative trauma could extremely limit their employment opportunities for the rest of their lives. Consequently, after they exhaust their resources through contractual provisions or the NFL's negotiated benefit programs for former players, which some former players believe to be inherently flawed,¹¹ many players have turned to California's workers' compensation system.

Although California is not the only state where NFL players choose to file workers' compensation claims,¹² it is the general focus of this Comment. California's workers' compensation system offers comparatively greater

5. *Id.*

6. *Id.*

7. *Id.*

8. *See id.*

9. *See* Peter King, *One Team, 25 Years On*, SPORTS ILLUSTRATED, Dec. 12, 2011, at 74, 76–77; *see also* Jim Schenke, *Purdue Research Supports Key Element of Concussion Lawsuit*, PURDUE UNIV. (June 11, 2012), <http://www.purdue.edu/newsroom/general/2012/120611T-TalavageNFLPA.html>.

10. *The Average NFL Player*, BLOOMBERG BUSINESSWEEK (Jan. 27, 2011), http://www.businessweek.com/magazine/content/11_06/b4214058615722.htm.

11. NFL, COLLECTIVE BARGAINING AGREEMENT arts. 41, 58, 61–62, 64–65 (2011) [hereinafter 2011 NFL CBA]; Class Action Complaint (Jury Trial Demanded) ¶ 61, *Eller v. NFL Players Ass'n*, 872 F. Supp. 2d 823 (D. Minn. 2012) (No. 11CV02623) [hereinafter *Eller Complaint*].

12. Several Washington Redskins players have filed workers' compensation claims in Maryland because it offered greater benefits than Virginia, where the team and insurer argued a majority of employment took place. Darren Rovell, *Teams Face Workers' Comp Threat*, ESPN (Aug. 30, 2012), http://espn.go.com/espn/otl/story/_/id/8316657/nfl-teams-facing-large-bills-related-workers-compensation-claims-head-injuries.

benefits than other states, such as awards for injuries based on cumulative trauma.¹³ For NFL teams and their insurers, though, these claims are becoming increasingly expensive,¹⁴ and they are finding legal ways to keep claims out of California. Despite the cost to the NFL, former and current NFL players have rights as workers to compensation for workplace injuries (based on a single game or an entire career), and the law should not foreclose their ability to be made whole through workers' compensation in California based on its interest in such claims.

Section II of this Comment briefly describes workers' compensation law with a focus on California and the NFL. It also demonstrates how the Full Faith and Credit Clause of the U.S. Constitution affects California's jurisdictional reach in these types of claims. Section III then analyzes the various ways NFL teams have challenged California's jurisdiction over workers' compensation claims filed by NFL players and reviews the current state of the law based on a recent Ninth Circuit decision. Section IV considers alternative means to ensure NFL players receive adequate compensation should the NFL, its teams, and advocates successfully close the legal loophole that players take advantage of within California's workers' compensation system. Section V concludes that former NFL players should be entitled to compensation for their workplace injuries through the force of law because the currently available alternatives fail to adequately compensate them.

II. CALIFORNIA WORKERS' COMPENSATION LAW AND THE FULL FAITH AND CREDIT CLAUSE

California's workers' compensation law allows professional football players to seek redress for injuries suffered throughout their entire playing careers. Thus, an understanding of workers' compensation law in general, California's specific statutory provisions, and the Full Faith and Credit Clause are critical to fully grasping why NFL players file claims for workers' compensation in the first place and why they file in California specifically.

A. *California's Workers' Compensation System*

In general, workers' compensation law is a creature of statutes intended to compensate employees for workplace injuries, but the manner in which these benefits are provided varies widely between the fifty states.¹⁵ The common

13. *Id.*

14. *Id.*

15. See Matthew J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 978–79 (2d ed. 2009).

requirements between each system, though, are: (1) the individual seeking benefits is statutorily defined as an employee; and (2) the injury “arises out of” or “in the course of” the employment.¹⁶ Furthermore, modern workers’ compensation systems function as strict liability regimes as employees do not have to prove any breach of a duty or violation of statutory liability, and common law defenses, such as contributory negligence and assumption of the risk, are not available to employers.¹⁷ In exchange, employees “relinquish[] rights to pursue tort actions against their employers” that could result in larger awards.¹⁸

Professional athletes are employees for purposes of workers’ compensation in most cases, so they are entitled to the statutory benefits under specific statutory frameworks.¹⁹ However, because professional sports is a unique industry, some states offer athletes better protections or greater benefits than other states, and several aspects of California’s workers’ compensation system make it especially appealing to former NFL players.²⁰

As an initial matter, professional athletes are included within the statutory definition of employee in California.²¹ Another provision allows employees to recover for injuries that are either specific or cumulative in nature.²² Cumulative injuries are defined as “occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment.”²³ For professional football players, this distinction is critical because repetitive trauma is inherent to playing football, and many players continue to suffer from the long-term effects well after they retire.²⁴

Additionally, other provisions provide evidence of California’s public policy supporting its interest in adjudicating claims that arise within its borders. For instance, section 5000 of the California Labor Code states that no agreement shall exempt any employer of its liability to compensate its employees under workers’ compensation.²⁵ Under this section, it is reasonable to infer that contractual clauses that may deprive California

16. *Id.* at 979.

17. *Id.* at 978.

18. *Id.*

19. *See id.* 978–79.

20. *See* Rovell, *supra* note 12.

21. *See generally* CAL. LAB. CODE § 3351 (West 2011).

22. *Id.* § 3208.1.

23. *Id.*

24. *See* King, *supra* note 8, at 74, 76–77; *see also* Schenke, *supra* note 8.

25. *See* § 5000.

employees of the benefits they are entitled to under its laws or that may substitute such benefits for less favorable ones, such as choice of law or forum selection, are disfavored by California. Furthermore, section 3600.5 addresses coverage of out-of-state employees temporarily employed within California.²⁶ Under California law, any employee, whether based in California or elsewhere, is subject to the Workmen's Compensation Insurance Act if the injury occurred within the state.²⁷ Consequently, any employee, even if only temporarily employed in California, may collect from its employer using California's workers' compensation system as long as the work injury occurred within its borders. For instance, a professional athlete may collect workers' compensation in California for cumulative trauma by alleging a contributing injury occurred in just a single athletic event within California's borders. Thus, this provision reinforces the notion that California favors its own system of benefits over others and provides the statutory authority allowing NFL players that never played for a California-based team to file claims.

Yet, this beneficial employee treatment is not absolute. Subsection 3600.5(b) includes a reciprocity provision exempting an out-of-state employer from the benefits under the Act if the employer's home state also includes a similar reciprocity provision in its workers' compensation laws.²⁸ Meaning that if an out-of-state employer is located in a state that would apply California workers' compensation law to a California employee injured within its borders, then California similarly would apply the governing law of the out-of-state employer.²⁹

California's strong public policy in favor of adjudicating claims arising from within its own borders is clearly demonstrated through these various provisions. However, when an employer located outside of California seeks to challenge California's broad jurisdiction pursuant to its laws absent such a reciprocity provision, courts have turned to the Full Faith and Credit Clause.

B. Full Faith and Credit Clause

The U.S. Constitution states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which

26. *See generally id.* § 3600.5.

27. *Id.* § 3600.5(b).

28. *Id.*

29. *See id.*

such Acts, Records and Proceedings shall be proved, and the Effect thereof.”³⁰ Congress later codified the clause in U.S. Code § 1738, declaring that any laws or judicial decisions in one state shall have the same effect in another.³¹

By challenging jurisdiction over out-of-state workers’ compensation claims made by employees, employers or their insurance companies argue that other states’ judgments should not be given effect within their state’s borders.³² Consequently, the application of the Full Faith and Credit Clause in cases challenging California’s jurisdiction over workers’ compensation claims³³ exemplifies the concept of giving effect to a state’s right of autonomy over claims within its own borders. States have various interests in adjudicating workers’ compensation claims such as being the place where the employee entered into a contract, where the employee resided, or where the employee’s injury occurred.³⁴ Further, the test of whether to apply a particular state’s law, according to the Full Faith and Credit Clause, is not a weighing of one state’s interest against that of another, but it is whether that state’s interest “is legitimate and substantial in itself.”³⁵ As such, California established its legitimate interest in broad jurisdiction over workers’ compensation claims through a pair of Supreme Court decisions in the 1930s and a California case interpreting California’s workers’ compensation laws in conjunction with the Full Faith and Credit Clause.³⁶

C. Application of Full Faith and Credit to Jurisdiction Issues in California Workers’ Compensation

The Supreme Court first applied the Full Faith and Credit Clause to workers’ compensation cases in California in a non-sports context, which established the analysis framework for sports. In *Alaska Packers Ass’n v. Industrial Accident Commission*, the Supreme Court upheld the validity of a workers’ compensation award in California because the Full Faith and Credit Clause did not mandate the application of Alaska law.³⁷ In this case, a salmon canner entered into an employment contract in California for work primarily to

30. U.S. CONST. art. IV, § 1.

31. 28 U.S.C. § 1738 (2006).

32. *See, e.g.*, *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 539 (1935).

33. *See generally, e.g.*, *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493 (1939); *Alaska Packers*, 294 U.S. 532.

34. 9 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW §142.03 (2012).

35. *Id.*

36. *See generally, e.g.*, *Pac. Emp’rs*, 306 U.S. 493; *Alaska Packers*, 294 U.S. 532; *Injured Workers’ Ins. Fund v. Workers’ Comp. Appeals Bd.*, 66 Cal. Comp. Cas. 923 (Ct. App. 2001).

37. *Alaska Packers Ass’n*, 294 U.S. at 548–50.

be performed in Alaska.³⁸ The employment contract explicitly provided that the parties would be bound by Alaska workers' compensations laws; however, after being injured in Alaska, the employee filed for and was awarded workers' compensation under California law related to the time that he spent in California.³⁹ The Supreme Court held that California had an interest in adjudicating an employment relationship entered into within its border and that its interest was not inferior to Alaska's interest, where the performance of the contract took place.⁴⁰

The extent of California's jurisdictional reach was further developed in *Pacific Employers Insurance Co. v. Industrial Accident Commission*.⁴¹ In this case, the Supreme Court held that the Full Faith and Credit Clause did not require California to apply Massachusetts' workers' compensation law even though Massachusetts claimed exclusive jurisdiction over all claims made by injured employees of the state.⁴² The employee claiming workers' compensation in California was a resident of Massachusetts and was employed under a contract entered into in Massachusetts.⁴³ However, the employee was injured in California when he was temporarily working for his employer in that state.⁴⁴ In its decision, the Supreme Court affirmed the California award to the employee and concluded that applying Massachusetts law interfered with California's express policy of "apply[ing] its own provisions for compensation, to the exclusion of all others."⁴⁵

Using the Full Faith and Credit Clause, the U.S. Supreme Court established precedent that one state may not legislate for another state and may not project its laws onto another state's jurisdiction when the state's legitimate interest in the claim is at issue. Specifically within the realm of workers' compensation, a state may not project its own laws into another by claiming an exclusive right to adjudicate the claim of an employee, such as an NFL player, who was injured while temporarily employed in another state because the state of injury has a legitimate interest in the outcome.⁴⁶ NFL players practice and play games in the state where their team is based, but due to the nature of a sixteen-game season, including eight away games, the players will be

38. *Id.* at 538.

39. *Id.* at 538–39.

40. *Id.* at 549–50.

41. See generally *Pac. Emp'rs*, 306 U.S. 493.

42. *Id.* at 498, 504–05.

43. *Id.* at 497–98.

44. *Id.* at 498.

45. *Id.* at 504–05.

46. See *supra* notes 37–45 and accompanying text.

temporarily employed in other states during most away games.⁴⁷ Thus, by establishing a state's right to adjudicate claims where an employee was injured while only temporarily within its borders, the Supreme Court laid the foundation for NFL players to file claims in California when they were injured during a game played within the state.

D. California's Jurisdiction over Workers' Compensation Claims in Professional Sports

A California case built upon the foundation laid in *Alaska Packers* and *Pacific Employers* by refusing to review California's jurisdiction over an NFL player's cumulative trauma claim when the claimant played only a single game in the state.⁴⁸ In *Injured Workers' Insurance Fund v. Workers' Compensation Appeals Board*, the California appellate court denied the review of California's jurisdiction over a former Baltimore Colts player's workers' compensation claim because Maryland, the state of employment, offered no extra-territorial provision in its own laws that would exempt the Colts from California's exclusive jurisdiction.⁴⁹

Numerous teams employed the player during his career including the Green Bay Packers, Buffalo Bills, and Baltimore Colts, but it was during his time with the Colts that he played his only game in California.⁵⁰ His claim, though, was based on cumulative trauma suffered throughout his career as a professional football player.⁵¹ Within his claim for cumulative trauma, he also alleged that he suffered a specific injury while he played his only game in California.⁵² Even though the player was not a resident of California, did not enter into his employment contract in California, and worked only very temporarily in California, California properly exercised its jurisdiction over the claim.⁵³ Consequently, this case can be said to have opened the door for

47. Only a few NFL teams are located within the same state as their adversaries, thus making interstate travel necessary. For example, if the Houston Texans were to play the Dallas Cowboys, there would be no out-of-state temporary employment implications. However, to play against the other teams within the Texans' division, the players would at least be temporarily employed in Indiana, Tennessee, and Florida for one game each season. See *Houston Texans Schedule - 2012*, ESPN, http://espn.go.com/nfl/team/schedule/_/name/hou/houston-texans (last visited Mar. 25, 2013).

48. *Injured Workers' Ins. Fund v. Workers' Comp. Appeals Bd.*, 66 Cal. Comp. Cas. 923, 925-26 (Ct. App. 2001).

49. *Id.*

50. *Id.* at 923.

51. *Id.*

52. *Id.*

53. *Id.* at 924-26. It should be noted that California's jurisdiction was only proper for the claims against the Baltimore Colts. *Id.* at 925. The Workers' Compensation Appeals Board

NFL players to file workers' compensation claims in California based on cumulative trauma.

III. CHALLENGING CALIFORNIA'S JURISDICTION

Hundreds of NFL players not playing for California teams have filed claims in the California court system to collect workers' compensation,⁵⁴ and teams are determined to keep them out. To start, challenging these claims necessarily implicates federal labor law because the terms of player employment are governed by a collective bargaining agreement between the National Football League Players Association (NFLPA) and the National Football League Management Council (NFLMC).⁵⁵ As such, when players violate specific provisions concerning workers' compensation in a collective bargaining agreement, the proper forum for resolution of those claims is arbitration.⁵⁶ Moreover, the U.S. Court of Appeals for the Ninth Circuit weighed in on the issue of California's jurisdiction in a recent review of an NFL workers' compensation arbitration award.⁵⁷ Despite the abundance of awareness brought to this issue, the question of whether NFL players can continue filing workers' compensation claims in California is still unclear at best, but recent trends weigh against the players' rights to choose where to file claims.

A. State Law Claims

As NFL workers' compensation issues began to garner media attention in the late 2000s, the Cincinnati Bengals began their fight against California's jurisdiction in Ohio courtrooms.⁵⁸ In 2008, the Bengals sought injunctions in Hamilton County, Ohio, against several of their former players, alleging they breached contractual provisions relating to Ohio's exclusive jurisdiction over workers' compensation claims by filing claims in California.⁵⁹ Subsequently,

reconsidered the claims against the Packers and Bills because the player never played in California with those teams, meaning that California had no jurisdiction over them. *Id.*

54. Schwarz, *supra* note 1.

55. *See* Labor Management Relations (Taft-Hartley) Act §301(a), 29 U.S.C. § 185(a) (2006); NFL, COLLECTIVE BARGAINING AGREEMENT art. II (2006) [hereinafter 2006 NFL CBA]. Although the NFLPA and NFLMC negotiated a new collective bargaining agreement in 2011, this Comment mainly refers to and focuses on provisions of the collective bargaining agreement from 2006 because it serves as the basis for the arbitration awards and the appeals opinion referred to in this and later sections.

56. *See id.* at art. IX, §§ 1, 6, art. X, §7.

57. *See generally* Matthews v. NFL Mgmt. Council, 688 F.3d 1107 (9th Cir. 2012).

58. Schwarz, *supra* note 1.

59. Cincinnati Bengals, Inc. v. Abdullah, No. 1:09-CV-738, 2010 U.S. Dist. LEXIS 55252, at

the players removed the claim from the state court because the product of collective bargaining is subject to the exclusive jurisdiction of federal courts.⁶⁰ To maintain their claims made under Ohio law, the Bengals challenged the removal, arguing that the exclusive remedy provisions of the contracts implicated a substantial question of Ohio's workmen's compensation law and that the complaint was "nonremovable" under federal law.⁶¹ The court disagreed and concluded that the Bengals' complaint did not allege any statutory violation of the exclusive remedy provision but rather alleged a state law breach of contract claim that did not involve a substantial question of Ohio's workmen's compensation law.⁶²

The court also confirmed the federal court's jurisdiction by stating that it "seem[ed] clear that the resolution of the Bengals' claims require[d] the interpretation of the contract clause . . . [to determine whether] players who have filed actions in California have violated their contracts."⁶³ In a subsequent opinion, the Ohio district court confirmed that the benefits awarded by a California tribunal were properly within California's jurisdiction under the Full Faith and Credit Clause,⁶⁴ affirmed California's substantial interest in the players' claims,⁶⁵ and granted the players' motion to compel arbitration.⁶⁶

According to this case, teams such as the Bengals cannot effectively challenge players' California workers' compensation claims through state common law remedies due to preemption by federal labor law. Teams may prefer to keep claims within their own state courts because these courts may be more favorable for a variety of reasons, such as local fan support and revenue generation. However, as discussed below, it is not necessarily true that a state court will be more favorable to its home team than an arbitrator or a federal court.⁶⁷

B. Arbitration

Two NFL arbitrators have specifically addressed the issue of forum

*2 (S.D. Ohio Jan. 6, 2010).

60. *Id.* at *4.

61. *Id.* at *12–14.

62. *See id.* at *19–20.

63. *Id.* at *21.

64. *Cincinnati Bengals, Inc. v. Abdullah*, No. 1:09-CV-738, 2010 U.S. Dist. LEXIS 54102, at *15–16 (S.D. Ohio Apr. 28, 2010).

65. *See id.* at *16.

66. *Id.* at *33.

67. *See infra* Part III.B–C.

selection and choice of law clauses in written awards, ultimately leading to a body of law in favor of teams and management in the NFL.

Under article IX of the 2006 NFL Collective Bargaining Agreement (2006 NFL CBA), any dispute regarding the interpretation or application of the collective bargaining agreement or the uniform player contract, which cannot be resolved by other means, is submitted to final and binding arbitration.⁶⁸ Due to the nature of arbitration as a private agreement between parties, the language of the disputed contract controls, and arbitrators base their decisions entirely on what was agreed upon.⁶⁹ As such, in circumstances related to California's jurisdiction over workers' compensation claims, disputes over the specific language in the uniform player contract regarding choice of law and exclusive jurisdiction arise.⁷⁰ Thus, arbitrators will not take California's interest in adjudicating the claim into consideration like a judicial court would.

On August 5, 2010, Arbitrator Calvin William Sharpe issued an arbitral award against Bruce Matthews, a former Tennessee Titans football player.⁷¹ The dispute arose when the Tennessee Titans filed a grievance against Matthews for filing a workers' compensation claim in California after he retired from a nineteen-year career.⁷² The team argued that filing a workers' compensation claim in California violated forum selection and choice of law clauses in Matthews's player contract with the team, which required any such claim to be filed in Texas⁷³ or Tennessee and to be governed by each state's respective laws.⁷⁴ Specifically, the Titans cited paragraph 26D, which stated:

Jurisdiction of all workers compensation claims and all other matters related to workers compensation . . . and including all issues of law, issues of fact, and matters related to workers compensation benefits, shall be exclusively determined by and exclusively decided in accordance with the internal laws of the State of Tennessee without resort to choice of law rules.⁷⁵

68. 2006 NFL CBA, *supra* note 55, art. IX, §§ 1, 8.

69. See ELKOURI & ELKOURI, HOW ARBITRATION WORKS 428, 435 (Alan M. Ruben ed., 6th ed. 2003).

70. See generally NFL Mgmt. Council v. NFL Players Ass'n (Aug. 5, 2010) (Sharpe, Arb.), http://www.americanbar.org/content/dam/aba/migrated/2011_build/entertainment_sports/matthews_v_tennessee_titans.authcheckdam.PDF [hereinafter Matthews Arbitration]; Chi. Bears v. Haynes (Apr. 11, 2011) (Townley, Arb.), http://www.pcllp.net/Bears_Worrell.pdf [hereinafter Bears Arbitration].

71. See generally Matthews Arbitration, *supra* note 70.

72. *Id.* at 3.

73. A claim could be filed in Texas under the contract because the Tennessee Titans were preceded as a franchise by the Houston Oilers. See *id.*

74. *Id.* at 4.

75. *Id.* at 11.

The arbitrator also considered paragraph 22 of Matthews's contract because it dealt with choosing Tennessee law to govern the agreement.⁷⁶

The Titans contended that paragraph 26D was a forum selection clause that gave exclusive jurisdiction to the state of Tennessee and prohibited filing of workers' compensation claims in other states, such as California.⁷⁷ According to Arbitrator Sharpe, the clause did not provide Tennessee with exclusive jurisdiction but, rather, reflected a choice of law provision because the provision merely meant jurisdiction in workers' compensation cases is one of many issues that will be decided by Tennessee law.⁷⁸ Therefore, Matthews's contract did not preclude him from filing his claim in California.⁷⁹

Unfortunately for Matthews, the inquiry into the propriety of his California claim was not complete. While the claim remained in California, a California tribunal would determine which state's law to apply and created the possibility of Tennessee law being rejected despite the choice of law clause.⁸⁰ However, the effect of the choice of law clause actually helped the Titans because it foreclosed on Matthews's ability to argue for the application of California law even while in a California forum.⁸¹ The choice of law clause in the contract was mutually agreed upon and placed an equal responsibility on the parties to ensure the application of Tennessee law.⁸² Consequently, through Arbitrator Sharpe's authority to interpret and enforce the provisions of the Matthews's contract, he issued an award allowing the claim to remain in California but requiring the parties to stipulate to proceed under Tennessee law.⁸³

In 2011, another arbitrator heard a dispute regarding the application of a player contract choice of law and forum selection clauses that ran contrary to California's jurisdiction over workers' compensation claims. In this instance, the Chicago Bears filed grievances with the NFL against former players Michael Haynes, Joe Odom, and Cameron Worrell for filing workers' compensation claims in California and violating their player contracts (Bears' contracts).⁸⁴ Paragraph 33 of the Bears' contracts stated, in part, "Furthermore, the exclusive jurisdiction for resolving injury related claims

76. *Id.* at 13–14.

77. *Id.* at 4.

78. *Id.* at 11–12.

79. *Id.* at 14.

80. *Id.*

81. *Id.* at 15.

82. *Id.*

83. *Id.* at 18.

84. Bears Arbitration, *supra* note 70, at 1–2.

shall be the Illinois Industrial Commission of the State of Illinois, and in the case of Workers Compensation claims the Illinois Workers Compensation Act shall govern.”⁸⁵

Although this provision seems similar to paragraph 26D in the Matthews arbitration, Arbitrator Rosemary Townley reached a different conclusion.⁸⁶ Arbitrator Townley found that the language in the provision clearly reflected a forum selection clause, as it specified that any workers' compensation claim was subject to Illinois law, thus falling within the exclusive jurisdiction of the Illinois Industrial Commission.⁸⁷ Therefore, unlike in the Matthews arbitration, the former players violated the Bears' contracts by filing workers' compensation claims in California and were ordered to cease and desist the pursuit of their claims.⁸⁸

Ultimately, these two arbitration awards had the same effect on the players despite being decided on different grounds: the awards precluded the players from receiving the favorable benefits of California's workers' compensation system.⁸⁹ However, the distinction between the awards is worth taking notice of for future disputes over this issue because it emphasizes the importance of carefully drafting individual player contracts. The Matthews award was based on the finding of a choice of law clause for any workers' compensation claim,⁹⁰ the Bears award was based on the finding of a forum selection clause.⁹¹ Arguably, the more specific language used in the Bears' contracts provided a difficult obstacle for the players to overcome because the clause prohibited the claim from even being brought in the state.⁹² If the language in the Matthews's player contract would have been slightly more ambiguous or interpreted just a little differently, then a California court could have decided which state's laws to apply, and Matthews could have proceeded under California's favorable laws.⁹³

Subsequently, Matthews and the Bears players petitioned federal courts to

85. *Id.* at 3.

86. Compare Matthews Arbitration, *supra* note 70, at 10–15, 18 (determining that the clause in the standard player contract was not a forum clause, but a law clause, and that the California Workers Compensation Board could only hear the matter if it applied Tennessee law), with Bears Arbitration, *supra* note 70, at 22–28 (illustrating that the standard player contract had both a forum clause and a law clause that prevented the players from filing workers' compensation claims in California).

87. Bears Arbitration, *supra* note 70, at 27.

88. *Id.* at 29.

89. *Id.*; Matthews Arbitration, *supra* note 70, at 18.

90. Matthews Arbitration, *supra* note 70, at 18.

91. Bears Arbitration, *supra* note 70, at 29.

92. *See id.*

93. *See* Matthews Arbitration, *supra* note 70, at 10–15, 18.

vacate the arbitrators' awards with little success.⁹⁴ Matthews then appealed his case to the U.S. Court of Appeals for the Ninth Circuit.⁹⁵

C. Ninth Circuit Case

On appeal in the Ninth Circuit, Bruce Matthews sought to vacate the arbitration award barring him from pursuing his workers' compensation claim in California.⁹⁶ He claimed that the award violated California public policy, federal labor policy, and the Full Faith and Credit Clause.⁹⁷ The court affirmed the award on the basis that California lacked jurisdiction over Matthews's claim in the first place, but the holding was very fact-specific and limited to the case at hand.⁹⁸ As such, although the court ruled against Matthews, it did not completely foreclose on the possibility of former NFL players pursuing legitimate claims in California.

Federal courts will rarely vacate arbitration awards except in a few narrow circumstances such as an alleged violation of public policy or an arbitrator exceeding his power.⁹⁹ In this case, Matthews first alleged that the award violated California's public policy against contractual agreements "waivi[ng] an employee's right to seek California workers' compensation benefits"¹⁰⁰ Matthews supported his conclusion of a "well-defined and dominant [no waiver] public policy" in California with various statutory provisions as well as case law on the matter.¹⁰¹ However, the court concluded that California's public policy only extended the right to seek workers' compensation benefits to employees who are eligible to receive benefits under the statutory regime.¹⁰² In this case, Matthews failed to establish that his claim fell within the scope of the court's interpretation of California's "no waiver" rule because nothing in the record supported a conclusion that he

94. *See generally* NFL Players Ass'n v. NFL Mgmt. Council, No. 10CV1671, 2011 U.S. Dist. LEXIS 865 (S.D. Cal. Jan. 5, 2011) (illustrating Bruce Matthews's unsuccessful appeal of the arbitration decision preventing his workers' compensation claim in California); *Chi. Bears Football Club, Inc. v. Haynes*, 816 F. Supp. 2d 534 (N.D. Ill. 2011) (illustrating the former Bears players' unsuccessful attempt to vacate the arbitrator's awards in favor of the Chicago Bears).

95. *See generally* *Matthews v. NFL Mgmt. Council*, 688 F.3d 1107 (9th Cir. 2012) (representing Bruce Matthews's appeal to the Ninth Circuit to have the arbitration decision rendered against him vacated).

96. *Id.* at 1109.

97. *See id.* at 1109–10.

98. *See id.* at 1110.

99. *See id.* at 1111, 1115.

100. *Id.* at 1111.

101. *Id.*

102. *Id.* at 1111–12.

suffered any discrete injury while temporarily employed within California.¹⁰³ Claiming every game he played in, including those within California, contributed to the cumulative injuries he suffered from was an insufficient theory to justify extending California's public policy because the court was uncertain whether a California tribunal would even accept coverage of an employee under these circumstances.¹⁰⁴ Thus, the court failed to find any violation of California's public policy.

Matthews also failed to convince the court that the award violated federal labor policy against bargaining away minimum labor standards and the Full Faith and Credit Clause.¹⁰⁵ The court could not find a violation of labor policy because, as mentioned above, California's jurisdiction over the claim was unclear at best.¹⁰⁶ As such, Matthews was unable to show that he was deprived of any benefit he was entitled to under California law.¹⁰⁷ Similarly, he could not show that the arbitrator exceeded his power by choosing to ignore the application of California law during the proceedings in violation of the Full Faith and Credit Clause.¹⁰⁸ According to the court, nothing in the facts of the case justified California's right to apply its law because, again, Matthews could not show California had a substantial interest in adjudicating the claim due to insufficient contacts.¹⁰⁹

Within the opinion, the court identified a clear standard by stating, "An employee who makes a prima facie showing that his claim falls within the scope of California's workers' compensation regime may indeed be able to establish that an arbitration award prohibiting him from seeking such benefits violates California policy."¹¹⁰ Though the court introduced this standard within its discussion of California jurisdiction, the standard also could have been applicable to Matthews's other arguments regarding the arbitrator's power and federal labor policy if the court had announced that California had jurisdiction over the claim.¹¹¹

Although the court clearly concluded that Matthews did not meet this standard, it is possible he could have qualified for benefits upon the determination of a California tribunal despite the court's uncertainty

103. *Id.* at 1113 & n.4.

104. *Id.* at 1114.

105. *Id.* at 1114–16.

106. *Id.* at 1115.

107. *Id.*

108. *Id.* at 1115–17.

109. *Id.* at 1116.

110. *Id.* at 1114.

111. *See id.* at 1115–17.

determination. The court's opinion was flawed when it distinguished the facts of Matthews's case from existing California cases regarding Matthews's failure to justify the application of California law based on his limited contacts with the state. To the contrary, as discussed earlier in *Injured Workers' Insurance Fund*, a California tribunal upheld its jurisdiction over a former NFL player's workers' compensation claim in California when he played only *one* game within the state with the Baltimore Colts.¹¹² In Matthews's case, the court actually took judicial notice that his teams played *thirteen* games in California during his career.¹¹³ The court's opinion failed to take the Colts player's case into account when it decided that the legitimacy of Matthews's claim in California was unclear; as *Injured Workers'* shows, it is plausible that a California tribunal could accept a cumulative trauma claim based on injuries suffered during thirteen games played in California.

Despite the court's perhaps erroneous jurisdictional uncertainty declaration, Matthews's claims may have had other fatal flaws. Most importantly, Matthews never claimed to have suffered a specific injury in any one of those thirteen games that his teams played in California. Based on the underlying theory of his claim, he *should* have argued he suffered an injury in *each* of those games played within California; however, he did not allege any specific injury during any game.

The fact-specific nature of the court's analysis is important to former NFL players seeking workers' compensation in California because the law has not yet completely foreclosed on the possibility to file legitimate claims. Based on the court's opinion, it is critical for such claims to allege sufficient contacts with California through a specific injury suffered within the state that contributed to the cumulative trauma. However, as some questions over the validity of such workers' compensation claims remain unanswered at large, former players should consider other means by which they can be adequately compensated for their workplace injuries.

IV. ALTERNATIVES TO CALIFORNIA'S WORKERS' COMPENSATION SYSTEM

With recent NFL arbitration awards enforcing player contract forum selection and choice of law clauses as well as the Ninth Circuit's holding, California's jurisdiction over many former NFL players' workers' compensation claims will be less likely to come in the years ahead. As such, practical alternatives must be put forth into a forum for discussion. One such

112. See *supra* notes 51–53 and accompanying text.

113. Compare *Injured Workers' Ins. Fund v. Workers' Comp. Appeals Bd.*, 66 Cal. Comp. Cas. 923, 924–26 (Ct. App. 2001), with *Matthews*, 688 F. 3d at 1113.

alternative is for players and teams to negotiate in good faith to ensure that these workers' compensation issues are resolved. Another option is through separate legal action by former players against the NFLPA to attain greater benefits than in past collective bargaining agreements; however, the viability of this alternative is questionable based on recent events in litigation over the issue.

A. Alternative Dispute Resolution Between Players and Teams

The 2011 NFL Collective Bargaining Agreement (the Agreement) addresses workers' compensation issues such as benefits, rejection of coverage, and off-sets almost identically to the way they were addressed in the 2006 NFL CBA.¹¹⁴ However, several significant changes were made to the Agreement due to the recent issues concerning workers' compensation claims in California. For instance, Article 41 of the Agreement, the workers' compensation section, begins by stating, "The parties shall continue to *discuss in good faith* appropriate reforms and revisions to the provisions of this Agreement and the Player Contract related to workers' compensation issues."¹¹⁵

As demonstrated earlier, forum selection and choice of law clauses are not only commonplace in player contracts but are also integral to resolving workers' compensation jurisdiction issues. The language included in these provisions will determine the nature of the clauses depending upon their relative specificity or vagueness. Because the language, when used effectively, determines whether a player can receive California benefits, players have a strong interest in bargaining for terms in their best interests. As such, the mandate to negotiate in good faith should ensure that players and teams bargain for mutually acceptable language or else leave open the possibility for such forum selection or choice of law clauses being unenforceable as unconscionable.¹¹⁶

Other notable changes include section 5, which is the "carve-out" provision.¹¹⁷ It provides that "[t]he parties shall immediately establish a joint committee that will make good faith efforts to negotiate a possible California

114. See 2011 NFL CBA, *supra* note 11, art. 41; see also 2006 NFL CBA, *supra* note 55, art. LIV.

115. 2011 NFL CBA, *supra* note 11, art. 41 (emphasis added).

116. A court could strike this type of clause as unconscionable when the terms are not negotiated in good faith as demanded by the 2011 NFL CBA because it suffers from procedural unfairness through a lack of bargaining power. See JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 482, 490-91 (3d ed. 1990).

117. See 2011 NFL CBA, *supra* note 11, art. 41, § 5.

Workers' compensation alternative dispute resolution program on a trial basis (i.e., carve out)."¹¹⁸ Along the same lines, another section addressing reservation of rights preserves the rights of any existing claims involving workers' compensation issues over choice of law or forum provisions in player contracts.¹¹⁹

The carve-out provision is in the best interest of both management and players because it allows them to develop an alternative dispute resolution system to resolve the issue of California workers' compensation claims without resorting to arbitration and eventually courts. Mandating mediation before arbitration is a plausible scenario. Mediation is a cost-effective dispute resolution procedure that utilizes a neutral third party for a variety of purposes, such as facilitating negotiations or evaluating the merit of certain positions.¹²⁰ Furthermore, mediation does not necessarily lead to a final, binding decision if the parties do not eventually reach an agreement.¹²¹ This would be an effective method for the NFL to employ on a trial basis to resolve California workers' compensation disputes because it provides a forum to evaluate each case independently. When players file claims in California, the circumstances of each case are different, and some may have more legitimate bases. A mediator with experience in workers' compensation and disability benefits could evaluate each case based on the severity of the alleged injury and the need for additional compensation beyond that provided through collective bargaining to reach a reasonable settlement up to the level of benefits that California could provide. Allowing evaluation on a case-by-case basis also eliminates the potential problems of establishing an arbitral precedent on the issue.¹²²

For now, arbitration is the sole forum for dispute resolution of workers' compensation issues in the NFL based on the Agreement. Each arbitration decision is made upon the interpretation of a specific player contract or the Agreement itself.¹²³ The establishment of a mandatory mediation program prior to arbitration, as discussed above, will eliminate some of the unnecessary costs involved with private arbitration and the strict adherence to unfair contractual provisions in some instances. However, should the mediation

118. *Id.*

119. *Id.* art. 41, § 6.

120. *Mediation Procedure*, CPR, <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/613/Mediation-Procedure.aspx> (last visited Mar. 26, 2013).

121. *Id.*

122. See generally W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895 (2010).

123. See ELKOURI & ELKOURI, *supra* note 69, at 428, 435.

process fail, arbitration will still be the final forum as designated by the Agreement.

Overall, these new provisions represent a different strategy to combat the slew of former players seeking workers' compensation in California without infringing too much on players' rights. Mandating good faith negotiation or mediation prior to arbitration may provide the parties with an alternative venue to work out a mutually beneficial resolution before undergoing an arduous, expensive proceeding, and the Agreement provides the mechanisms to explore these alternatives.

B. Retired Players' Legal Action for Collective Bargaining Rights

Additionally, the Agreement expanded the disability benefits available to former players. However, for a group of retired players led by Carl Eller, the NFLPA did not go far enough to protect the rights of NFL players after their careers were over.¹²⁴ Consequently, they filed a lawsuit against the NFLPA,¹²⁵ but it was dismissed in May 2012.¹²⁶ Now, the fate of the lawsuit rests on the appeal filed and pending in the U.S. Court of Appeals for the Eighth Circuit.¹²⁷

Disability benefits were previously provided through the Bert Bell/Pete Rozelle NFL Retirement Plan and the NFL Supplemental Disability Plan;¹²⁸ the Agreement combines and improves those two sections through the NFL Player Disability Plan in Article 61.¹²⁹ In general, this plan defines disabilities, sets the amount of benefits available for categories of disabilities, and establishes procedures for collecting such benefits.¹³⁰ Some improvements made through collective bargaining in 2011—in addition to efficiency through consolidation—include redefining “Total and Permanent Disability” (T&P Disability), re-categorizing levels of T&P Disabilities, and increasing the benefits available to some categories of T&P Disabilities.¹³¹

124. *Retired NFL Players File Suit Against NFLPA, Smith, Brady Plaintiffs*, SPORTING NEWS (Sept. 13, 2011), <http://aol.sportingnews.com/nfl/story/2011-09-13/retired-nfl-players-file-suit-against-nflpa-demaurence-smith-brady-plaintiffs#ixzz1XtiDY4UX>.

125. See generally Eller Complaint, *supra* note 11.

126. See *Eller v. NFL Players Ass'n*, 872 F. Supp. 2d 823, 838 (D. Minn. 2012).

127. Associated Press, *Retirees Appeal Dismissed Lawsuit vs. NFLPA*, YAHOO! SPORTS (June 21, 2012), <http://sports.yahoo.com/news/retirees-appeal-dismissed-lawsuit-vs-215951975--nfl.html>.

128. 2006 NFL CBA, *supra* note 55, arts. XLVII, LI.

129. 2011 NFL CBA, *supra* note 11, art. 61.

130. *Id.*

131. *Id.*; NFL ALUMNI ASS'N, COLLECTIVE BARGAINING AGREEMENT FAQs 4 (2011), available at <http://www.nflalumniplayers.com/sites/www.nflalumniplayers.com/files/cba-faqs.pdf>

The Agreement also improved the 88 Plan, which provides medical benefits for vested players suffering from dementia, Amyotrophic Lateral Sclerosis (ALS), and Parkinson's disease by increasing the maximum benefits available to eligible recipients.¹³² Furthermore, the Agreement created "Neuro-Cognitive Disability Benefits" to provide relief in certain circumstances to players suffering from "permanent, neuro-cognitive impairment" who are ineligible to receive benefits under the disability plan.¹³³ These neuro-cognitive benefits provide monthly limited benefits no less than \$1500 or \$3000, depending on the level of impairment, until the player reaches the age of 55 or is eligible under another NFL benefit plan.¹³⁴

However, it was evident that these improvements were not good enough for a class of retired players. In September 2011, the class led by Carl Eller filed its lawsuit against the NFLPA after the Agreement went into effect.¹³⁵ According to the complaint, the "[retirement] system is acknowledged as deficient and flawed both with respect to pensions and administration of benefit programs."¹³⁶ Supporting the allegations regarding the inherent failures of the collectively bargained benefits system, the complaint noted that, as of 2010, only 3154 players were receiving disability benefits under the former plan¹³⁷ and 151 players were receiving benefits under the 88 Plan.¹³⁸ The class also claimed that the NFLPA bargained for improved wages of current players at the "expense of the rights of, and benefits due to, retirees"¹³⁹ and further stated that "the NFLPA has been a substantial cause of the insufficient/inadequate retiree benefits, programs and operations."¹⁴⁰ Several retired players even felt cheated by the current players because they did not receive the additional \$300 million to \$500 million in extra benefits promised during early rounds of bargaining.¹⁴¹ As such, the class sought declaratory relief to establish that the NFLPA and its representatives have no right to represent retired players in bargaining, to establish that the class has the right to negotiate for retiree benefits, and to remove any terms of the Agreement

[hereinafter FAQs].

132. 2011 NFL CBA, *supra* note 11, art. 58; FAQs, *supra* note 131, at 5.

133. 2011 NFL CBA, *supra* note 11, art. 65, § 1; FAQs, *supra* note 131, at 5.

134. 2011 NFL CBA, *supra* note 11, art. 65, § 3; FAQs, *supra* note 131, at 5.

135. *See generally* Eller Complaint, *supra* note 11.

136. *Id.* ¶ 61.

137. *Id.* ¶ 48.

138. *Id.* ¶ 58.

139. *Id.* ¶ 64.

140. *Id.* ¶ 79.

141. *See id.* ¶¶ 86–87; Associated Press, *supra* note 127.

related to issues affecting retiree benefits.¹⁴²

The district court did not agree with the class's contentions and dismissed the case.¹⁴³ The court found that the NFLPA did not create a dispute with the retired players' rights because the NFLPA actually negotiated substantial benefits for its retired counterparts despite having no legal obligation to do so.¹⁴⁴ Furthermore, the court said it was in no position to determine the adequacy of the bargained-for benefits on behalf of the retired players, and noted that the NFLPA had no legal duty to achieve any certain level of benefits through collective bargaining.¹⁴⁵ Moreover, the members of the class were at most third-party beneficiaries of the Agreement and only had the right to challenge the Agreement if they were not receiving benefits they were entitled to, which was not the case.¹⁴⁶ Granting declaratory judgment for the class would have required the Agreement to be renegotiated to attain greater benefits for retired players, but it also would have imposed a legal obligation on the NFL, which was not a party to the lawsuit.¹⁴⁷

For now, it is unlikely that the class will receive any legal relief. However, if the class is successful in its pending appeal and moves forward with the lawsuit, this would have drastic implications not only for the parties to the lawsuit but for the NFL as well. Assuming the class could use its legal leverage to bring the NFLPA back to the bargaining table with the NFL solely to negotiate retired players' disability benefits, retired players could finally get a voice. Through these negotiations, they could work to reform the procedures for obtaining benefits and challenging eligibility denials. If money for retiree benefits was the contentious issue for both the NFL and the NFLPA, reforming the system rather than augmenting the total amount of benefits available would allow more players to receive the benefits currently available under the system. When more players are able to receive the benefits they are entitled to under the Agreement, it may lessen the burden on NFL teams when their former players file workers' compensation claims in California.

V. CONCLUSION

In recent years, California's employee-friendly workers' compensation system attracted the attention of professional athletes, especially NFL players.

142. Eller Complaint, *supra* note 11, ¶¶ 134–36.

143. See Eller v. NFL Players Ass'n, 872 F. Supp. 2d 823, 838 (D. Minn. 2012).

144. *Id.* at 835.

145. *Id.* at 836.

146. *Id.*

147. *Id.* at 836–37.

California's liberal legislation and judicial construction allows NFL players to file claims when they are injured within the state, even if the player only played a single game within the borders of the state and the alleged injury was cumulative. Thus, the challenge for NFL players is not to get the claim into California but, rather, to keep it there.

Consequently, NFL teams are not likely to litigate or settle workers' compensation claims in California without first challenging its jurisdiction through arbitration. In state courtrooms, California's jurisdiction is likely to remain intact based on Supreme Court precedent and adherence to the Full Faith and Credit Clause. Conversely, recent arbitration awards favoring teams and the Ninth Circuit's decision on the issue strongly suggest that the law may foreclose on California's interest in adjudicating these claims in favor of adherence to player contract provisions.

Should the NFL prevail in keeping claims out of California, the resolution of this issue is best left between the adverse parties: the players and the NFL. Collective bargaining in 2011 addressed some concerns but did not completely resolve them. Changes to article 41 of the Agreement could result in stronger policies favoring players' ability to bargain for better individual contractual provisions to protect against cumulative, long-term injuries. Moreover, the retired players may have an opportunity to bargain for their own benefits after their careers are over depending on the outcome of the *Eller* lawsuit.

For now, NFL players will continue to file workers' compensation claims in California, and teams will continue to fight against California's jurisdiction. Moreover, as the prevalence of former NFL players suffering from cumulative head trauma during their career rises, the number of workers' compensation claims in California is likely to increase. Thus, it is crucial that all parties involved in the situation work together to resolve the issue because it will only continue to grow and intensify. Down . . . set . . .