

GRABBING THEM BY THE BALLS: LEGISLATURES, COURTS, AND TEAM OWNERS BAR NON-ELITE PROFESSIONAL ATHLETES FROM WORKERS' COMPENSATION

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I. INTRODUCTION	624
II. DISPELLING THE MYTH THAT ALL PROFESSIONAL ATHLETES EARN HIGH SALARIES & DO NOT NEED WORKERS' COMPENSATION PROTECTION	626
A. <i>Non-Elite Professional Athletes Do Not Earn High Salaries</i>	626
1. Basketball.....	626
2. Baseball.....	627
3. Soccer	629
4. Hockey.....	630
5. Football.....	630
B. <i>Disproportionate Numbers of Non-Elite Professional Athletes Who Earn Low Salaries are Women</i>	631
1. Basketball.....	631
2. Softball.....	632
3. Soccer	632
4. Hockey.....	633
5. Football.....	633
C. <i>Non-Elite Professional Athletes Need Workers' Compensation Protection</i>	633
III. LEGISLATURES, COURTS AND TEAM OWNERS LIMIT AND EXCLUDE NON-ELITE PROFESSIONAL ATHLETES, A DISPROPORTIONATE NUMBER OF WHOM ARE WOMEN, FROM WORKERS' COMPENSATION	635
A. <i>Overview of Workers' Compensation Laws</i>	636
B. <i>Legislatures and Courts Limit and Exclude Non-Elite Professional Athletes from Workers' Compensation</i>	639

* J.D., American University, Washington College of Law, 2000; B.A., Union College, 1996. I would like to thank Professor Susan Carle for her insight and guidance in the development of this Comment. I would also like to thank Professor Ellen Zavian for introducing me to the topic of professional athletes and workers' compensation issues, and the various people at the leagues and players' associations who offered their empirical data for my Comment. Finally, I would like to thank my parents, brother, grandparents, and Steven for their encouragement, love and support.

1. Statutory Exclusion	640
2. Statutory Inclusion, But Functional Exclusion	642
3. Exclusion Through Caselaw.....	642
4. Election Method.....	644
5. Set-Off Method.....	645
C. Team Owners Limit and Exclude Non-Elite Professional Athletes from Workers' Compensation.....	647
IV. RECOMMENDATIONS.....	650
V. CONCLUSION.....	654

I. INTRODUCTION

In a number of jurisdictions in the United States, professional athletes do not receive adequate protection under state workers' compensation laws¹—a protection granted to most employees for occupational injuries.² Professional athletes often cannot acquire workers' compensation benefits after a sports-related injury because legislatures and courts have created laws that bar coverage for athletes.³ Further, some team owners limit workers' compensation benefits to professional athletes by contractual restrictions.⁴ While highly paid professional athletes may be unaffected when limited or excluded from workers' compensation benefits, non-elite⁵ or low paid professional athletes are greatly affected by such limitations and exclusions.

Most female professional athletes fall into the non-elite category⁶ and are disproportionately affected in comparison to male athletes when legislatures, courts and team owners limit and exclude them from workers' compensation benefits. First, female professional athletes receive lower salaries and fewer benefits than male professional athletes, and as such, injuries can have a greater impact on their financial future.⁷ Second, female professional athletes have

1. See discussion *infra* Part III.B.

2. See ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1, at 1-1 (1997) (describing various aspects of workers' compensation laws); see also, e.g., 29 U.S.C. § 152 (1999) (defining "employee" very broadly, excluding only a select few).

3. See discussion *infra* Part III.B. (discussing different states' mechanisms of providing or not providing workers' compensation benefits for professional athletes).

4. See discussion *infra* Part III.C. (explaining that players' contracts preclude them from receiving workers' compensation).

5. For the purposes of this Comment, "non-elite professional athlete" will include most female athletes and all male minor league athletes.

6. See *id.* (defining "non-elite professional athlete").

7. See discussion *infra* Part II.B. (citing reports that NBA players' average salary is over \$1 million while WNBA players' average salary is \$35,000).

a higher injury rate than their male counterparts.⁸ Therefore, such limitations and exclusions have a greater impact on female professional athletes faced with a workplace injury than on their male counterparts.

This Comment advocates that non-elite professional athletes be protected by workers' compensation benefits. Part II dispels the myth that all professional athletes receive high salaries, and shows that many non-elite professional athletes do not earn high salaries.⁹ Additionally, women constitute a disproportionate number of those non-elite professional athletes who do not earn high salaries.¹⁰ Part III provides an overview of workers' compensation laws and demonstrates how legislatures, courts and team owners have limited and excluded professional athletes' rights to workers' compensation.¹¹ Part IV recommends that state legislatures repeal statutory exceptions and pass legislation to overturn judicial opinions limiting non-elite athletes' ability to recover workers' compensation.¹² This section also explains how non-elite professional athletes can help themselves by unionizing so that they will have more bargaining power to negotiate for workers' compensation protection.¹³ Part V concludes that because non-elite professional athletes cannot self-insure themselves against workplace injuries, they must seek statutory reform to include them under each state's workers' compensation statute and unionize so that they can collectively bargain for higher salaries and guaranteed workers' compensation benefits.¹⁴

8. See discussion *infra* Part II.C. (explaining that, for example, female basketball players are four times more likely than male athletes to tear the ligaments that support the knee, and female soccer players and skiers are twice as likely as male athletes to injure their knees).

9. See discussion *infra* Part II. (clarifying that the salaries paid to famous athletes are not typical or representative of that paid to most athletes).

10. See discussion *infra* Part II.B. (observing that almost all female athletes are non-elite whereas only male athletes in the minor leagues are non-elite).

11. See discussion *infra* Part III. (noting how professional athletes are treated differently than other employees under workers' compensation laws).

12. See discussion *infra* Part IV. (suggesting that the best solution is to require all players to be included in the workers' compensation system).

13. See discussion *infra* Part IV. (recommending that non-elite professional athletes negotiate for guaranteed contracts under which disability benefits do not expire in the event of injury).

14. See discussion *infra* Part V. (recommending that in order to stop legislatures, courts and team owners from barring non-elite professional athletes from workers' compensation coverage, professional athletes need to seek legislative relief).

II. DISPELLING THE MYTH THAT ALL PROFESSIONAL ATHLETES EARN HIGH SALARIES & DO NOT NEED WORKERS' COMPENSATION PROTECTION

A. *Non-Elite Professional Athletes Do Not Earn High Salaries*

The notion that all professional athletes earn large incomes is a popular misconception.¹⁵ Often, people hear or read about famous professional athletes' salaries,¹⁶ and then assume that *all* professional athletes enjoy similar compensation. Additionally, people assume that all professional athletes play for the National Basketball Association ("NBA"), Major League Baseball ("MLB"), Major League Soccer ("MLS"), the National Hockey League ("NHL"), the National Football League ("NFL"), or the Women's National Basketball Association ("WNBA").¹⁷ Regardless of what people may hear or read about professional athletes and the multi-million dollar salaries that these associations and leagues pay,¹⁸ many professional athletes who play in the minor leagues do not earn high salaries.¹⁹

1. Basketball

The three minor basketball leagues are the Continental Basketball

15. See ROBERT C. BERRY & GLENN M. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES* 42 (1986) (noting that although some professional athletes may earn a comfortable salary for a short period, they do not have life-long security); see also Frederic Pepe & Thomas P. Frerichs, *Injustice Uncovered? Worker's Compensation and the Professional Athlete*, in *SPORTS AND THE LAW* 18, 19 (Charles E. Quirk ed., 1996) (noting the misconception that all professional athletes are overpaid and arguing that professional athletes need the same legal protection as ordinary working people precisely because they do not earn large salaries).

16. See Peter Spiegel, *Forbes 1997 Top 40 Athletes* (visited Jan. 21, 2000) <<http://forbes.com/forbes/97/1215/Athletes/>> [hereinafter Spiegel] (reporting that Shaquille O'Neal earned \$12.9 million in 1997 and Brett Favre earned \$5.6 million in 1997).

17. See, e.g., *ESPN.com* (visited Feb. 14, 2000) <<http://espn.go.com>> (displaying these leagues, except the WNBA, in a prominent position on the homepage under "sports sections" and advertising the ESPN Network as featuring, among others, NFL.com, NBA.com, NHL.com, and WNBA.com. Note that MLB and MLS are listed as "Baseball" and "Soccer" respectively.).

18. See Spiegel, *supra* note 16 (listing salaries ranging from \$9.2 to \$78.3 million).

19. See Larry W. Fleming, *Squeeze Play; Minor League Money Fuels Big-League Dreams*, CHATTANOOGA TIMES, July 8, 1998, at D1 (stating that "[a] first-year minor-league player earns \$850 per month based on the Professional Baseball Agreement, which works out to about \$575 after deductions"); Paula Voell, *For the Love of Baseball; The Pay's Not Great. The Hours are Long. But for the Women of the Buffalo Nighthawks, The Game Is Its Own Reward*, THE BUFF. NEWS, July 12, 1998, at 1E (mentioning that the Buffalo Nighthawks players, part of a six-team Ladies Professional league, earned between "\$850 to \$1,000 per month, plus \$15 *per diem* on the road"); Rob Oller, *Lowell Isn't a Chump for Playing for Change*, THE COLUMBUS DISPATCH, July 30, 1998, at 1D (noting that New York Yankees top prospect, Mike Lowell, only earns \$14,000 from the Columbus Clippers, a minor-league team).

Association ("CBA"),²⁰ International Basketball League ("IBL"),²¹ and United States Basketball League ("USBL").²² Players in all 3 leagues do not earn high salaries. These minor league basketball teams have not unionized, and there are no collective bargaining agreements that players can use to insist on mandatory salary rates.²³ Thus, players must negotiate individually for their salaries.²⁴

The CBA consists of nine teams with ten to eleven active players per team,²⁵ in addition to one to two injured players.²⁶ The average salary for CBA players is \$30,000.²⁷ Similarly, the IBL consists of eight teams with ten active players and two inactive players.²⁸ The minimum salary for IBL players is \$20,000, and the median salary is approximately \$40,000.²⁹ The USBL, a summer league, consists of twelve teams³⁰ with twelve players per team.³¹ The minimum salary for a USBL player is \$300 per week, and the average salary is \$450 per week.³² Injured USBL players do not receive their salary.³³

2. Baseball

Players in all five minor league baseball classes— Triple A, Double

20. See *CBAhoops.com: The Official Site of the Continental Basketball Association* (visited Feb. 14, 2000) <<http://www.cbahoops.com/>> [hereinafter *CBAhoops.com*] (describing the CBA as "the official developmental league of the NBA").

21. See *The International Basketball League* (visited Feb. 14, 2000) <<http://www.iblhoops.com/splash.htm>> (describing the IBL as "a new kind of league . . . a new brand of basketball").

22. See *United States Basketball League* (visited Feb. 14, 2000) [hereinafter *USBL*] <<http://www.usbl.com>> (referring to the USBL as "the league of opportunity" because 113 USBL players have gone on to the NBA).

23. See Telephone Interview with Matt Correa, Basketball Operations Coordinator of the Continental Basketball Association (Dec. 3, 1999) [hereinafter Correa interview] (notes on file with the author); Telephone Interview with Deron Filip, Director of Media Relations of the Continental Basketball Association (Dec. 3, 1999) [hereinafter Filip interview] (notes on file with the author); Telephone Interview with Tim Richardson, Spokesperson for the International Basketball League (Dec. 8, 1999) [hereinafter Richardson interview] (notes on file with the author); Telephone Interview with Sean Fisher, Public Relations Director of the United States Basketball League (Dec. 3, 1999) [hereinafter Fisher interview] (notes on file with the author).

24. See Correa interview, *supra* note 23 (explaining that each team operates under a uniform salary budget).

25. See *CBAhoops.com*, *supra* note 20 (listing the teams and players).

26. See Correa interview, *supra* note 23.

27. See Correa interview, *supra* note 23; Filip interview, *supra* note 23.

28. See Richardson interview, *supra* note 23.

29. See Richardson interview, *supra* note 23.

30. See *USBL*, *supra* note 22 (listing the number of teams).

31. See Fisher interview, *supra* note 23.

32. See Fisher interview, *supra* note 23.

33. See Fisher interview, *supra* note 23.

A, Class A, A-Short Season, and Rookie League³⁴—do not earn high salaries. Since these minor league baseball teams have not unionized, players must negotiate their own salaries.³⁵

The Triple A League consists of thirty teams each with twenty-four active players and three to four disabled players.³⁶ During a five-and-a-half month season, the minimum salary for a Triple A League player is approximately \$2,500 per month, and the median salary is approximately \$3,500 per month.³⁷ The Double A League is comprised of thirty teams with twenty-four active players and three to four disabled players on each team.³⁸ During a five-and-a-half month season, the minimum salary for a Double A League player is approximately \$1,500 per month, while the median salary is approximately \$2,100 per month.³⁹ The Class A League consists of sixty teams with twenty-five active players on each team.⁴⁰ During a five-and-a-half month season, the minimum salary for a Class A League player is approximately \$600 per month, while the median salary is approximately \$1,000 per month.⁴¹ The Class A-Short Season includes twenty-two teams with thirty active players on each team.⁴² During a three-and-a-half month season, the minimum salary for a Class A-Short Season player is also approximately \$600 per month, while the median salary is approximately \$1,000 per month.⁴³ The Rookie League consists of eighty-two teams with thirty active players on each team.⁴⁴ During a three-and-a-half month season, the minimum salary for a Rookie League player is approximately \$550 per month, while the median salary is approximately \$800 per

34. See *Minor Leagues – The Official Site of Major League Baseball* (visited Mar. 30, 2000) [hereinafter *Minor Leagues*] <<http://majorleaguebaseball.com/u/baseball/mlbcom/2000/minors/schedule>> (listing all of the mentioned minor leagues as affiliated with MLB except Class A-Short Season).

35. See Telephone Interview with Dick Beverage, Secretary/Treasurer of the Association of Professional Baseball Players of America (Oct. 13, 1999) [hereinafter Beverage interview] (notes on file with the author).

36. See Telephone Interview with Jim Ferguson, Director of Media Relations of Minor League Baseball (Oct. 13, 1999) [hereinafter Ferguson interview] (notes on file with the author).

37. See Beverage interview, *supra* note 35.

38. See Ferguson interview, *supra* note 36; *Minor Leagues*, *supra* note 34.

39. See Beverage interview, *supra* note 35.

40. See Ferguson interview, *supra* note 36; *Minor Leagues*, *supra* note 34.

41. See Beverage interview, *supra* note 35.

42. See Ferguson interview, *supra* note 36.

43. See Beverage interview, *supra* note 35.

44. See Ferguson interview, *supra* note 36; see also *MLSNET: Teams* (visited Feb. 15, 2000) <<http://www.mlsnet.com/teams>> (listing teams and players).

month.⁴⁵

3. Soccer

Major League Soccer ("MLS") players do not earn high salaries. The MLS includes twelve teams with approximately twenty players per team.⁴⁶ Approximately fifteen percent of the MLS players receive only the minimum salary of \$24,000.⁴⁷ The average salary for MLS players is slightly less than \$80,000.⁴⁸

In addition to the MLS, there are two minor outdoor professional leagues—the A-League (Division 2)⁴⁹ and D3 Pro (Division 3), –and a minor indoor professional league—the National Professional Soccer League ("NPSL").⁵⁰ The A-League consists of thirty teams, with twenty-six players on each roster list. Of the twenty-six, eighteen are eligible to play per game.⁵¹ There is no minimum salary, but the median salary is \$500 per month.⁵² The D3 Pro League has twenty-seven teams and twenty-six players on each roster list, of which eighteen are eligible to play per game.⁵³ There is no minimum salary; but the median salary is \$250 per month.⁵⁴

The NPSL is comprised of twelve teams with sixteen active players and a total roster of twenty to twenty-two.⁵⁵ There is no minimum salary, however, some development players earn \$3,000 per season.⁵⁶ The median salary for NPSL players is approximately \$25,000 per season.⁵⁷

45. See Beverage interview, *supra* note 35.

46. See Telephone Interview with John Kerr, Executive Director of the Major League Soccer Player's Association (Oct. 5, 1999) (notes on file with the author).

47. See *id.*

48. See Amy Shipley, *U.S. Can't Kick About Salaries*, WASH. POST, June 11, 1998, at E09 (referring to estimations by league spokesman Dan Courtmanche).

49. See *United Soccer Leagues A-League* (visited Feb. 15, 2000) [hereinafter *USL*] <<http://www.usisl.com/A-league/>> (listing team names and individual team websites).

50. See *National Professional Soccer League* (visited Feb. 15, 2000) <<http://www.npslsoccer.com/>> (listing team names and individual team websites).

51. See Telephone Interview with Scott Craighton, Associate Director of Public Relations of the United Soccer Leagues (Oct. 13, 1999) [hereinafter *Craighton interview*] (notes on file with the author); *USL*, *supra* note 49.

52. See *Craighton interview*, *supra* note 51.

53. See *Craighton interview*, *supra* note 51.

54. See *Craighton interview*, *supra* note 51.

55. See Telephone Interview with Chuck Murr, Director of Media Relations of the National Professional Soccer League (Oct. 13, 1999) (notes on file with the author).

56. See *id.*

57. See *id.*

4. Hockey

There are three minor hockey leagues: the American Hockey League ("AHL"), the East Coast Hockey League ("ECHL"), and the International Hockey League ("IHL").⁵⁸ As with other non-elite teams, these players do not earn high salaries.⁵⁹ Similar to minor league baseball, minor hockey leagues are not unionized, and players are strictly on their own when negotiating their salaries.⁶⁰

The AHL includes nineteen teams with twenty-three players on each team.⁶¹ Currently, the minimum salary in the AHL is \$26,000; however, because minor hockey leagues are not unionized, team owners and players can agree to a lower salary.⁶² The ECHL consists of twenty-eight teams with twenty players on each team.⁶³ The minimum salary for an ECHL player is \$27,500.⁶⁴ The IHL has thirteen teams with twenty-three players on each team and plays seventy games.⁶⁵ The minimum salary for an IHL player is \$325 per week plus housing.⁶⁶

5. Football

In addition to the National Football League, there is one other American professional football league: the Arena Football League ("AFL").⁶⁷ In the AFL, there are fifteen teams, each with an active roster of twenty men plus an additional four-man taxi squad.⁶⁸ Similar to minor league baseball and hockey, the AFL players are not unionized; therefore, each team can determine the individual football player's salary without constraint or regulation.⁶⁹ While there is no minimum salary, the median salary for AFL players is

58. See Telephone Interview with Dino Fazio, Director of Marketing/Licensing of the Professional Hockey Player's Association (Oct. 5, 1999) [hereinafter Fazio interview] (notes on file with the author); see also *NHL.com: All Leagues* (visited Feb. 15, 2000) [hereinafter *NHL.com*] <<http://www.nhl.com/alleagues.index.htm>> (listing team rosters for all three leagues).

59. See Fazio interview, *supra* note 58.

60. See Fazio interview, *supra* note 58.

61. See *NHL.com*, *supra* note 58.

62. See Fazio interview, *supra* note 58.

63. See *NHL.com*, *supra* note 58.

64. See Fazio interview, *supra* note 58.

65. See Fazio interview, *supra* note 58.

66. See Fazio interview, *supra* note 58.

67. See *Arena Football League* (visited Feb. 15, 2000) <<http://www.arenafootball.com/>> (listing players and teams).

68. See Telephone Interview with Joe Vrankin, Chief Financial Officer of the Arena Football League (Oct. 13, 1999) (notes on file with the author).

69. See *id.*

approximately \$30,000 per season.⁷⁰

B. Disproportionate Numbers of Non-Elite Professional Athletes Who Earn Low Salaries are Women

Female professional athletes generally receive much lower salaries than male professional athletes.⁷¹ Also, whereas only male athletes in the minor leagues are non-elite, almost all female athletes are non-elite.⁷² As a result, limiting or excluding professional athletes from worker's compensation benefits will have a disparate impact on female professional athletes.

1. Basketball

In 1999, the Women's National Basketball Association ("WNBA") players played thirty-two games in a three-month season.⁷³ The WNBA includes twelve teams, each with eleven active and two or three inactive players.⁷⁴ Even with a collective bargaining agreement, the minimum veteran salary was \$30,000 and the minimum rookie salary was \$25,000.⁷⁵ The average WNBA salary was approximately \$35,000.⁷⁶ Prior to the WNBA collective bargaining agreement, the WNBA paid players who filled out the rosters considerably less.⁷⁷ Specifically, first round draft choices received \$20,000 for the season;

70. *See id.*

71. *Compare They Agree: Let's Play Ball; Six Year Agreement Will Allow NBA to Have Regular Season of About 50 Games Beginning the First Week of February*, AUSTIN AMERICAN-STATESMAN, Jan. 7, 1999, at C1 (stating that "NBA players . . . median [salary] is about \$1.3 million [M]ajor-league baseball pays an average of \$1.45 million."), with Earl Gustkey, *Final Appeal: Other Women's League Takes Its Turn in Spotlight with Championship Series*, L.A. TIMES, Mar. 8, 1998, at C1 (stating that "[t]he ABL attracts top players because . . . its average [salary] is \$80,000), and Jeanie Chung, *Not Ready for Prime Time*, CHI. SUN-TIMES, Jan. 24, 1999, at 22 (stating that "the [Women's Pro Softball League] does not pay enough money for its players. The players' salaries average \$1,500 per month.").

74. *See supra* note 5 (defining "non-elite professional athlete").

73. *See* Telephone Interview with Pam Wheeler, Director of Operations for the Women's National Basketball Players' Association (Oct. 1, 1999) (notes on file with the author).

74. *See id.*

75. *See id.*

76. *See* Telephone Interview with Daniel Wasserman, Director of Communications, National Basketball Players' Association (Oct. 25, 1999) [hereinafter Wasserman interview] (notes on file with the author); *see also* Dan Johnson, *Money Gone; ABL Folds in Third Season*, DES MOINES REGISTER, Dec. 23, 1998, at Sports 1 (indicating that WNBA players earn between \$30,000 and \$35,000). Compare this slight difference between minimum and median salaries with those paid to male athletes. For example, the minimum pay for MLS players is \$24,000 but the median pay is just under \$80,000. *See supra* notes 46-48 and accompanying text. As of June 2000, the WNBA will consist of sixteen teams, each comprised of the same number of players as stated above. In 2000, the WNBA's minimum veteran salary will be \$32,500, and the minimum rookie salary will be \$26,000. *See* Wasserman interview.

77. *See* Valerie Lister, *WNBA Pay Ranges From \$7,500-\$50,000*, USA TODAY, Apr. 3, 1997, at 8C (contrasting the salaries of high-profile players with the salaries of the rank and file players).

second round, \$16,000; third, \$13,000; and fourth, \$11,000. Undrafted players could be assigned to the 10-player teams for \$7,500. Players on the development squad received \$5,000.⁷⁸

The former American Basketball League ("ABL") female players also did not earn high salaries. According to a 1998-99 ABL contract, a low-range former ABL player received \$44,000.⁷⁹ In the same year, an ABL contract for a mid-range player mandated a salary of \$77,000.⁸⁰

2. Softball

The Women's Professional Softball League ("WPSL") players earn very low salaries.⁸¹ There are six teams in the WPSL with approximately fifteen to seventeen players on each roster.⁸² While the highest paid WPSL player earns \$18,000 per season, approximately ten percent of the WPSL players receive the minimum salary of \$3,500 per season.⁸³ The average salary is \$5,770 and the median salary is \$7,000.⁸⁴

3. Soccer

In 1999, there were no professional women's soccer leagues. However, such a league is projected for the spring of 2001.⁸⁵ There is an amateur W-League, which has some professional female soccer players on its teams.⁸⁶ The W-League consists of thirty-six teams with twenty-six players on each roster. However, only the professional players receive a salary—approximately \$750 per month.⁸⁷

78. *See id.*

79. *See* American Basketball League, Inc., Standard Player's Agreement, 1998-99, § 3 Payment (setting forth the compensation for services and including a \$20,000 bonus "if elected to the All-ABL 1st Team").

80. *See id.* (listing the salary of mid-range players. Compare this with the \$150,000 annual salary in "top player" contracts.).

81. *Id.*

82. *See* Telephone Interview with Hildred Deese, Director of Game Operations, Women's Pro Softball League (Oct. 1, 1999) (notes on file with the author).

83. *See id.*

84. *See id.*

85. *See* Telephone Interview with Burton Haimes, Chairman for the Development Committee, Women's Professional Soccer League (Dec. 3, 1999) (notes on file with the author); *see also* *U.S. Possibly Start Women's Pro League in 2001*, XINHUA ENGLISH NEWSWIRE, Mar. 6, 1999 (stating that Alan Rotherberg, Chairman of the Board for the women's World Cup organizing committee, envisions a league featuring 8 to 12 teams playing during the spring and summer in major U.S. cities including Los Angeles, New York, and Chicago).

86. *See* Craighton interview, *supra* note 51.

87. *See* Craighton interview, *supra* note 51.

4. Hockey

A women's professional hockey league is unlikely to materialize for at least another three years.⁸⁸ Currently, there is no indication of how many teams and players will play, or what the minimum and median salaries will be.⁸⁹

5. Football

The Women's Professional Football League ("WPFL") began play in October 1999.⁹⁰ The league currently has only two teams,⁹¹ with two additional teams⁹² scheduled to enter the WPFL in 2000.⁹³ The players on the existing two teams receive approximately \$100 per game plus travel expenses.⁹⁴

C. Non-Elite Professional Athletes Need Workers' Compensation Protection

Non-elite professional athletes generally do not receive guaranteed contracts that secure a period of employment.⁹⁵ Thus, when non-elite professional athletes are injured to such a degree that they are no longer capable of playing for their respective teams, the injured athletes will only receive their salary for the remainder of the season.⁹⁶ As a result, when a state excludes professional athletes from

88. See David Shoalts, *Women's Pro Hockey League Remains a Dream*, GLOBE & MAIL, Mar. 16, 1999, at 51 (explaining that because women's hockey is in its infancy, there are simply not enough elite players to stock even a modest professional venture).

89. See *id.* (noting that if and when a professional women's hockey league is started, it would probably be modeled on the Women's National Basketball Association).

90. See Tina Kelley, *They're Calling for a Fair Catch: New Pro League is Giving Women the Chance to Play Football Just Like the Guys*, THE PLAIN DEALER-CLEVELAND, OH., Dec. 15, 1999, at 2D (explaining that the women's football league was created by Terry Sullivan, a backer of minor-league football teams, and Carter Turner, owner of the St. Paul Pigs, a mid-America football league team).

91. The two existing teams are the Minnesota Vixens and the Lake Michigan Minx of Chicago.

92. The additional teams are the New York Sharks and a team from Dallas.

93. See Kelly, *supra* note 90 (stating that it is hoped that the league's teams will generate enough interest to bring sponsors and more franchises on board).

94. See *id.*

95. Compare discussion *infra* Part III.C, with cases discussing elite professional athletes who receive guaranteed contracts. See, e.g., *Wilson v. Franchise Tax Board*, 20 Cal. App. 4th 1441, 1451 (Cal. Ct. App. 1993) (stating that "[a]lthough the Raiders paid Wilson's off-season medical expenses, we also think that was in their self-interest, since Wilson... had a guaranteed contract under which he would be paid even if cut from the team or unable to play due to injury."); see also *Basketball After All*, WASH. TIMES, Jan. 9, 1999, at C11 (mentioning that professional basketball entered a new era when Kevin Garnett, two years removed from high school, "signed a six-year contract extension that guaranteed the 20 year-old \$126 million"); Neil Hohlfield, *Brown's Numbers Dwarf IHL Players*, HOUSTON CHRON., Dec. 15, 1998, at 7 (claiming that 360 NHL players have about \$21.6 million worth of guaranteed contracts).

96. See *infra* text accompanying notes 179, 187-88.

its workers' compensation programs, it inherently hurts non-elite professional athletes and female professional athletes because they have no guaranteed contracts, and therefore no remedy to seek long-term benefits.⁹⁷

In addition, most non-elite professional athletes—with the exception of WNBA players⁹⁸—are not unionized⁹⁹ and need workers' compensation coverage for this reason as well. Because they have no means to collectively bargain as major professional athletes do,¹⁰⁰ they have no means of negotiating for higher salaries, guaranteed contracts, and guaranteed benefits when they suffer workplace injuries.

Female athletes suffer a greater amount of career-ending injuries than their male counterparts.¹⁰¹ Female basketball players are four times more likely than male athletes to tear the ligaments that support the knee, and female soccer players and skiers are twice as likely as male athletes to injure their knees.¹⁰² According to a sports physiologist, "[k]nee injuries . . . have escalated since 1972, when federal Title IX¹⁰³ requirements mandated equal numbers of sporting

97. See *infra* Part III.B (discussing the effects of the lack of guaranteed contracts).

98. See *Just What the NBA Needs: WNBA Players Vote to Join Same Union as Men* (last modified Nov. 11, 1998) <http://www.cnnsi.com/basketball/wnba/news/1998/11/05/wnba_union/> (stating that on November 5, 1998, the "WNBA players voted overwhelmingly . . . to have the National Basketball Players Association represent them, the same union negotiating on behalf of locked-out NBA players").

99. See Telephone Interview with "The Whispering Squash" (name withheld by request), employee of American Basketball League (Oct. 28, 1998) (notes on file with the author) (stating that former ABL players do not belong to a union); Telephone Interview with Anna Rose Valentini, Director of League Services of Women's Pro Softball (Oct. 28, 1998) [notes on file with author] (noting that women who play for the WPSL are not unionized).

100. See National Labor Relations Act of 1935, 29 U.S.C. §§151-69 (1994). Collective bargaining helps employees bargain as a solid unit for the same wages, hours, and other terms and conditions of employment. Without collective bargaining, each employee has to negotiate his or her own terms and conditions, which may be substantially different than other employees with similar jobs and experiences. *Id.*

101. See, e.g. Blaine Harden & Devon Spurgeon, *For Female Athletes, Knee Injuries Abound; Basketball Teams are Suffering Unusual Rate of Torn Ligaments*, WASH. POST, Mar. 29, 1998, at A01 (stating that "[s]eason-ending knee injuries for women playing college basketball are four to six times more frequent than for men . . .").

102. See *Appropriations for 1999 Before the Subcomm. on the Dep't of Labor Health and Human Services, Education, and Related Agencies*, 105th Cong. 1373 (1998) (statement of Michael Ehrlich, M.D., American Academy of Orthopedic Surgeons) (providing testimony on women's sports injuries); see also Donald K. Shelbourne, Thorp J. Davis, & Thomas E. Klootwyk, *The Relationship Between Intercondylar Notch Width of the Femur and the Incidence of Anterior Cruciate Ligament Tears: A Prospective Study*, 26 AM. J. OF SPORTS MED., May 15, 1998, at 402 (mentioning that many investigations show women's anterior cruciate ligament ("ACL") tears at a higher rate than men's).

103. Title IX, 20 U.S.C. § 1681(a) (providing that "[n]o person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . .").

opportunities for women and men"¹⁰⁴ in public schools. Because women's bodies differ from men's bodies in terms of being prone to injury, female athletes in particular need workers' compensation protection. In addition, the practice of limiting and excluding professional athletes from workers' compensation benefit packages disproportionately impacts female professional athletes because they receive lower salaries than male professional athletes.¹⁰⁵

In sum, most non-elite professional athletes earn low salaries,¹⁰⁶ do not have guaranteed contracts,¹⁰⁷ and are not unionized.¹⁰⁸ While such athletes could greatly benefit from worker's compensation protection, many states and team owners limit and exclude professional athletes from workers' compensation coverage.¹⁰⁹ This exclusion has an especially harsh impact on non-elite professional athletes, who may be unable to insure themselves against occupational injuries.¹¹⁰

III. LEGISLATURES, COURTS AND TEAM OWNERS LIMIT AND EXCLUDE NON-ELITE PROFESSIONAL ATHLETES, A DISPROPORTIONATE NUMBER OF WHOM ARE WOMEN, FROM WORKERS' COMPENSATION

Professional athletes are treated differently than other employees under workers' compensation laws.¹¹¹ Treatment of professional

104. See Todd Wilkinson, *Pop, Crackle, Snap*, WOMEN'S SPORTS & FITNESS, Apr. 1998, at 68 (explaining that because more women are participating in organized sports than ever before, and these sports are becoming more and more challenging, women are facing increased risks to their knees, which serve as a nexus of mobility in most sports).

105. See, e.g., Susan Warmbrunn, *Athletes' Pay Reflects Gender Gap*, THE GAZETTE, Jan. 20, 2000, at 3 (pointing out that although the women's U.S. Soccer Team won the 1999 World Cup, they still earn a fraction of what male soccer players earn, even though the men came in last place in the 1998 men's World Cup).

106. See discussion *supra* Part II.A-B. (offering examples of minimum and median salaries of non-elite professional athletes in various sports).

107. See *supra* notes 95-97 and accompanying text (discussing the effects of the lack of guaranteed contracts).

108. See *supra* note 99 and accompanying text (citing sources who reveal that teams are not unionized).

109. See Stephen Cormac Carlin & Christopher M. Fairman, Note, *Squeeze Play: Workers' Compensation and the Professional Athlete*, 12 U. MIAMI ENT. & SPORTS L. REV. 95, 104 (noting that professional athletes' workers' compensation differs from workers' compensation received by other employees in two ways. First, state workers' compensation statutes vary greatly in their specific treatment of professional athletes. Second, the professional athlete's employment contract with the team often includes specific provisions concerning workers' compensation. Both of these factors have the effect of limiting an athlete's ability to collect workers' compensation benefits).

110. See discussion *infra* Part III.B-C (explaining the limitations of self-insuring against injury).

111. See Carlin & Fairman, *supra* note 109, at 108 (commenting on the unfairness of excluding professional athletes from workers' compensation benefits).

athletes differs greatly among state workers' compensation statutes, but a number of states exclude professional athletes from workers' compensation coverage.¹¹² There are also specific provisions concerning workers' compensation in many professional athletes' employment contracts.¹¹³ Team owners use both state statutes and employment contracts to limit the collection of workers' compensation benefits by professional athletes.¹¹⁴ As a result, non-elite professional athletes who earn low salaries are left with no ability to recover from workplace injuries.

A. Overview of Workers' Compensation Laws

Lawmakers designed workers' compensation laws to provide universal coverage by creating an equal exchange between employers and employees.¹¹⁵ Workers' compensation laws obligate employers to pay for employee injuries, regardless of fault, by contracting with private insurance carriers or paying premiums to state workers' compensation funds.¹¹⁶ Therefore, employers are strictly liable for their employees' work-related injuries and cannot claim any tort defenses.¹¹⁷ However, employers are not liable for punitive damages, and, depending on the severity and type of injury, their actual damages often are fixed by statutory caps.¹¹⁸ In exchange, employees

112. See discussion *infra* Part III.B (explaining the different statutory schemes of workers' compensation for professional athletes); see also Carlin & Fairman, *supra* note 109, at 108 (observing that statutory exclusion may result when a state legislation has been heavily lobbied by sports team owners).

113. See discussion *infra* Part III.C (explaining how the American Basketball League and Women's National Basketball Association limit workers' compensation benefits to their players).

114. See discussion *infra* Parts III.B-C; see also D.C. Arena Professional Athletic Teams Act of 1997, Bill No. 12-337 (noting Council Member Evans' proposed bill would have aided Washington Wizards and Washington Capitals owner, Abe Pollin, and other franchised team owners, by excluding professional athletes from workers' compensation coverage in the District of Columbia); Athelia Knight, *Workers' Compensation Measure in D.C. Criticized; Plan Would Limit Payouts to Wizards, Caps*, WASH. POST, Sept. 13, 1997, at C3 (noting that professional basketball and hockey players' unions attacked workers' compensation proposals which would limit benefits for National Basketball Association and National Hockey League players whose injuries occurred while playing at the MCI Center).

115. See discussion *infra* Part III.A (discussing the exchange of employees' tort claims for employers' guaranteed workers' compensation benefits); see also Dawson v. A & H Mfg. Co., 463 A.2d 519, 521 (R.I. 1983) (stating the purpose of workers' compensation is to provide employees with universal coverage "arising out of and in the course of employment").

116. See LARSON, *supra* note 2, at 7-1 app. A and §§ 2.00-2.10 (describing various ways states permit employers to provide workers' compensation benefits). See generally U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS VI (1994) (explaining that one of the goals of workers' compensation laws is compensation regardless of fault).

117. See WILLIAM LLOYD PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 573 (West 1984) (equating workers' compensation with strict liability).

118. See Carlin & Fairman, *supra* note 109, at 97 (noting that workers' compensation is a

are entitled to fixed amounts of compensation without having to prove that their employers are at fault,¹¹⁹ but they cannot sue their employers for negligence.¹²⁰

Each state creates its own workers' compensation statutes.¹²¹ Generally, to obtain workers' compensation benefits, individuals must be "employees" instead of "independent contractors,"¹²² and their injuries must be work-related.¹²³ Further, an employment agreement that creates an expressed or implied contract for hire must exist in order for workers' compensation protections to be triggered.¹²⁴

type of strict liability or no-fault insurance).

119. See Ronald G. Ehrenberg, *Workers' Compensation, Wages, and the Risk of Injury*, in *NEW PERSPECTIVES IN WORKERS' COMPENSATION* 71, 72 (John F. Burton, Jr. ed., 1988) (stressing that employers are responsible for providing economic relief to employees when injured, even when employees have not proven that their employer is at fault).

120. See generally PROSSER & KEETON, *supra* note 117, at 574 (stating that workers' compensation statutes afford employees exclusive remedies to damages against employers).

121. See STATE WORKERS' COMPENSATION ADMINISTRATION PROFILES (1992) (prepared by Office of Workers' Compensation Programs of the Employment Standards Administration of the U.S. Department of Labor) (comparing workers' compensation procedures among various jurisdictions and indicating variations in specific procedures and names used to describe workers' compensation).

122. Under workers' compensation coverage, an "employee" is an individual that works for hire, and is under the control of an employer. See LARSON, *supra* note 2, at § 43.00 - § 43.01 (citing *Fields v. Twin City Drive-In*, 534 S.W.2d 457, 458 (Ky. 1976)) (clarifying that, even though the Kentucky legislature used the term "contract for hire" as part of the definition of an employee in its Workers' Compensation Statute, the legislature did not intend to include independent contractors as employees). Courts look to several factors when determining employee status, including who governs the employee, who provides the equipment, who is responsible for the working conditions, for whose benefit the work was created, and how the employee was paid. See RESTATEMENT (SECOND) OF AGENCY § 220 (1958). Section 220 offers the "master-servant" analysis, defining the master's ability to control the servant's conduct in performing his/her responsibilities. The "master-servant" test examines whether the master is the dominant authority, whether the master supplies the servant's tools, whether the servant perform acts for the master's work, and whether the master pays the servant by the hour or by the job. *Id.* Independent contractors are independent from employers having specific control over their work product, whereas employees lack such freedom. See PETER M. LENCISIS, *WORKERS' COMPENSATION, A REFERENCE AND GUIDE* 44-46 (1998) (noting differences between an employee and an independent contractor). In addition, independent contractors are paid at the completion of a project, while an employee is paid on a scheduled basis. See also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752-53 (1989) (holding that the respondent sculptor was an independent contractor because he received his payment when project was completed, he supplied his own tools, he was retained for a relatively short period of time, CCNV had no right to assign additional projects to Reid, CCNV did not pay payroll or Social Security taxes, etc.).

123. See LARSON, *supra* note 2, at § 6.10 (claiming that injuries are limited to those that "arise out of and in the course of employment"); see also U.S. CHAMBER OF COMMERCE, *supra* note 116, at 2 (noting that workers' compensation does not cover employees' health problems outside the scope of their employment).

124. See LARSON, *supra* note 2, at § 47.10 (claiming an employment agreement sets up the parties' rights); see also *TIG Insurance Co. v. Deaton, Inc.*, No. 97-2637, 1998 U.S. App. LEXIS 31612, at *10 (4th Cir. Dec. 18, 1998) (claiming that an insurance policy that establishes the intent of both parties is a form of an employment contract that covers workers' compensation risks); *Jose Granados v. Windson Development Corp.* No. 980190, 1999 Va. LEXIS 22, at *8 (Va. 1999) (contending that an illegal alien cannot claim workers' compensation benefits even if she

Most states classify workers' compensation benefits under four different schemes: temporary disability benefits; permanent disability benefits; medical benefits; and death benefits.¹²⁵ The scheme under which one's injury falls determines the compensation.¹²⁶

Temporary disability benefits are for short-term injuries that prevent an employee from working but anticipate an employee's return to work after full recovery.¹²⁷ Temporary benefit schemes compensate for income lost during an employee's inability to work due to a temporary injury.¹²⁸ Usually, the temporary benefit provides for two-thirds of an injured worker's regular earnings.¹²⁹

Permanent disability benefits cover permanent partial disabilities and permanent total disabilities.¹³⁰ Permanent disability benefit schemes compensate permanent physical impairment, limitation, or loss of earning capacity for injured employees.¹³¹ Similar to the temporary disability benefit scheme, permanent disability benefits usually provide two-thirds of an injured worker's regular earnings.¹³² There are inherent differences between temporary disability benefits

or he enters an employment contract when an illegal alien is forbidden to be employed in the United States); *Robert Henson v. How Foundation-State Ins. Fund*, 1998 Okla. LEXIS 123, at *9 (Okla. 1998) (recognizing that an individual is only entitled to workers' compensation benefits under the Oklahoma Workers' Compensation Act if she or he has an employment agreement of labor in exchange for wages and other benefits defined by law); *Outland v. Monmouth-Ocean Educ. Serv. Comm'n*, 713 A.2d 460, 464 (N.J. 1998) (stating that "workers' compensation benefits to an employee are based on the 'wages' of an employee, a term that is defined under N.J.S.A. 34:15-37 as the money rate of pay 'under the employment contract'").

125. See *WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY, AND EFFICIENCY* 4-5 (John D. Worrall & David Appel, eds., 1985) [hereinafter Worrall & Appel] (discussing how states provide mandatory workers' compensation benefits, except for New Jersey, South Carolina, and Texas. New Jersey, South Carolina, and Texas allow employers to elect whether they want to be covered by workers' compensation or common tort law.); see also discussion *infra* notes 127-38 and accompanying text (defining the four different schemes).

126. See *infra* text accompanying notes 127-38.

127. See generally EDWARD M. WELCH, *EMPLOYER'S GUIDE TO WORKERS' COMPENSATION* § 8.3 (1994) (indicating that employers pay temporary disability benefits immediately following an employee's injury).

128. See *id.* at § 8.3 (noting that temporary benefits only last until an employee can return to work or receives as much recovery as expected).

129. See *id.* at § 8.3 (discussing maximum limit a worker can collect for injury).

130. See *id.* at § 8.4 - § 8.5 (noting that permanent partial disabilities are reserved for injuries that are expected to result in a permanent impairment even after a period of healing). Permanent partial disabilities account for the largest share of workers' compensation costs. Permanent total disabilities are reserved for workers with extremely severe injuries who are prevented from returning to any type of work for a permanent duration. *Id.*

131. See Ehrenberg, *supra* note 119, at 72-73 (explaining the difference between temporary disability benefits and permanent disability benefits). See generally Worrall and Appel, *supra* note 125, at 4-5 (distinguishing temporary disability benefits from permanent disability benefits).

132. See WELCH, *supra* note 127, at § 8.5 (discussing the amount employees can collect for injuries); see also Worrall & Appel, *supra* note 125, at 5 (noting permanent disability benefits account for sixty-five percent of workers' compensation costs).

and permanent disability benefits, however;¹³³ whereas permanent disability benefits indemnify against future loss of bodily functions and wage earning capacity, temporary disability benefits only compensate current income loss.¹³⁴

Medical benefits pay for all medical expenses related to an employee's injury.¹³⁵ Usually, medical benefits are unlimited because they assist in recovery.¹³⁶ Death benefits, which make up only a small share of workers' compensation schemes,¹³⁷ provide for fatal injuries or diseases. Death benefits usually cover burial and survival costs.¹³⁸

B. Legislatures and Courts Limit and Exclude Non-Elite Professional Athletes from Workers' Compensation

State workers' compensation statutes apply to professional athletes in a different manner than other employees.¹³⁹ States generally approach workers' compensation benefits for professional athletes in the following ways: statutory exclusion method;¹⁴⁰ functional exclusion method;¹⁴¹ exclusion through case-law method;¹⁴² election method;¹⁴³ and set-off method.¹⁴⁴ As a result of each of these

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

134. See generally Worrall & Appel, *supra* note 125, at 4-5 (contrasting permanent and temporary disability benefits).

135. See WELCH, *supra* note 127, at § 10.2 (giving a wide range of examples of medical expenses which would be covered).

136. See Worrall & Appel, *supra* note 125, at 4 (differentiating medical benefits from other types of benefits that compensate the worker for lost wages).

137. See *id.* at 5 (noting that death benefits account for seven percent of indemnity costs).

138. See WELCH, *supra* note 127, at § 9.7 (stating that many jurisdictions pay death benefits until a widow or widower remarries; however, some jurisdictions pay a fixed amount or dowry when a widow or widower remarries. Children receive death benefits until they reach the age of 18 unless the child is physically or mentally disabled, in which the state would pay the child indefinitely; when there are no dependents, the state only pays for the employees burial and is not required to pay survival costs).

139. See discussion *infra* Part III.B (discussing different states' mechanisms of providing or not providing workers' compensation benefits for professional athletes).

140. See FLA. STAT. ANN. § 440.02(1)(c)(3) (creating an exclusion from the statutory definition of employee).

141. See IOWA CODE §85.33(6) (1998) (granting coverage to professional athletes under the state's workers' compensation statute while creating a separate way to determine benefits).

142. See *Palmer v. Kansas City Chiefs Football Club*, 621 S.W.2d 350 (Mo. Ct. App. 1981) (holding that a football player's injury due to the deliberate collision of bodies did not constitute an injury because it was "not an unexpected occupational event").

143. See ILL. COMP. STAT. ANN. ch. 820 § 305(11) (West 1998) (allowing employers engaged in an enterprise or business not enumerated in the Act to choose whether to participate in the state's workers' compensation statute).

144. See HERZ & BAKER, *supra* note 133, at 15-16 (discussing the set-off method).

methods, if a professional athlete suffers injury, she or he may not be granted workers' compensation protection. The elimination of workers' compensation protection might not affect the elite professional athletes, who make so much money that the relatively low compensation offered by workers' compensation will be insignificant to them.¹⁴⁵ However, non-elite professional athletes likely will be negatively affected, because they earn low salaries and cannot self-insure against occupational injury. In other words, it will be very difficult for non-elite professional athletes to subsidize their injuries through their prior earnings.

1. Statutory Exclusion

Some states, such as Florida, specifically exclude professional athletes from their workers' compensation programs.¹⁴⁶ The Florida statute provides that "employment does not include service performed by or as: professional athletes, such as professional boxers, wrestlers, baseball, football, basketball, hockey, polo, tennis, jai alai, and similar players."¹⁴⁷ In *Rudolph v. Miami Dolphins*,¹⁴⁸ this statute was challenged under the Fourteenth Amendment's Equal Protection Clause and found constitutional.¹⁴⁹ The *Rudolph* court held that Florida's statutory exclusion of professional athletes has a reasonable relationship to a legitimate state purpose.¹⁵⁰

145. See *supra* note 16 and accompanying text (affirming the level of salary received by elite professional players).

146. See FLA. STAT. ANN. § 440.02 (1)(c)(3) (excluding professional athletes from the statute's definition of employee).

147. *Id.*

148. 447 So. 2d 284 (Fla. 1984).

149. *Id.* at 292 (holding that Florida's statute excludes professional athletes from workers' compensation benefits for all related activities of the sport, such as actual games, regular season practice, and pre-season training, thus denying professional football players workers' compensation benefits).

150. *Id.* The court stated:

Professional football players incur serious injuries on a regular, frequent, and repetitive basis. They are generally well paid, and as NFL contracts in these cases exemplify, they willfully hold themselves out as well-skilled in the sport of their choice. They make a conscious decision to use their skills in an occupation involving a high risk of frequent, repetitive, and serious injury. We cannot say that the legislature's exclusion of this voluntary, though highly dangerous, activity from the workers' compensation act fails to bear some reasonable relationship to a legitimate state purpose and is so completely arbitrary and lacking in equality of application to all persons similarly situated as to violate the cited constitutional provisions.

Id. But see *Miles v. Montreal Baseball Club*, 379 So. 2d 1325, 1325-26 (Fla. Dist. Ct. App. 1980). In *Miles*, a professional baseball player was required by the manager of the Montreal Expos to attend a press party. During the party, Miles and other team members dived into the Intercoastal Waterway. While diving, Miles hit bottom and was paralyzed. The court held that if Miles had been injured playing baseball, he would not be covered by Florida's workers'

Other states, such as Massachusetts¹⁵¹ and Wyoming,¹⁵² exclude professional athletes from workers' compensation benefits by stating that professional athletes are not employees. Conversely, some states, such as Rhode Island¹⁵³ and Washington,¹⁵⁴ exclude certain types of athletes. For example, Rhode Island statutorily excludes professional hockey players from workers' compensation coverage,¹⁵⁵ while Washington statutorily excludes horse race jockeys.¹⁵⁶

In addition, many states statutorily exclude professional athletes from recovery for injuries sustained between two successive seasons (off-season or pre-season).¹⁵⁷ For example, in Alabama:

Benefits are not payable to any individual on the basis of any services, substantially all of which consist of participation in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive seasons or similar periods of that sport or athletic event if that individual performed the services in the first of those seasons or similar periods and there is a reasonable assurance that the individual will perform the same or similar services in the second of those seasons or similar periods.¹⁵⁸

compensation statute. However, because Miles was required to attend the press party, which is not work typically associated with playing baseball, he was granted workers' compensation benefits. *Id.* at 1325-26.

151. MASS. GEN. LAWS ANN. ch. 152 § 1(4) (West 1998) (excluding professional athletes by extending coverage to employees except "persons employed to participate in organized professional athletics, while so employed, if their contracts of hire provide for the payment of wages during the period of any disability resulting from such employment . . .").

152. WYO. STAT. ANN. § 27-14-102(a)(vii)(F) (Michie) (1998) (stating that employee status does not include a professional athlete).

153. R.I. GEN. LAWS § 28-29-15 (1998) (exempting certain professional athletes).

154. WASH. REV. CODE ANN. § 51.12.020 (West & Supp. 1998) (enumerating employment that is not included within mandatory coverage of the workers' compensation statute).

155. R.I. GEN. LAWS § 28-29-15 (1998) (excluding professional hockey players from mandatory coverage of the workers' compensation statute).

156. WASH. REV. CODE ANN. § 51.12.020 (West & Supp. 1998) (excluding racehorse jockeys from state workers' compensation statutes).

157. See e.g., IOWA CODE ANN. § 96.5(9) (West 1998); LA. REV. STAT. ANN. § 1600(6)(b) (West 1998); ME. REV. STAT. ANN. tit. 26, § 1192(10) (West 1998); MASS. GEN. LAWS ANN. ch. 151A, § 25(g) (West 1998); MINN. STAT. ANN. § 268.08 (Subdiv. 7) (West 1998); MO. ANN. STAT. § 288.040(7) (West 1998); NEB. REV. STAT. § 48-628 (9) (1997); N.H. REV. STAT. ANN. § 282-A:16 (1997); N.J. STAT. ANN. § 43:21-4(h) (West 1998); VT. STAT. ANN. tit. 21, § 1343 (e) (1998); W. VA. CODE § 21A-6-3(7) (1998).

158. ALA. CODE § 23.20.381(a) (1998).

2. Statutory Inclusion, But Functional Exclusion

Some states have specific provisions that include professional athletes under their workers' compensation programs, but functionally exclude them from such benefits.¹⁵⁹ Iowa, for example, does not allow professional athletes to fully recover their lost salary for permanent disabilities.¹⁶⁰ The Iowa Code states that:

The degree of permanent disability of an individual who was injured in the course of performing as a professional athlete shall not be determined based upon employment as a professional athlete but shall be determined based upon other occupations the individual has previously performed or was reasonably suited to perform at the time of the injury.¹⁶¹

Iowa's system does not consider the likelihood that if professional athletes started playing at a very early age and limited their educational or vocational training, they might not be "reasonably suited" for any other occupation. Thus, even though the Iowa workers' compensation statute technically includes professional athletes, it functionally excludes them from full recovery.

Similarly, Louisiana's workers' compensation provision covers professional athletes but creates a set-off scheme of workers' compensation benefits.¹⁶² As a result, Louisiana's statute contravenes the purpose of permanent disability benefits, which is to provide for future loss of bodily functions and wage earning capacity based on one's current earnings.

3. Exclusion Through Caselaw

Some states are silent on the issue of coverage for professional athletes.¹⁶³ Courts in two states, however, have interpreted such

159. IOWA CODE § 85.33(6) (1998); LA. REV. STAT. ANN. § 1225(D) (West & Supp. 1998) (stating the scope of coverage under workers' compensation).

160. IOWA CODE § 85.33(6) (1998) (limiting the recovery of professional athletes).

161. *Id.*

162. LA. REV. STAT. ANN. § 1225(D) (West & Supp. 1998). The statute states that:

The compensation benefits payable to a professional athlete under any provision of this Chapter shall be reduced or offset by an amount equal to the total amount of benefits, wages, or other type of payment mentioned in any part of this provision on a dollar-for-dollar basis and not just on a week-to-week basis, if a professional athlete receives payment or remuneration.

Id. See also discussion *infra* Part III.B.5 (explaining set-off schemes).

163. See MO. ANN. STAT. § 288.040 (giving no mention to the coverage of professional

silence to mean that professional athletes are not covered under the state's workers' compensation laws.¹⁶⁴ In *Palmer v. Kansas City Chiefs Football Club*,¹⁶⁵ a Missouri court rejected a claim for workers' compensation benefits by a football player.¹⁶⁶ The court concluded that the deliberate collision of bodies did not constitute an "injury" under Missouri's definition of workers' compensation, and that Palmer's injury was "not an unexpected occupational event."¹⁶⁷ Therefore, Palmer could not receive workers' compensation benefits for his injuries.¹⁶⁸ Similarly, a Maryland court in *Rowe v. Baltimore Colts*¹⁶⁹ held that an occupation such as football, which requires physical contact, cannot give rise to "accidental injur[ies]"¹⁷⁰ under the Maryland Workmen's Compensation Law.¹⁷¹

athletes in the workers' compensation statute); MD. CODE ANN., [LAB. & EMPL.] § 9-101 (1988) (remaining silent on the position of coverage for professional athletes under the workers' compensation statute).

164. See *Palmer v. Kansas City Chiefs Football Club*, 621 S.W.2d 350 (Mo. Ct. App. 1981) (denying workers' compensation for an injury received during the course of a game); *Rowe v. Baltimore Colts*, 454 A.2d 872 (Md. Ct. Spec. App. 1983) (denying a football player benefits under the state's workers' compensation statute). However, other states interpret such silence to mean inclusion. See also *Albrecht v. Industrial Commission*, 648 N.E. 2d 923, 925-26 (Ill. App. Ct. 1995) (holding that professional football players are skilled workers under the Illinois workers' compensation statute, and any shortened work expectancy in a player's career would not preclude him from a wage-loss differential award); *Bayless v. Philadelphia National League Club*, 472 F. Supp. 625, 631 (E.D. Pa. 1979), *aff'd*, 615 F.2d 1352 (3d Cir. 1980) (holding that all employees, regardless of their income, fell under the Pennsylvania Workmen's Compensation Act); *United States Fidelity & Guar. Co. v. Indemnity Ins. Co. of N. Am.*, 271 F.2d 955, 956 (5th Cir. 1959) (affirming professional baseball players are covered by workers' compensation laws); *Brinkman v. Buffalo Bills Football Club*, 433 F. Supp. 699, 702 (W.D.N.Y. 1977) (holding exclusive remedy for football injury is workers' compensation); *Metropolitan Cas. Ins. Co. of New York v. Huhn*, 141 S.E. 121, 125-26 (Ga. 1928) (holding professional baseball players fall under state's workers' compensation laws); *McGlasson v. Workmen's Compensation Appeal Bd.*, 557 A.2d 841, 841-43 (Pa. Commw. Ct. 1989) (granting workers' compensation award to Philadelphia Eagles player whose injury ended his football career); *Knelson v. Meadowlanders, Inc.*, 732 P.2d 808, 810, 814 (Kan. Ct. App. 1987) (affirming Kansas' district court's finding that workers' compensation applies to professional hockey players).

165. 621 S.W.2d 350 (Mo. Ct. App. 1981).

166. *Id.* at 357 (claiming workers' compensation benefits only pay individuals with an unexpected occupational injury).

167. *Id.* (noting that the function of a professional lineman is to maneuver the other player off balance by exploiting his vulnerable position or unexpected posture in order to knock him down and block him from moving up the field; thus, executing the off balance posture is not an unexpected occupational injury, but rather is necessary in order to win a football game).

168. *Id.* (finding that because this injury could not be considered an unexpected occupational event, due to the nature of the occupation, and therefore Missouri's workers' compensation statute did not apply).

169. 454 A.2d 872 (Md. Ct. Spec. App. 1983) (denying a football player benefits under the state's workers' compensation statute because an occupation requiring physical contact cannot give rise to accidental injuries).

170. *Id.* at 878 (finding "accidental injuries" to include "force, trauma, violence, surprise, and mischance" from unusual conditions).

171. MD. ANN. CODE [LAB. & EMPL.] § 9-101 (1988) (defining accidental injuries as injuries that result from unusual conditions in employment). "If the injury sustained while the

4. Election Method

Another means of limiting professional athletes from workers' compensation benefits is by election. Some states give team owners the *option* of participating in workers' compensation programs, but without requiring participation in such programs.¹⁷² For example, in Illinois, an employer has a choice of whether to participate in the state's workers' compensation program.¹⁷³ If team owners choose not to participate in the state's workers' compensation programs, professional athletes must rely on their contracts for benefits.¹⁷⁴ Some team contracts, however, limit or exclude professional athletes from private benefits.¹⁷⁵ For example, team contracts that provide benefit coverage most likely will terminate at the end of the season if a player's injury is permanent.¹⁷⁶ The termination of a professional athlete's contract, combined with the absence of state's workers' compensation coverage, leaves non-elite professional athletes with no remedies to pay for their permanent injuries.¹⁷⁷ Further, the election method allows teams to provide fewer benefits to professional athletes in comparison to a state workers' compensation program.¹⁷⁸

In Minnesota, both the professional athletes and the employers decide jointly whether to forgo workers' compensation benefits and instead opt for players' contracts.¹⁷⁹ The Minnesota statute states that "[p]rofessional athletes under contract for hire whose contract gives compensation not less than that provided by this chapter are not

employee is performing daily, routine duties, the injury has not resulted from an unusual condition of employment or an unusual strain or exertion and is, therefore, not accidental". *Id.* at § 9-101 (II) (A).

172. See ILL. COMP. STAT. ANN. ch. 820 § 305(11) (West 1998) (granting employers engaged in any enterprise or business not enumerated in the Act the option of choosing whether to participate); see also W. VA. CODE § 23-2-1(b)(6) (1998) (allowing employers engaged in organized professional sport activities to elect whether to subscribe to the workers' compensation fund).

173. See ILL. COMP. STAT. ANN. ch. 820 § 305(11) (West 1998) (stating that employers not enumerated in the Act can choose whether to participate).

174. See *supra* Part II.C (discussing the effects on non-elite professional athletes who do not have guaranteed contracts).

175. See discussion *infra* Part III.C (discussing how team owners limit or exclude athletes from workers' compensation statutes).

176. See discussion *infra* Part III.C (expounding on team contracts which provide benefits that terminate at the end of the season if the injury is permanent).

177. See *infra* text accompanying notes 207-12 (discussing how the interaction between employers' contracts and state workers' compensation statutes limit athletes' remedies in the case of permanent injuries).

178. See *supra* text accompanying notes 100-09, 143 (relating how the election method can result in professional athletes' being provided less benefits than they would otherwise receive under a workers' compensation statute).

179. MINN. STAT. ANN. § 176.041 (Subdiv. 1) (West 1998) (avoiding double compensation).

subject thereto if a written consent not to be bound thereby, signed by the professional athlete and the employer and approved by the commission."¹⁸⁰ If players do not have good negotiating powers, team owners can persuade them to sign written consent forgoing workers' compensation benefits.¹⁸¹ This creates a problem when injured players' non-guaranteed contracts terminate due to permanent injuries; they cannot cover their injury costs since they never earned enough to self-insure themselves.¹⁸²

5. Set-Off Method

Some states establish set-off schemes, in which workers' compensation benefits are subtracted from any benefits paid under contract and team owners receive a credit¹⁸³ to avoid doubly compensating professional athletes.¹⁸⁴ Set-off schemes are reasonable with regard to temporary disability benefits because such benefit plans were only created to compensate for lost earnings during one's rehabilitation period—during which time team owners should not have to double their athletes' pay.¹⁸⁵ However, set-off schemes are unreasonable when dealing with permanent disability payments because such benefit plans were created to compensate injured employees for future limitations and loss of bodily functions.¹⁸⁶ In such situations, professional athletes need workers' compensation benefits because they are not being compensated for any period during their employment, but are being compensated prospectively for the period after their employment terminates. Professional

180. *Id.*

181. See Dean Robert P. Garbarino, *So You Want to be a Sports Lawyer, or is it a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor or Contract Representative?*, 1 VILL. SPORTS & ENT. L.F. 11, 34, 37 (1994) (detailing that a marginal player could be in danger if the agent is confrontational or not competent in the art of negotiation).

182. *See id.*

183. *See* Herz & Baker, *supra* note 133, at 15 (describing set-off schemes)

184. *See* Herz & Baker, *supra* note 133, at 15-16 (explaining the rationale for set-off schemes).

185. *See* Herz & Baker, *supra* note 133, at 15-16 (discussing set-off schemes as applied to both temporary and permanent disabilities).

186. *See* Carlin & Fairman, *supra* note 109, at 121. This Note explains that under the permanent disability benefit scheme which provides for future loss:

An employer is not entitled to credit against awards for permanent disability. This is because such payments are prospective in nature. Consequently, there is no credit because they do not compensate for anything the employer paid the employee during the period of employment [Therefore, i]t makes no sense to allow a set-off credit [for permanent disability benefits] since there has not even arguably been any double compensation.

Id.

athletes who are permanently injured, therefore, need both workers' compensation benefits and their remaining contractual benefits in order to compensate for their future physical—and therefore occupational—inabilities.¹⁸⁷

For example, Missouri effectively prevents an injured professional athlete from receiving workers' compensation benefits of any kind by offsetting them against contract benefits.¹⁸⁸ Missouri, however, favors professional athletes' employers by entitling them to full credit¹⁸⁹ for supplying medical care and benefits for an injured player.¹⁹⁰ In contrast, Louisiana reduces or offsets compensation benefits payable to a professional athlete on a dollar-for-dollar basis, not just on a weekly basis, if the athlete receives any payments or benefits from the employer.¹⁹¹ The Ohio statute deems any advanced payment under a contract for hire as a payment of workers' compensation benefits.¹⁹² Under Ohio law, the employer is subsequently reimbursed for payments advanced to the player by the workers' compensation program.¹⁹³ Thus, the player never receives any money from the workers' compensation program and only receives compensation from her or his employer.¹⁹⁴ Basically, set-off schemes allow team

187. See LARSON, *supra* note 2, at § 57.46 (noting it is unfair to create a set-off scheme for those who are permanently disabled).

188. See MO. ANN. STAT. § 287.270 (West 1997). The Code states:

No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder . . . and employers of professional athletes under contract shall be entitled to full credit for wages or benefits paid to the employee after the injury including medical, surgical or hospital benefits paid to or for the employee or his dependents on account of the injury, disability, or death, pursuant to the provisions of the contract.

Id.

189. Full credit refers to a state compensating an employer for all expenses it pays for its employee's injury. See MO. ANN. STAT. § 287.270 (West 1997).

190. See *id.*

191. See LA. REV. STAT. ANN. § 1225(D) (West & Supp. 1998). This statute classifies what constitutes as payments or benefits as:

1. Any wages or benefits payable or paid to the athlete; 2. A collective bargaining agreement; 3. A contract for hire for any type; 4. Any type of severance pay; 5. Any type of injured reserve pay; 6. Any type of termination pay; 7. Any grievance or settlement pay; 8. Any workers' compensation benefit of any type; 9. Any other payment made to the professional athlete by the employer pursuant to any contract or agreement whatsoever.

Id. (emphasis added).

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

193. See *id.*

194. See Carlin & Fairman, *supra* note 109, at 112 (noting that the set-off method covers professional athletes under workers' compensation schemes; however, any contract benefits

owners to obtain a windfall through offsetting their teams' contractual compensation responsibilities by taking a credit against a state's workers' compensation policies.¹⁹⁵

C. Team Owners Limit and Exclude Non-Elite Professional Athletes from Workers' Compensation

In addition to state statutes and judicial decisions, professional athletes' contracts may restrict them from receiving workers' compensation benefits.¹⁹⁶ If a contract provides greater benefits than the statutory standard for workers' compensation, the professional athlete may be unable to rely on the state's workers' compensation plan, which may provide disability benefits after a contract expires.¹⁹⁷ Contract negotiations, therefore, are extremely important.¹⁹⁸

For example, this section shows how the WNBA and the former ABL leagues contractually restrict the collection of benefits by female professional athletes.¹⁹⁹ Although both the WNBA and the former ABL offer workers' compensation coverage, injured female professional athletes would receive benefits limited to the term of their contract or season.²⁰⁰ Neither league would compensate female professional athletes for career-ending injuries or permanent disabilities.²⁰¹ Additionally, both leagues' contract provisions would

paid to the injured athlete reduces his benefit package on a dollar-for-dollar basis).

195. See WNBA Standard Player Contract, Para. 2(b) (detailing how the player has agreed to sign away her worker's compensation claim to the league, who then subtracts such claim from her salary if injury occurs).

196. See discussion *infra* Part III.C (discussing the restrictions of the former ABL's and the current WNBA's contracts pertaining to full workers' compensation coverage for their professional athletes).

197. See *supra* text accompanying note 179 (stating that Minnesota's statute gives professional athletes and their employers the option to forgo workers' compensation benefits when the contract provides for greater benefits); see also MICH. COMP. LAWS ANN. § 418.360 (West 1998) (discussing Michigan's statute which fundamentally excludes professional athletes who make more than 200 percent of the state's weekly wage).

198. The jurisdiction in which a professional athlete plays will determine whether she or he will receive any workers' compensation benefits. As discussed, if professional athletes play in a state that has an exclusion statute— for example, Florida— and they do not have a guaranteed contract, they will be unable to receive workers' compensation benefits if injured and will be responsible for paying for their injuries by themselves. See *supra* note 146 (citing Florida's statute).

199. See discussion *infra* Part III.C (examining the methods used to restrict female professional athletes from collecting benefits).

200. See *infra* text accompanying notes 203-08 (outlining the way in which injured female professionals in the WNBA and the former ABL would be restricted to the term of their contract or season).

201. See Paragraph 6, ABL Standard Players Agreement (noting that the ABL only provided workers' compensation to its players for the contract period); Paragraph 2(b), WNBA Standard Player Contract (stating that the WNBA only provides workers' compensation to its players for the remainder of the season in which they are injured).

prevent injured female professional athletes from receiving full workers' compensation benefits by offsetting these against their contract benefits.²⁰²

Three provisions of the ABL Standard Players Agreement affected workers' compensation claims for female basketball players.²⁰³ The agreement provided that if a player was injured as a direct result of participating in any team practice, game, or promotional event, then the ABL would have paid workers' compensation insurance, including hospital, medical and dental expenses.²⁰⁴ Nevertheless, ABL basketball players were only protected during their contract period: "the ABL's obligation to provide said medical and dental services shall cease upon termination of this Agreement."²⁰⁵ Thus, players had no remedy to receive compensation benefits for latent or delayed presentation of injuries after their contracts terminated.²⁰⁶

Paragraph ten of the ABL agreement further stated that:

The [former] ABL's obligations hereunder to continue to pay <<last_name>> compensation in the event of illness or injury emanating directly from <<last_name>>'s performance of <<last_name>>'s obligations as defined in this Agreement, shall be *reduced* by any workers' compensation benefits and any insurance provided by the [former] ABL, or other medical benefits paid to <<last_name>> by the [former] ABL.²⁰⁷

Here, the ABL established a set-off scheme that limited female basketball players from full coverage.²⁰⁸

This provision of the ABL agreement did not consider career-ending injuries.²⁰⁹ Because the ABL did not cover players after expiration of their contracts, players who incurred permanent

202. See Paragraph 10, ABL Standard Players Agreement (mentioning that ABL benefits paid to injured players were reduced by any state workers' compensation benefits); Paragraph 2(b), WNBA Standard Player Contract (claiming injured WNBA player receives her salary minus any workers' compensation benefits).

203. See *infra* text accompanying notes 204-14 (highlighting how certain provisions from the ABL Standard Players Agreement affected female basketball players' workers' compensation claims).

204. See Paragraph 6, ABL Standard Players Agreement.

205. *Id.*

206. This Comment defines "delayed presentation of injuries" as an injury that does not appear immediately after an occupational incident but appears months or years later.

207. Paragraph 10, ABL Standard Players Agreement.

208. *Id.*

209. See *id.* (reserving the option of the league not to review a player's contract after an injury with no further obligation to pay compensation).

disabilities had to pay all future injury costs.²¹⁰ This created a hardship for players who could not seek alternative employment because their injuries impaired their ability to work.²¹¹

Additionally, the ABL rendered full salary to the player's estate or duly appointed representative or beneficiary upon a player's death.²¹² The full salary granted to the decedent's estate, however, was only for the specific contract year in which the player died.²¹³ If the decedent's female basketball player was the sole breadwinner of the household, a full salary for one year would not have been enough to support a family in the future.²¹⁴ Thus, widowers or widows should be able to seek long-term benefits under workers' compensation laws.

The WNBA Standard Player Contract also includes provisions that preclude female basketball players from obtaining full benefit coverage.²¹⁵ Paragraph two (b) of the contract states that if a player is injured as a result of playing during the WNBA season, "[s]he will continue receiving her salary *less* any workers' compensation benefits which, to the extent permitted by law, the Player hereby assigns to the League until the conclusion of the regular season in which her injury occurred."²¹⁶ Similar to the ABL contract, the WNBA contract creates a scheme that functionally excludes female basketball players from full benefit coverage. In fact, the WNBA's contract is more restrictive than the ABL's contract regarding benefits because it only covers players for the season in which they are injured and not for the remaining portion of their contract.²¹⁷ For example, if a WNBA player signs a three-year contract and is injured in her first season, she will be compensated for the first season but will not receive any benefits for the remaining two seasons.²¹⁸ Thus, the WNBA does not guarantee contracts for its players.

210. See Paragraph 6, ABL Standard Players Agreement (noting that the ABL did not protect its members after their contract period).

211. See generally WNBA Standard Contract, Para. 2(b) (discontinuing salary when player terminates contract due to injuries).

212. See Paragraph 17 B, ABL Standard Players Agreement.

213. See *id.* (limiting the salary given a decedent's estate to the specific contract year the player died).

214. See generally WNBA Standard Player Contract, Para. 2(b) (discontinuing salary when player terminates contract due to injury).

215. See generally WNBA Standard Player Contract, Para. 2(b) (limiting a player's coverage to that particular season only).

216. Paragraph 2(b), WNBA Standard Player Contract.

217. Compare Paragraph 2(b), WNBA Standard Player Contract (covering WNBA players for only the regular season), with Paragraph 6, ABL Standard Players Agreement (covering former ABL players for entire contract period).

218. See Paragraph 2(b), WNBA Standard Player Contract.

Additionally, the WNBA does not offer continued benefits to players who are injured during pre-draft camp.²¹⁹ The WNBA states that "[n]o such salary continuation shall apply to a termination due in part to an injury sustained in connection with any pre-draft camp conducted by the WNBA."²²⁰ Again, the WNBA significantly reduces its obligations to pay its players workers' compensation benefits.

Furthermore, unlike the ABL, the WNBA releases itself from liability for risk of death or personal injury while participating in basketball games, scrimmages, training sessions, clinics or demonstrations.²²¹ Hence, female basketball players assume the risk of death or personal injuries when choosing to play for the WNBA.

Similar to the ABL and WNBA, non-elite professional athletes' contracts limit and exclude them from receiving workers' compensation coverage. Highly paid athletes may be able to protect their benefits by collective bargaining. However, non-elite professional athletes, with the exception WNBA players, are significantly disadvantaged because they have no unions, and therefore they must sign contracts without full workers' compensation coverage.

IV. RECOMMENDATIONS

As this Comment demonstrates, legislatures, courts, and team owners exclude non-elite professional athletes—a disproportionate number of whom are women—from workers' compensation benefits. In order to rectify this problem, professional athletes need to seek statutory reform by repealing statutory exceptions, prompting legislatures to overturn incorrect judicial decisions, and encouraging collective bargaining.

Such limitation and exclusion of workers' compensation benefits has a disparate impact upon female professional athletes, who have lower salaries than male athletes and a higher injury rate than their male counterparts.²²² If society wants to promote women's sports,

219. *See id.* (including no provision for contractual benefits for pre-draft camp injuries).

220. *Id.*

221. *See* Paragraph 12, WNBA Standard Player Contract (noting that the WNBA releases itself from injury to any unborn fetus).

222. *See* BLACK'S LAW DICTIONARY 196 (Pocket ed. 1996) (defining disparate impact as discrimination caused by a policy which is neutral on its face but has a disproportionate impact on the individual or group because of sex, race, color, religion, or national origin); *see also* Victory v. Hewlett-Packard Co., 1999 U.S. Dist. LEXIS 620, at *43, *44 (holding Hewlett-Packard's promotion and salary policies disparately impacted women seeking higher positions within the company).

public policy should mandate that this problem be rectified.

First, legislatures should repeal statutory exceptions and enact legislation to include professional athletes under their statutory workers' compensation provisions. States should not only provide workers' compensation benefits to professional athletes during their regular season but also provide recovery for injuries between two successive seasons (i.e., training for the following season).

The *Rudolph* court's rationalization that all professional players are paid well to participate in those sports in which there is a high rate of injury²²³ is simply unfounded. As discussed in Part II, many professional athletes do not earn high salaries.²²⁴ If non-elite professional athletes earn low salaries and suffer occupational injuries, it will be very difficult for them to subsidize their medical expenses. Their salaries do not reflect compensation for the risk of injury anymore than the salaries of workers in other occupations with comparable injury rates. If these non-athlete workers are entitled to the protections of the workers' compensation system, then professional athletes should be entitled to the same protections.

Furthermore, the fact that players consciously choose to participate in contact sports should not prevent them from receiving workers' compensation coverage. Many other groups of employees who choose to work in fields that are dangerous and often cause occupational injuries—such as firefighters, police officers, and steel workers—are not limited or excluded from workers' compensation coverage. There is simply nothing different about the risk of harm by participation in athletics. Thus, one appropriate solution is to rewrite workers' compensation legislation to cover *all* workers in high-risk occupations, including professional athletes.

In the alternative, a state wishing to exclude highly paid professional athletes, could create a law similar to that of Michigan.²²⁵ Michigan's statute covers professional athletes only if they are making less than 200 percent of the state's weekly wage.²²⁶ Athletes are only exempted from workers' compensation benefits if they earn more

223. See *supra* text accompanying notes 148-50 (explaining the court's analysis in *Rudolph*).

224. See discussion *supra* Part II (disputing the claim that most professional athletes earn high salaries).

225. MICH. COMP. LAWS ANN. § 418.360 (West 1998).

226. *Id.* See also Liz Lederman Fine, *If Your Child Is Skipping School, Act Quickly*, SUN-SENTINEL, Dec. 6, 1998, at 6E (noting that the Bureau of Labor's most current statistics from a 1996 report stated that the "average gross weekly salary for U.S. workers with various levels of education and training: Short-term on-the-job training: \$337; Work experience in related occupation: \$534; Associate degree: \$639; Bachelor's degree: \$686; Master's degree: \$682; Doctoral degree: \$847; and Professional degree: \$1,057").

than 200 percent of Michigan's weekly wage. This approach would extend coverage to those professional athletes who truly cannot cover themselves, while allowing states to save money by not covering those "stars" whose salaries allow them to self-insure against the risk of injury.

Second, states that include professional athletes under their workers' compensation program should be precluded from functionally excluding them from such benefits. States such as Iowa²²⁷ should not be allowed to minimize athletes' recovery by insisting that professional athletes can receive compensation based only on either past employment or employment that they might have had at the time of the injury if they had never become a professional athlete. Such speculation is patently unfair, as no other employee receives benefits based upon a previous occupation or an occupation for which the employee would have been reasonably suited at the time of the injury.

Instead, states should follow the lead of cases such as *Albrecht v. Industrial Commission*²²⁸ and *Bayless v. Philadelphia National League Club*,²²⁹ in which the courts allowed the plaintiffs to recover under the workers' compensation system based solely on their salary as an athlete prior to their work-related injury. In *Albrecht*, the court held that professional football players are skilled workers under the Illinois workers' compensation statute,²³⁰ and any shortened work expectancy in players' careers would not preclude them from wage-loss differential awards.²³¹ In *Bayless*, the court held that all employees, regardless of their income, fell under the Pennsylvania Workmen's

227. IOWA CODE, § 85.33(6) (1998).

228. 648 N.E. 2d 923 (Ill. App. Ct. 1995).

229. 472 F. Supp. 625 (E.D. Pa. 1979), *aff'd*, 615 F.2d 1352 (3d Cir. 1980).

230. *Id.* at 925. Under the Illinois workers' compensation statute, to qualify for a wage-loss differential award, claimants must prove that their injuries resulted in a partial incapacity that prevented them from pursuing their usual line of employment and impaired their earnings. Thus, injured employees are compensated for reduced earning capacity based on the presumption that, but for the injury, the employees would still continue their usual line of work. The award is based on the difference between what the employees would have earned if they still worked at the same occupation while injured, minus what they are currently earning in some suitable employment. *Id.* at 926-27. See also ILL. COMP. STAT. ANN. ch. 820, 305/8(d)1 (West 1994) (giving workers' compensation coverage to individuals defined as skilled workers).

231. *Albrecht*, 648 N.E.2d at 927. The claimant, Ted Albrecht, a Chicago Bears offensive lineman, played in the NFL for five seasons between 1977 and 1981. In April of 1982, at training camp, Albrecht endured a disc herniation and bulging disc, injuring himself to such a degree that he could no longer play. The evidence indicated that Albrecht's earnings between 1983 and 1986 were considerably less than his salary in 1982, his final season playing with the Chicago Bears. Because he proved an impairment in his earning capacity, the court held that the former professional football player was entitled to wage-loss benefits based on his final season playing with the team. *Id.* at 924-27.

Compensation Act.²³² The court recognized that professional athletes should be protected by workers compensation, stating that if Bayless was allowed to bring his claim under tort law, "hundreds and possibly thousands of low as well as high priced athletes on Major and Minor League Teams would be deprived of humanitarian benefits and protections the Act provides."²³³ Thus, states could follow the *Albrecht* and *Bayless* courts and determine that the exclusive remedy for professional athletes' injuries is workers' compensation.²³⁴

In the alternative, state legislatures should pass legislation to overturn judicial opinions limiting non-elite professional athletes' ability to recover workers' compensation. Legislatures should explain to the courts that they should not interpret such "silence" as implying that professional athletes are prohibited from workers' compensation benefits.

Third, states should not give team owners the option of participating in workers' compensation programs. Instead, states should mandate such coverage. This will prevent the law from having a negative effect on non-elite professional athletes, including female professional athletes, who may receive fewer benefits if their contract provides for less than what the state would have provided. In addition, such state legislative initiatives would prevent professional athletes from finding themselves unable to receive any benefits to cover the cost of their permanent injuries when their contracts terminate upon injury.

The best solution is to require all players to be part of the workers' compensation system. This would allow teams with large financial resources to help subsidize the less elite teams. But if this cannot be accomplished, states should give players—rather than team owners—the option of electing to participate in states' workers' compensation programs. Thus, courts could create a system similar to that in Texas, where athletes themselves can elect to participate in workers' compensations programs.²³⁵ If professional athletes elect to participate in workers' compensation programs, they must forgo

232. *Bayless*, 472 F. Supp. at 627. Bayless, a professional baseball player, brought a claim for personal injuries suffered while employed as a pitcher in the minor league farm system against the Philadelphia Phillies National League Baseball Club. Bayless' claim was for mental illness caused by the lack of sound medical care in administering drugs for severe back pain. This case is interesting because Bayless brought the case under common tort law, rather than workers' compensation law. Nevertheless, the employer refuted Bayless' claim, asserting that Bayless was an employee of the team and thus fell under the sphere of workers' compensation, not under tort law. *Id.* at 627-31.

233. *Id.*

234. *Albrecht*, 648 N.E. 2d at 925; *Bayless*, 472 F. Supp. at 627.

235. TEX. REV. CIV. STAT. ANN. § 406.095 (a) (West 1998).

injury benefits under their contract or collective bargaining agreement.²³⁶ This choice must be made within fifteen days of the injury.²³⁷

Fourth, set-off schemes that eliminate access to permanent disability payments should be forbidden, as they deny professional athletes compensation for future limitation and loss of bodily functions. Such schemes are especially unfair to non-elite professional athletes who never receive any money from the state's workers' compensation program and only receive minimal compensation from their employer. Thus, these non-elite athletes are potentially rendered unable to subsidize their long-term injury and future disability. Such schemes should only be used if a professional athlete has the option to elect disability insurance that provides more money than workers' compensation benefits.

Finally, professional athletes can protect themselves from statutes and contractual restrictions if they unionize. Once non-elite professional athletes are unionized, they can negotiate for higher salaries and greater workers' compensation benefit plans under their respective contracts, when a state is unwilling to grant them workers' compensation benefits. Non-elite professional athletes need to negotiate for guaranteed contracts so that their disability benefits do not expire in the event of injury. Alternatively, if team owners are able to negotiate for non-guaranteed contracts, non-elite professional athletes should at least negotiate for permanent injury disability insurance coverage that applies regardless of whether the contract expires. This will guarantee that non-elite professional athletes will be covered for latent and delayed presentation of injuries if the contract terminates.

V. CONCLUSION

Not all professional athletes earn high salaries. In fact, many non-elite professional athletes and female professional athletes earn low salaries,²³⁸ do not have guaranteed contracts,²³⁹ and are unable to self-insure themselves from workplace injuries. Thus, when legislatures, courts, and team owners limit or exclude professional athletes from workers' compensation,²⁴⁰ non-elite professional athletes, a

236. *Id.*

237. TEX. ADMIN. CODE § 112.401 (West 1994).

238. See discussion *supra* Part II.A-B (analyzing salary level of non-elite and female professional athletes).

239. See discussion *supra* Part II.C (discussing the lack of guaranteed contracts).

240. See discussion *supra* Part III (discussing the different mechanisms courts, legislatures,

disproportionate number of whom are women, are negatively affected.

In order to stop legislatures, courts, and team owners from barring non-elite professional athletes from workers' compensation coverage, professional athletes need to first seek statutory reform by repealing statutory exceptions and enact legislation that includes them under their state's workers' compensation provisions. Second, professional athletes need to prompt legislatures to take action to repeal functional exclusion of professional athletes from workers' compensation benefits. Third, state legislatures should pass legislation to repeal judicial opinions that have interpreted silence as forbidding professional athletes worker's compensation coverage. Fourth, states should either mandate that team owners participate in workers' compensation programs or give players— rather than the team owners— the option to elect workers' compensation programs. Fifth, if a state continues to exclude highly paid professional athletes from workers' compensation benefits, then it should adopt a scheme similar to Michigan's statute, where athletes are covered if they earn less than 200 percent of the state's weekly wage. Last, non-elite professional athletes should unionize so that they can collectively bargain for higher salaries and guaranteed workers' compensation benefits.

and team owners use to preclude professional athletes from workers' compensation benefits); *see also* D.C. Arena Professional Athletic Teams Act of 1997, Bill No. 12-337 (proposing legislation that would exclude professional athletes from basic workers' compensation coverage in the District of Columbia, and thus benefit owners of professional sports teams that will play in the MCI Center).

