

**TONIGHT'S MATCHUP – WORKERS' COMPENSATION V. MEDICAL
MALPRACTICE: WHAT SHOULD LOWER-PAID, INEXPERIENCED ATHLETES
RECEIVE WHEN A TEAM DOCTOR ALLEGEDLY AIDS IN ENDING THEIR
CAREERS?**

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INTRODUCTION

Bone-crushing tackles, strong checks into the wall, and hard fouls are a source of enjoyment for many fans of professional sports. Watching them on sports highlights or in person can be one of the biggest thrills of a fan's afternoon. But beyond the enjoyment value, a humbling feeling should come over all that witness an athlete shaken up or taken off the field, whether during a game or even at practice. A human life has been altered, and perhaps in a way that will never make them the same again.

Many will immediately chime in that these persons are overpaid crybabies who are more than able to take care of any medical costs they endure due to injury. Even though it is tough to deny that this is the case for many athletes, a vast number of others made or make salaries at a rate more commensurate with ordinary citizens. These athletes still don a uniform in the hopes of becoming a superstar, but may now face the reality their dreams are cut short due to a debilitating injury.

While there is no question these athletes receive medical care at the outset, the cost of which is absorbed by their employers, the standard of that care can be lower than some would believe, many times due to the conflicts the medical staff may endure. On numerous occasions, this care has led to an even more serious injury than the one received during the game. When a secondary injury is so serious that a career is ended, several avenues can be traveled in an attempt to recover some

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help for future expenses. The current system to obtain recourse is by no means uniform or fair to all who wish to reap its benefits. A change to the current system needs to be instituted immediately, making financial support available for those athletes that do not and will never receive an exorbitant salary - those who may have only gone to a few practices, and never played a game - but nonetheless were injured and cast aside by their respective teams.

There are some states that have heeded this call by allowing athletes to bring medical malpractice suits against team doctors and other medical staff, but this is not the answer to the problem. While this gives these athletes some much-needed financial support, this does nothing but hurt the rest of society in the long run. Other states only allow an award out of a state's Workers' Compensation statutory scheme, and often times is a very minimal aid to the injured athlete.

This article will focus upon the need for changes in the current options available for lower-paid and inexperienced athletes in professional team sports, primarily asking for all states to consider amending their Workers' Compensation schemes to better suit the needs of such an athlete that is injured, perhaps permanently, from not only his job but also from improper medical treatment by team doctors. It will discuss several hypothetical solutions mentioned in other articles offered as a possible way to fix the system and minimize the disparity, especially when it comes to financial recourse. All of the solutions were drafted with the idea of creating more protection for injured athletes. But in those examples, the disadvantages far outweigh the benefits, and some are too impractical to work in today's sports world, as opposed to the new Workers' Compensation statute proposed below.

As this article looks into this option, it will also focus on a true-life model that is currently fighting the inadequacy of the system. Former National Football League ("NFL") player Greg Lotysz epitomizes this struggle, as he fights for the right to sue New York Jets team doctors for

medical malpractice, and best exemplifies the need for change. While his is a compelling story for medical malpractice proponents, it shows his recourse should not be in the malpractice arena. His fight will better show the need to protect him and his comrades through amended Workers' Compensation laws.

I. THE SAGA OF GREG LOTYSZ

The Greg Lotysz story began in Thunder Bay, Ontario, and continued as he earned Division II All-American honors at the University of North Dakota.¹ The 6'6", 310-pound offensive tackle got the attention of then New York Jets coach Bill Parcells, who promoted him off the practice squad in 2000.²

Unfortunately for Greg, during his second practice of his second season with the Jets, his knee was seriously injured while bracing for contact on the offensive line.³ Despite the seriousness of the injury (torn anterior cruciate ligament (ACL) and medial cruciate ligament (MCL), as well as a damaged lateral meniscus), there was still a chance Greg would be able to play again, therefore, optimism surrounded his prognosis as surgery was scheduled with the Jets' orthopedic surgeons.⁴

Upon completion of the surgery, it became apparent that not everything was going according to schedule. Eventually, Greg learned that one, possibly two infections presumably resulted from the surgery, and Greg claims that the damage done by the infections permanently disabled him and effectively ended any chance of returning to an NFL career.⁵ Greg sued the two

¹ Greg's story was the focus of a segment on ESPN's *Outside the Lines* in a fall 2003 broadcast (Airdate Unknown).

² *Felled at the Line of Scrimmage: Former Jet, Claiming He Was Cared For Poorly After Surgery, Sues Team Docs*, Sunday Special, UNDNNews.com, Jun. 30, 2002, available at <http://www.undnews.com/football.htm> (last visited Oct. 1, 2003).

³ *Id.*

⁴ *Id.*

⁵ *Id.* When Greg got out of surgery, he complained of swelling, heat, and pain in his knee, but was told it was a normal response. *Id.* Eventually, Greg resorted to taking painkillers non-stop. *Id.* The new ACL and all surgical implements were taken out and replaced with a cadaver ACL. *Id.*

surgeons, their private practice, and another infectious disease specialist for medical malpractice.⁶ He noted in his complaint the doctors did not treat or even detect the initial infection properly.⁷

Due to the limited service Greg served in the NFL, he is not eligible for most of the benefits provided through the union and the collective bargaining agreement, but is eligible for Workers' Compensation, reimbursement of medical and rehabilitation expenses, and disability.⁸

In late 2002, Greg's malpractice suit was dismissed at the trial court level, since the judge ruled the doctors were team employees and could not face the suit under New York Workers' Compensation law.⁹ Greg obviously hoped the doctors would not be seen as team employees, and decided to appeal this matter, "because the people around me have been affected by what's happened to me...When the doctors are sleeping, I'll be up at 3 a.m. putting ice on my knee. It's not a sob story; it's reality."¹⁰

Oral arguments for the appeal were scheduled for October 1, 2003, and Greg attended. On that same day, an article appeared in *Newsday* stating "the players association for every major team sport have thrown their support behind. . .Lotysz in his appeal . . ."¹¹ In a brief filed by the unions, they were "in full support" of Greg's claim the doctors should not be shielded from malpractice.¹² Following the appeal, Greg felt the panel "asked some very good questions," but also noted that it's

⁶ *See id.* Roughly 50,000 ACL reconstruction surgeries occur a year in the United States, and it has been said the infection rate in those is less than one percent.

⁷ *Id.*

⁸ *Id.*

⁹ *See* Allan Maki, *Jets Lineman to Appeal Court Ruling*, THE GLOBE AND MAIL, Dec. 30, 2002, available at <http://www.theglobeandmail.com/servlet/ArticleNews/printarticle/gam/20021230/SFOCA?section=Healthcare> (last visited Oct. 1, 2003).

¹⁰ *Id.*

¹¹ Ken Berger, *Unions Support Ex-Jet's Lawsuit*, NEWSDAY, Oct. 1, 2003, available at <http://www.newsday.com/sports/football/jets/ny-greg013476105oct01,0,5578674.story?coll=ny-sports-headlines> (last visited Oct. 17, 2003).

¹² *Id.* The unions called the employment arrangement "a sham," noting that the role of team doctors is "fraught with potential conflicts of interest."

hard to figure out what will happen, considering “it’s hard to read people, especially five judges.”¹³ A decision on this appeal is expected within the next two to four months.

As far as what his former team has done, the Jets general manager has said the team has paid what Greg deserves contractually - his prorated salary and his medical expenses - which include everything but prescriptions and transportation.¹⁴ The Jets also filed a brief in regards to Greg’s suit, but in favor of the doctors.¹⁵ Unfortunately, Greg is unable to work today after testing his ability to do so as a graduate assistant with the football team at his college alma mater, and cannot walk without the help of a cane.¹⁶ He is left with the prospect of being unable to help support his family, which includes a child under the age of a year, and a wife that works as a bank teller, who is also a recent cancer survivor.¹⁷

Greg claims his knee has only gotten worse, and he continues his fight not only for his family, but “for a lot of guys who’ve played pro sports.”¹⁸ Despite that dedication, Greg’s struggle was not needed for other former athletes who have had their careers ended because of faulty medical treatment. On August 6, 2002, a former offensive lineman for the Jacksonville Jaguars, Jeff Novak, accepted a settlement in his medical malpractice lawsuit against a former team doctor. Novak received \$2 million in the settlement, after a judge threw out his \$5.35 million judgment.¹⁹

¹³ Ken Berger, *Appeal Hearing Encourages Ex-Jet*, NEWSDAY, October 2, 2003, available at <http://www.newsday.com/sports/football/jets/ny-greg023477864oct02,0,6098376.story?coll=ny-sports-headlines> (last visited Oct. 17, 2003).

¹⁴ See *Felled at the Line of Scrimmage*, *supra* note 2.

¹⁵ See Berger, *supra* note 11.

¹⁶ See *Felled at the Line of Scrimmage*, *supra* note 2.

¹⁷ See *Felled at the Line of Scrimmage*, *supra* note 2. Greg is currently pursuing a master’s degree at the University of North Dakota.

¹⁸ Allan Maki, *Court to Rule on Suit Filed by Ex-Jet*, THE GLOBE AND MAIL, Sept. 23, 2003, available at <http://www.theglobeandmail.com/servlet/ArticleNews/freeheadlines/LAC/20030923/SFOCA23/health/Health> (last visited Oct. 1, 2003).

¹⁹ See *Chiefs’ Holmes May Miss Rest of Season*, ST. PETERSBURG TIMES ONLINE, Dec. 19, 2002, available at http://www.sptimes.com/2002/12/19/Sports/Chiefs_Holmes_may_mi.shtml (last visited Oct. 17, 2003).

He had suffered a bone bruise in 1998, and in a story eerily similar to Greg's, claimed infections that stemmed from the improper treatment of the bruise ended his career.²⁰

How is it two professional athletes, who both suffered post-treatment infections, have to travel different paths in their fight for fairness? Jeff was able to attain some help for stabilizing his financial future, while Greg is stuck fighting just for the right to argue he should have the same opportunity. It does not seem right, and there are many complicated issues that go into even thinking uniformity can easily be reached in our country's federalist system. Keep Greg's story in mind as the various avenues of possible reparations are discussed, and the conflicts a team doctor faces when treating such athletes, leading to the need for those reparations.

II. WHAT HAPPENS WHEN AN ATHLETE IS INJURED?

Upon injury, athletes will receive some sort of medical attention. But before one looks at the individuals that provide the care and the issues they undertake during their treatment, it is important to first analyze what the collective bargaining agreements and in some circumstances, the standard contracts, mandate upon the event of an injury to a player. These documents dictate certain procedures and standards in recovering financial support, and while the athlete that is the focus of this article might not always be eligible for all of the following, an in-depth analysis into these documents is still needed to provide a look into how the issues of this article (Workers' Compensation, medical treatment, etc.) fit into those standards and procedures.

A. *Recouping Under Standard Contracts and Collective Bargaining Agreements*

1. *National Basketball Association*

²⁰ *Id.*

In Article IV of the Collective Bargaining Agreement between the National Basketball Players Association and the league, the benefits available to players are laid out in an easy to comprehend format.²¹ The benefits set out are available not just to current players, but also help the athletes plan for post-career opportunities, including benefits available upon the conclusion of their careers.²² Life insurance and accidental death and dismemberment benefits exist, as well as disability and medical/dental insurance benefits.²³ Most importantly for this article however, Section 1 provides for Workers' Compensation benefits in accordance with applicable statutes.²⁴

Article XXII is also important to this article, for it directly addresses medical treatment of players.²⁵ In section 1, it mandates when a team has a player requiring care of an orthopedic surgeon, one, rather than several, surgeons can treat him.²⁶ Players are protected in this section by allowing representatives designated by the union to attend meetings of the Committee of Team Physicians to discuss matters related to the treatment.²⁷

Section 4 perhaps implies the greatest protection available to players.²⁸ The parties agreed that "[a] player who consults a physician other than such player's Team physician" must give all information the team may request.²⁹ By the text of this section, it appears the player has the ability to see someone other than the Team doctor for perhaps a second (or first) opinion.³⁰

²¹ See *CBA Online, Article IV: Benefits*, National Basketball Players Association, available at <http://www.nbpa.com/cba/articleIV.html> (last visited Oct. 18, 2003).

²² See *id.*

²³ See *id.*

²⁴ See *id.*

²⁵ See *CBA Online, Article XXII: Medical Treatment of Players and Release Medical Information*, National Basketball Players Association, available at <http://www.nbpa.com/cba/articleXXII.html> (last visited Oct. 18, 2003).

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

2. Major League Baseball

In baseball, the collective bargaining agreement between the league and the Major League Baseball Players Association has a particular paragraph devoted to injury. Within that paragraph, the agreement states:

[i]f a Player's Contract is terminated by a Club by reason of the Player's failure to render his services due to a disability resulting directly from injury sustained in the course and within the scope of his employment under the Contract, and notice is received by the Club...the Player shall be entitled to receive from the Club the unpaid balance of the full salary for the year in which the injury was sustained, less all workers' compensation payments received by the Player as compensation for loss of income for the specific period for which the Club is compensating him in full.³¹

In addition to this language, the standard player's contract also contains language that could come into play in future legal action. It notes that the Player has an exceptional and unique skill of such an unusual and extraordinary character that it "cannot be reasonably or adequately compensated for in damages at law..."³² Nonetheless, Workers' Compensation is understood to be a possibility for the injured athlete.

3. National Hockey League³³

The collective bargaining agreement between the league and the National Hockey League Players Association contains Article 23, which is a notice that Clubs shall maintain group life insurance policies, and the union shall also maintain such a policy.³⁴ Accidental death and dismemberment policies must be maintained by those two entities not only for the players, but also

³¹ *Major League Baseball Collective Bargaining Agreement*, BigLeaguers.com, available at http://us.i1.yimg.com/us.yimg.com/i/spo/mlbpa/mlbpa_cba.pdf (last visited Nov. 24, 2003). This particular quote appears on page 39 of the scanned in material.

³² *See id.* This particular quote appears on page 208 of the scanned in material.

³³ This collective bargaining agreement expires in the very near future (2004), so parts of this section may be modified by a new collective bargaining agreement.

³⁴ *See National Hockey League Collective Bargaining Agreement, Article 23*, LetsGoPens.com, available at http://www.letsGOPens.com/nhl_cba.php?id=23 (last visited Oct. 18, 2003).

for the spouses of players that are eligible for payments from these policies.³⁵ The amount of the benefit coverage depends on age at disability, as well as experience in the league.³⁶

In terms of serious injury, there is also a one-time benefit available for a player from the clubs and the union when a player on a club suffers a disability “resulting from blindness, dismemberment, paralysis, or brain damage.”³⁷ If an injury does not fall under the terms of those conditions, but still results in a career-ending status of the player, there are two possible results.³⁸

If the player has a career-ending injury stemming from a non-club related activity due to illness or accident, the union will provide a policy for a one-time benefit.³⁹ If the player has an injury during the course of his employment as a hockey player, including travel, etc., he is entitled to:

[r]eceive his remaining salary due in accordance with the terms of his contract for the remaining stated term of his contract as long as the said disability and inability to perform continue but in no event beyond the expiration date of the fixed term of his contract...In consideration of payment of such salary, as well as payments made by the Club...to provide Career Ending Disability Insurance and other consideration, the player does hereby covenant that in the event he files a claim under such...Insurance (unless such claim is not paid), *he personally releases and will release...the Club, the League, the NHLPA, all other Clubs, the Underwriters, and the servants, employees, officers and agents of each of the above from any...liability, claim, or demand...including without limitation liability in tort...*If a player does make it through a 160 game or more career, that person will receive the right to continue in the Hospitalization and Medical Plan for life following his retirement.⁴⁰ (emphasis added).

These sentiments also appear in different sections of the standard player contract. In the contract, the player agrees that “[s]hould the Player be disabled or unable to perform his duties under this contract he shall submit himself for medical examination and treatment by a physician

³⁵ See *id.*

³⁶ See *id.*

³⁷ *Id.*

³⁸ See *id.*

³⁹ See *National Hockey League Collective Bargaining Agreement, Article 23*, LetsGoPens.com, available at http://www.letsopens.com/nhl_cba.php?id=23 (last visited Oct. 18, 2003).

⁴⁰ *Id.* Author’s emphasis added.

selected by the Club....”⁴¹ If the player is deemed disabled or not in good physical condition by that physician, a team has a right to suspend the Player “for such period of disability or unfitness, and no compensation shall be payable for that period under this contract.”⁴² If those are the circumstances surrounding the player, an independent medical specialist may be called in if the player does not agree on the scope of the injury.⁴³

A final note worth mentioning in the contract is a similar line that appears in a standard Major League Baseball contract as well. It states, “the Player represents and agrees that he has exceptional and unique knowledge, skill and ability as a hockey player, the loss of which cannot be estimated with certainty and cannot be fairly or adequately compensated by damages.”⁴⁴ The contract notes that the Player agrees to give the Clubs the right to enjoin the Player by “appropriate injunctive proceedings without first exhausting any other remedy which may be available to the Club....”⁴⁵

It is apparent that when serious injury does occur, between the standard contract and the collective bargaining agreement, the player can receive some assistance, in the form of those one-time payments discussed earlier, the amount of which depends on the seriousness of the injury. While the protections may be more than other sports provide, this is not the most extensive group of protections either.

4. National Football League

⁴¹ *National Hockey League Collective Bargaining Agreement, Exhibit 1: Standard Player’s Contract*, LetsGoPens.com, available at http://www.letsGOPens.com/nhl_cba.php?id=32 (last visited Oct. 18, 2003). The standard contract appears as Exhibit 1 to the Collective Bargaining Agreement. *Id.*

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

The most elaborate analysis and extensive discussion on what to do with injured athletes involves the National Football League's collective bargaining agreement and standard contract. The league's standard contract has a paragraph dedicated to Workers' Compensation. It states,

[a]ny compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workers' compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workers' compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workers' compensation.⁴⁶

In addition to the paragraph on Workers' Compensation, there is also one on the proper injury grievance procedures an athlete must follow unless a collective bargaining agreement in existence at the time of termination of the contract provides otherwise.⁴⁷ Simply put, the procedure that applies is the following:

[i]f Player believes that at that time of termination of this contract by Club he was physically unable to perform the services required of him by this contract...Player may, within 60 days after examination by the Club's physician, submit at his own expense to an examination by a physician of his choice. If the opinion of the Player's physician with respect to his physical ability to perform the services required of him by this contract is contrary to that of the Club's physician, the dispute will be submitted within a reasonable time to final and binding arbitration by an arbitrator selected by Club and Player, or if they are unable to agree, one selected in accordance with the procedures of the American Arbitration Association on application by either party.⁴⁸

However, these clauses in the contract are just the tip of the iceberg. The collective bargaining agreement between the league and the players' union greatly elaborates on all issues related to the injury of a player. Five articles within the agreement are dedicated to issues related to the overall theme of this paper: Articles X, XII, XXII, XLIV, and LIV. Article X is the formal discussion of the Injury Grievance System procedures that is briefly discussed in the standard

⁴⁶ *National League Football Collective Bargaining Agreement*, NFLPA.org, available at <http://www.nflpa.org/Members/main.asp?subPage=CBA+Complete> (last visited Nov. 24, 2003). All sections of the collective bargaining agreement appear on this particular page, but there are notations made for page numbers. The standard contract is found in Appendix C, which is paginated as 229 on the website.

⁴⁷ *See id.*

⁴⁸ *Id.*

contract.⁴⁹ It lays out the process by which a player can formally complain upon the termination of his contract because of an injury the athlete has incurred in the performance of his services under the contract. The Club can defend its action by noting one of several reasons the employment was terminated.⁵⁰

Since these reasons revolve around the fitness and physical abilities of the player, it requires the player to go to a neutral physician within twenty days of the grievance for an examination to determine the injuries at issue, but can not visit them more than once, for they are never to be the treating physician.⁵¹ The physician must then submit a detailed typewritten medical report of the examination to the parties.⁵² And as mentioned earlier, the disposition of this disagreement can lead all the way to an arbitration hearing for a decision on the issues.⁵³

Article XII focuses upon the protection a player will receive upon receipt of an injury.⁵⁴ Under this article, a player that meets certain criteria is able to receive the benefits that include fifty percent of the player's contract salary for the season following the injury up to maximum payments based on certain years.⁵⁵ "A player will receive no amount of any contract covering any season subsequent to the season following the...injury, except if he has individually negotiated injury protection into that contract."⁵⁶ A player will not be entitled to these benefits more than once

⁴⁹ *See id.* Article X is paginated as 25.

⁵⁰ *See id.* Article X notes six special defenses a team can raise, but that list is not inclusive. *Id.* One defense listed is that the player did not pass the physical examination given at the beginning of training camp. *Id.* Another is that the player did not disclose any known physical or mental illness during the examination. *Id.*

⁵¹ *See id.*

⁵² *See National League Football Collective Bargaining Agreement*, NFLPA.org, available at <http://www.nflpa.org/Members/main.asp?subPage=CBA+Complete> (last visited Nov. 24, 2003).

⁵³ *See id.*

⁵⁴ *See id.* Article XII is paginated as 33.

⁵⁵ *See id.*

⁵⁶ *Id.*

during his career in the NFL, and the benefit shall be reduced by any salary guaranteed to the player for the season following the season of injury.⁵⁷

Article XXII concentrates on the pay available upon termination, where the grievance procedure is not an issue.⁵⁸ It only applies to players that have completed the season in which his fourth year or more of credited service under the league's retirement plan has been earned, and applies only in certain situations.⁵⁹

Articles XLIV and LIV focus more succinctly on the topics at issue in this look into the world of the injured athlete. Article XLIV deals with players' rights to medical care and treatment, while LIV deals directly with Workers' Compensation issues.⁶⁰

Article XLIV requires each team to have a certified orthopedic surgeon as one of its physicians.⁶¹ The Clubs will be responsible for the cost of these physicians, and these physicians are to be forthwith to the player and the club as to what the injury entails and what continued play can do to that injury.⁶² Club trainers are also required to aid in the treatment of players.⁶³

Article XLIV also mandates a player's right to get a second medical opinion.⁶⁴ A player has "the right to choose the surgeon who will perform surgery provided..." if a player, among other things, consults with the Club physician.⁶⁵ The Club will have to pay for the surgery, provided that

⁵⁷ See *National League Football Collective Bargaining Agreement*, NFLPA.org, available at <http://www.nflpa.org/Members/main.asp?subPage=CBA+Complete> (last visited Nov. 24, 2003).

⁵⁸ See *id.* Article XXII is on the same webpage, but paginated as 83.

⁵⁹ See *id.*

⁶⁰ See *id.* Article XLIV is paginated as 184, and LIV is located on 211.

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *National League Football Collective Bargaining Agreement*, NFLPA.org, available at <http://www.nflpa.org/Members/main.asp?subPage=CBA+Complete> (last visited Nov. 24, 2003).

⁶⁴ See *id.*

⁶⁵ *Id.*

no one from the Club or its staff incurs any liability relating to the adequacy or competency of the surgery or other medical services related to the surgery.⁶⁶

Under Article LIV, a Club is required to provide the equivalent of or elect to provide Workers' Compensation coverage, even in a state where coverage is not compulsory.⁶⁷ In those states where Clubs do not have the legal right to elect coverage for the athletes, procedures are still set out to protect those with injuries.⁶⁸

The players union's website further elaborates on the benefits players can have upon the end of their career,⁶⁹ mainly discussing several post-career financial plans secured in the collective bargaining process. These plans require a certain amount of time to be spent in the league before qualifying.⁷⁰ Basically, unless a player is "vested" in some qualifying way, it appears they are left in the dark after a simple pay-off.⁷¹

Perhaps football appears to be the most protective of injured athletes, while others may argue the other sports have a better plan, for example, hockey, where at least its players will receive some compensation for being injured during their work. Whatever sport may contain the most "fair" protection from the postponement or end of a career, they all at least imply the need of compensation and/or providing of medical care. Unfortunately, it is becoming more and more apparent that as much as leagues and teams would like to think they are providing ample medical support and compensation for injury, they are not. The lower-paid athletes with little experience are not receiving the support or care they should receive upon the injury (for example, due to qualifying requirements on many prominent programs), making all these provisions allegedly provided for

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See Player Benefits*, National Football League Players Association, available at <http://www.nflpa.org/Members/main.asp?subPage=Player+Benefits> (last visited Oct. 18, 2003).

⁷⁰ *See id.*

⁷¹ *Id.*

them mainly irrelevant. For example, Greg Lotysz's lawyer says he will only get roughly \$1,000 a month out of NFL plans.⁷²

With neither the collective bargaining agreements nor the standard player contracts being helpful for these individuals, athletes like Greg Lotysz have had to search for other routes to receive some financial support. Yes, injured players have received the compensation for some of the medical services they requested and needed, but in certain situations, they are not receiving what they deserve, after being cheated by the actual care, and the lack of recourse they have after being given that care.

What goes through a team physician's mind during the treatment of an athlete? Before discussing the avenues to further financial recourse after receiving faulty medical treatment, a short look into the world of a team doctor makes the idea of an athlete receiving additional compensation for the lack of care they received much more palatable.

B. The Actual Medical Treatment: Conflicts, Injuries, and Ruined Lives

Doctors have been a part of the professional sports scene for the past forty years, and today are hired by professional sports teams to conduct many different tests and physicals, as well as diagnose and treat injuries of the players on those teams.⁷³ Despite the high status in which the medical profession holds in the eyes of a majority of the general public, there are many conflicts that exist for the physicians involved in the sports world, causing great strain on that standing.

⁷² See Felled at the Line of Scrimmage, *supra* note 2.

⁷³ See Justin P. Caldarone, *Professional Team Doctors: Money, Prestige, and Ethical Dilemmas*, 9 SPORTS LAW J. 131, 134 (2002).

The ownership and management of a franchise creates a strong conflict for the team physician.⁷⁴ Despite what their better judgment may tell them, whatever his/her bosses may say puts a doctor in a difficult position. Almost one hundred percent of the time, no owner or coaching staff would be thrilled to learn one of their players is going to be unable to perform.⁷⁵ Pushing doctors for a quick fix or a way to patch an athlete up would best suit management's interest, and in many circumstances, must therefore be in the physician-employee's best interest as well, especially when it means job security.⁷⁶

Conflicts may also come from the players themselves, too.⁷⁷ Players have been known to pressure team doctors to give them clearance to play despite the doctor's knowledge it would be better to not go on to the field of battle.⁷⁸ As it has been noted, "[t]he professional locker room's macho atmosphere and the paranoia of job loss cause players to pressure team doctors into prematurely clearing them for action."⁷⁹ Professional athletes constantly fight off the rising youth in their games that wish to replace them, so in their minds they can not afford to sit out a game and give someone else the opportunity.⁸⁰

Perhaps one of the strongest conflicts a team doctor may endure stems from within himself or herself.⁸¹ What a team doctor can gain from just having the title alone has incredible value. "A team doctor typically recoups his measly hourly wage with the financial rewards of a thriving private practice, because ordinary clients flock to a doctor whom multi-million-dollar athletes trust with

⁷⁴ See *id.*, at 144; Nick DiCello, *No Pain, No Gain, No Compensation: Exploiting Professional Athletes Through Substandard Medical Care Administered By Team Physicians*, 49 CLEV. ST. L. REV. 507, 514 (2001).

⁷⁵ See Caldarone, *supra* note 73, at 144.

⁷⁶ See DiCello, *supra* note 74, at 514.

⁷⁷ See Caldarone, *supra* note 73, at 142; DiCello, *supra* note 74, at 515-16.

⁷⁸ See Caldarone, *supra* note 73, at 142.

⁷⁹ *Id.* at 142

⁸⁰ See DiCello, *supra* note 77, at 516.

⁸¹ See Caldarone, *supra* note 73 at 145-46; DiCello, *supra* note 74, at 516-17.

their careers.”⁸² The doctor feels he is part of the team, standing on the sidelines during games, and often times competing just to maintain their own position, too, much like the athletes fend off younger players.⁸³ Perhaps these two issues create such a strong impediment, their treatment decisions “may interfere with their medical judgment” to win at any cost and save their jobs at the expense of the athletes who trust them.⁸⁴

Whatever conflict may exist during the treatment of an injury, when an athlete eventually learns they may have received improper medical care, finding a vehicle for further financial recourse and support becomes the main fight, especially with the athletes at issue in this article, since their contracts and collective bargaining agreements do not provide financial security.

Two of the most commonly used paths to the courthouse are Workers’ Compensation and medical malpractice litigation. Depending on the jurisdiction, these roads have either been paved, or closed before the athletes even had a chance to gain momentum on them.⁸⁵ The result is a lack of uniformity not only between Workers’ Compensation and medical malpractice jurisdictions, but even within jurisdictions that have similar schemes. The next section is devoted to showing how many discrepancies actually exist in legal fights for this additional support.

C. Recouping for Injuries Under Workers’ Compensation and Medical Malpractice Suits

1. Workers’ Compensation

These schemes pay “defined benefits to employees who suffer ‘accidental injury arising out of and in the course of employment’, regardless of whether anyone was at fault in the incident.”⁸⁶

⁸² Caldarone, *supra* note 73, at 145.

⁸³ *See id.*

⁸⁴ DiCello, *supra* note 77, at 516-17.

⁸⁵ Florida’s Workers’ Compensation scheme expressly exempts the professional athlete from coverage. *See* WORKERS’ COMPENSATION LAW, FLA. STAT. ch. 440.02(17)(c)(3) (2003).

⁸⁶ PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 955 (West Group 2d ed. 1998).

They typically cover medical costs and rehabilitation, and the program is the “exclusive legal remedy against the employer who is insulated by statute from tort suit by the injured employee.”⁸⁷ Some of the Workers’ Compensation schemes are indeed more protective than others, while others exempt professional athletes altogether.⁸⁸

Football is the prime sports contributor to this area of the law, and this is likely due to the continuous pounding the players’ bodies undergo. It appears many times the teams try to fight the player as to whether they were in the “course of employment,” among other issues that arise in litigation. Whatever the circumstances surrounding the different cases, in those jurisdictions where athletes have been covered by Workers’ Compensation, a wide variety of rulings have been handed down, with some depending on traditional aspects of the injuries, while other suits revolve around technical aspects of the statute. Below follows some of those rulings, in addition to others where Workers’ Compensation suits have been limited and/or thrown out completely.

In *Brown v. Detroit Lions, Inc.*, an appellate court in Michigan affirmed Workers’ Compensation benefits to an athlete that had started as a linebacker for several years with another team and then played with the Lions.⁸⁹ Plaintiff’s knee was injured while being tackled during a game, but continued playing, only reporting the injury after the game.⁹⁰ He received treatment and was told by his coach he was needed, but was eventually released despite this statement.⁹¹ Defendant argued several issues in reducing the award, *inter alia* that his ability to perform other

⁸⁷ *Id.*

⁸⁸ *See, e.g.,* FLA. STAT. ch. 440.02(17)(c)(3). One of the few times a professional athlete has succeeded in bringing a Workers’ Compensation claim in Florida was in *Miles v. Montreal Baseball Club*. 379 So.2d 1325 (Fla. Dist. Ct. App. 1980). Plaintiff athlete was required to attend a press party and was injured in a diving accident, and the appellate court felt this was not work associated with playing baseball. *Id.*

⁸⁹ *See* *Brown v. Detroit Lions, Inc.*, 1997 WL 33344488, at 1 (Mich. App. 1997).

⁹⁰ *See id.* at 1.

⁹¹ *See id.* at 1.

types of work was not addressed in figuring the amount plaintiff received, but the court nonetheless upheld the award.⁹²

An appellate court in Virginia also affirmed an award under its state Workers' Compensation statute, noting professional football players are not exempt from coverage.⁹³ Plaintiff had undergone ACL reconstruction surgery four years prior to hearing a "pop" in his knee while blocking an opposing player during a game.⁹⁴ He again underwent ACL surgery on the same knee, and filed a claim for permanent partial disability.⁹⁵ But the case also stemmed from an injury he received just prior to the second knee injury, during a game when another player fell on this left ankle and foot.⁹⁶ Defendant argued plaintiff's injuries were from "voluntary participation in activities where injuries are customary, foreseeable, and expected," and therefore were "not accidental," noting that "predictability of the injury" should be the standard, and "professional football players must accept the risk of injury if they wish to play the game."⁹⁷ The court disagreed, and found credible evidence supported all of the commission's findings. The court held the foot and ankle injury were covered, but the knee was not since it was a cumulative injury. It concluded "[t]he nature of the employment and the foreseeability of a potential injury does not determine whether an injury sustained in the ordinary course of an employee's duties is an accident."⁹⁸

As noted earlier, some of the cases focus on purely technical issues. For example, in *Pro-Football, Inc. v. Paul*, the athlete was traded from the Denver Broncos to the Washington Redskins during the course of the duration of his contract with Denver.⁹⁹ The athlete was injured while

⁹² See *id.* at 2.

⁹³ See *Pro Football, Inc. v. Uhlenhake*, 558 S.E.2d 571, 37 Va.App. 407 (Va. App. 2002).

⁹⁴ *Id.* at 573.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ *Id.* at 574-76.

⁹⁸ *Id.* at 576.

⁹⁹ See *Paul*, 569 S.E.2d 66, 39 Va.App. 1 (Va. App. 2002).

playing with the Redskins, who felt the award given against it should not stand, since he was in essence, a “loaned employee” to the team.¹⁰⁰ The appellate court agreed with the Workers’ Compensation Commission in holding *inter alia*, the player’s employment contract with the Redskins consisted of: the original contract between the player and the Broncos, the trade agreement between the Broncos and Redskins, and the fulfillment of the conditions before the player’s employment with the Redskins.¹⁰¹

In Pennsylvania, a court dealt with another technical issue: whether a Workers’ Compensation claimant had effectively given notice to the team regarding his injury received by informing the team trainer.¹⁰² The Pittsburgh Steelers felt the athlete failed to give adequate notice, but the court disagreed.¹⁰³ The Court noted the employment contract required the player to report an injury to the Club physician or trainer, and as well, the player was treated immediately after leaving the field by the trainer on the sidelines and by the team doctor within a week of the injury.¹⁰⁴

In one last example of a court dealing with a technical issue, one had to decide whether or not a signing bonus should be included when computing the average weekly wage for Workers’ Compensation benefits.¹⁰⁵ The court felt it should not be considered, noting the “signing bonus is an independent contractual obligation” which had already been paid.¹⁰⁶

As the cases show, not all jurisdictions are in agreement as to the scope of their state’s Workers’ Compensation statutes. However, in showing different courts’ analyses of Workers’ Compensation, they still show why some awards should be granted. But in two notable cases, *Palmer*

¹⁰⁰ *Id* at 69.

¹⁰¹ *See id.* at 70-72.

¹⁰² *See Pittsburgh Steelers Sports, Inc. v. Workers’ Comp. App. Bd.*, 814 A.2d 788 (2002).

¹⁰³ *See id.*

¹⁰⁴ *See id.* at 792. Team doctors are not the only ones that could face particular conflicts. Team trainers are just as susceptible, and if found to practice professional incompetence or be liable for malpractice, their license could be revoked, suspended, or the renewal may not be issued. *See* 225 ILL. COMP. STAT. 5/16 (2003).

¹⁰⁵ *See McGlasson v. Workmen’s Comp. App. Bd.*, 557 A.2d 841, 125 Pa.Cmwlth. 487 (1989).

¹⁰⁶ *Id.* at 843.

v. Kansas City Chiefs Football Club and *Rowe v. Baltimore Colts*, the courts denied awards to athletes based on those courts' interpretations of their statutes, creating more diversity in Workers' Compensation case law.¹⁰⁷

In *Palmer*, the Industrial Commission granted an award to a player injured in the course of his employment.¹⁰⁸ The appellate court analyzed the normal function of the athlete's duty as an offensive guard, and determined the record "conclusively shows...the function of a professional football lineman in a trap play [during which the claimant was injured] is to maneuver the other player, to exploit his vulnerable posture..." and that "[w]hatever strain resulted was an expected incident of the usual work task done in the usual way," thereby reversing the commission.¹⁰⁹

In *Rowe*, the player was injured during an exhibition game scrimmage when he was hit in his arm during the process of a play.¹¹⁰ The court affirmed the Industrial Commission in holding the injury was neither "unusual nor extraordinary."¹¹¹ The court concluded an injury sustained by a professional football player as the result of legitimate and usual physical contact with other players, whether under actual or simulated game conditions, cannot be said to be an "accidental injury..."¹¹²

Despite the variety of holdings and the risk a plaintiff takes by opting for Workers' Compensation, at times it has been the very last resort and only remaining choice for players, much like it may be the case for Greg Lotysz, because numerous attempts to sue under other legal theories have been thrown out of courts.

In *Gambrell v. Kansas City Chiefs Football Club*, an athlete brought an action on fraud and deceit against his employer who reportedly told him his physical condition was fine and was fit to play, but

¹⁰⁷ See *Palmer v. Kansas City Chiefs Football Club, Inc.*, 621 S.W.2d 350 (Mo. 1981), and *Rowe v. Baltimore Colts*, 454 A.2d 872, 53 Md.App. 526 (1983).

¹⁰⁸ *Palmer*, 621 S.W.2d 350 (Mo. 1981).

¹⁰⁹ *Id.* at 356.

¹¹⁰ *Rowe*, 454 A.2d 872 (1983).

¹¹¹ *Id.* at 536.

¹¹² *Id.*

was in fact a misrepresentation, and was placed at a great risk of serious and permanent injury.¹¹³ A further injury did occur in a later football game, and plaintiff felt it would not have happened if he had been apprised of his injuries.¹¹⁴ The court noted the “key” to whether the Workers’ Compensation Act precludes a common law right of action “lies in the nature of the injury for which plaintiff makes [his] claim, not the nature of defendant’s act which plaintiff alleges to have been responsible for that injury.”¹¹⁵ It therefore concluded the damages plaintiff sought were accidental bodily injuries, which fit within the Act.¹¹⁶

In another example, breach of contract was used in attacking medical treatment given.¹¹⁷ The player was injured during an exhibition game and was examined.¹¹⁸ He was not informed he was physically able to play.¹¹⁹ Eventually the athlete’s contract was terminated, which was permitted, but plaintiff brought suit against the team *inter alia*, for breach of contract because the team failed to provide him with adequate care and for failing to pay him for the entire season.¹²⁰ The court determined claims for breach of contract for failure to provide adequate medical care were barred by the Workers’ Compensation Act and the claim for salary was barred by the collective bargaining agreement’s procedure set out for arbitration.¹²¹

Finally, a professional football player was injured during a regular season game, and eventually brought an action for medical malpractice.¹²² Plaintiff alleged the physician caused

¹¹³ See *Gambrell v. Kansas City Chiefs Football Club, Inc.*, 562 S.W.2d 163 (1978).

¹¹⁴ See *id.*

¹¹⁵ *Id.* at 168.

¹¹⁶ See *id.* This case is still good case law, but it would be interesting to see how Missouri Courts would handle a similar case considering the holding in *Palmer*.

¹¹⁷ See *Brinkman v. Buffalo Bills Football Club*, 433 F.Supp. 699 (1977).

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See *Hendy v. Losse*, 819 P.2d 1, 54 Cal.3d 723 (1991).

permanent damage to his knee by failing to diagnose and properly treat his condition.¹²³ The trial court accepted the physician's demurrer to the action based on the fact the player's exclusive remedy was Workers' Compensation, but the appellate court reversed, stating that while the statute prohibits actions against a physician-employer, it also allows it under a co-employee action.¹²⁴ The Supreme Court of California reversed the appellate court, holding that a part of the code immunizes co-employees for acts within the scope of employment, and *inter alia*, plaintiff did not present evidence that the physician was an employee by mistake or was an independent contractor.¹²⁵

2. *Medical Malpractice*

In some jurisdictions, the lower-paid, and inexperienced injured athlete actually has another way to attack the poor medical care by getting the opportunity to file a suit based in tort against employers, including deliberate concealment of medical information, and other negligent medical practices.¹²⁶ The percentage of plaintiffs that have been successful in 1) getting the court to allow the suit to go forward, and then 2) actually winning the case is extremely low. The percentage of successful suits is so low, not many are easily found. One case brought by players alleging medical malpractice analyzes the issues related to successfully precluding a Workers' Compensation Act and continuing with a tort claim.

In *Bryant v. Fox*, two former Chicago Bears brought, *inter alia*, a medical malpractice suit against an orthopedic surgeon retained by the Bears, who wanted the action to be barred by the exclusive-remedy provision of the Workers' Compensation Act.¹²⁷ The court noted coverage under

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ Weiler, *supra* note 86, at 979.

¹²⁷ *See Bryant v. Fox*, 162 Ill.App.3d 46, 515 N.E.2d 775 (1st Dist. 1987).

the act comes about in one of two ways: by an employer electing to be bound or when the statute provides automatic coverage for employers engaged in “certain enumerated businesses which are declared to be ultrahazardous.”¹²⁸ The Bears elected to be covered, but years after plaintiffs concluded their employment with the team. Therefore, only the second section was at issue, and the trial court granted a motion to dismiss based on that section.¹²⁹

The appellate court noted that the Bears failed to allege that they were covered by the second section, which was vital since professional sports clubs are not among the enumerated businesses that appear in the code.¹³⁰ The court reversed and remanded, stating that should the trial court find the Bears were covered by the second section, determining if the doctor was an employee as opposed to an independent contractor will determine “whether they are amendable to the instant common law actions.”¹³¹

The court then guided the lower court in how to determine this issue, by noting the doctor was “required to treat all injured players upon request, both during the regular season and the off season,” and “was not obligated to attend preseason games or practices, but could do so at his convenience.”¹³² The court concluded although the doctor was to treat injuries upon request, the evidence showed the Bears “were given little control” over the doctor’s actions, tending to show his status as an independent contractor.¹³³ While he may have been paid a retainer, the doctor would bill separately for any surgery he performed to the Bears, and also did not receive team benefits, like medical or life insurance or a pension and profit sharing plan.¹³⁴

¹²⁸ *Id.* at 48.

¹²⁹ *See id.*

¹³⁰ *See id.* at 48-9.

¹³¹ *Id.* at 49.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *See id.* at 50.

3. *A Sidebar on Disability Insurance*

While the focus has been on Workers' Compensation and Medical Malpractice, there are some athletes that forego those options completely. Not many players choose such a plan, but teams also have the ability to opt for it: disability insurance. Often times, "issues arise about whether a policy covers a particular case,"¹³⁵ but the outcome of those issues is moot in this article, for obtaining and receiving coverage of this insurance is not necessarily the norm in mainstream athletics and notably for lower-paid, little experienced athletes, especially since many of these policies are extremely expensive.¹³⁶

By now it should be apparent it depends on state lines as to what sort of financial support an injured athlete will receive after an injury sidelines them, perhaps for the rest of their lives. Hopefully it is also apparent that in no way is this a fair treatment for those that deserve to at least get back to a semblance of a normal life. Is there a way tweaking the system will create better options for lower-paid injured athletes, possibly even before further injuries occur from faulty treatment? Several alternatives have been discussed, ranging from having all jurisdictions allow medical malpractice suits upon injury to eliminating the team doctor position completely. These alternatives are discussed directly below, but the best option awaits at the end of the article, after it is shown all the disadvantages created by these other alternatives will outweigh their advantages, and/or are too impractical to succeed.

III. SOME PROPOSED SOLUTIONS AND THE BEST SOLUTION

A. What are Some Proposed Solutions and Why Won't They Work?

¹³⁵ PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 144-45 (2d ed. Supp. 2001).

¹³⁶ *Id.*

It does not seem fair that Greg Lotysz needs to be stuck in the position he presently faces while others have received millions for the treatment they received. Several possibilities exist for changing the current, unbalanced system in which injured players attempt to receive proper medical care and financial support. Numerous articles have approved (and disapproved) of these alternatives. While many seem feasible to the naked eye, it appears none will be effective in creating uniformity and protection to athletes without creating gigantic repercussions in other areas of the sports world and the general legal world as well.

One possible alternative is to put pressure on doctors to “get tough” with their employers by persuading management to realize medical evaluations made by the doctor are final and the services they provide are not in connection with winning, but the health of the athlete.¹³⁷ As ideal as this situation seems, this is perhaps one of the most impossible demands, as was even admitted by Scott Polsky, who proposed this suggestion.¹³⁸ There are surely other doctors that would be willing to bend the Hippocratic Oath to receive the millions in incentives and referrals for holding such a position of prestige.

A second suggestion is not putting pressure on management, but simply reducing some of the pressures on the doctors themselves.¹³⁹ One way may be to “prohibit the team doctor from acting as part of the team.”¹⁴⁰ By not participating in team activities and by not socializing with those on the team, that would leave things on a rather professional level.¹⁴¹ This may be another idealistic wish however, for not many doctors would be willing to forgo a taste of what being a part of a professional franchise is like, particularly if they were former athletes or have always had a

¹³⁷ See Scott Polsky, *Winning Medicine: Professional Sports Team Doctors' Conflicts of Interest*, 14 J. CONTEMP. HEALTH L. & POL'Y 503, 525 (1998).

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ *Id.* at 526.

¹⁴¹ See *id.*

strong desire to be with a certain team, or are lifelong fans of a franchise. Most doctors would want to convey to the community they are in fact a friend of the team and in close with the players anyway, a vital benefit in order to obtain more business.

A third alternative is to make the physician a league employee.¹⁴² An example would be a plan to rotate doctors through the league's cities to minimize camaraderie and keep medical services on a strictly professional level.¹⁴³ Even as the author suggests, this is not only an unattractive option for those not wishing to leave an opportunity at a lucrative practice in a preferred area, but will also fail for again, most doctors will socialize and fraternize with the players and management around the league, starting the conflict process all over again - just in a different town.¹⁴⁴

As a fourth choice, what about the players' unions being the doctors' employers?¹⁴⁵ This would make the entity responsible for a player's injury one that advocates the athlete's best interests, and a relationship would exist between the patient and physician very similar to those seen in the real world.¹⁴⁶ However, this is not the best option either, since it could cause yet another rift between management and the unions, particularly in contract negotiation years, considering perhaps management may see some of the union's policies on treatment as not only pampering players too much, but as tools for holding an unfair leverage in bargaining.

According to one article, an agent has proposed eliminating the team doctor position completely.¹⁴⁷ A system could exist where management would provide a list of preferred doctors for players to visit upon injury, and therefore management could not be as influential.¹⁴⁸ While this theory may seem like a start in the right direction, this idea was quickly downplayed by the author

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *See id.*

¹⁴⁵ *See DiCello, supra note 74, at 534.*

¹⁴⁶ *See id.*

¹⁴⁷ *See Polsky, supra note 137, at 526-27.*

¹⁴⁸ *See id.*

and is right in doing so, for as he stated, particular sports like football require medical personnel to be present and ready to act upon instant notice at every scrimmage, practice, and game, and not be waiting for a telephone call.¹⁴⁹

Another author has also recognized this alternative by noting apart from professional football and hockey, most teams would not require full-time doctors.¹⁵⁰ Again this is an alternative that would not be very logical to adopt. These other sports can be just as dangerous, and there is no reason to leave these individuals unprotected, unlike many other ordinary jobs, where medical personnel is on hand in the event of an emergency. Besides, the status quo regarding conflicts and improper care would still continue in the sports that were worthy enough to receive constant monitoring.

Another option is for players to hire their own doctors, which could be done through the union or privately.¹⁵¹ However, this alternative is totally impractical for those without the income to hire the doctors they may need to preserve their bodies in shape for a possible comeback. Again, if the union became involved, its control over the recovery of players is something management would not be thrilled to endure, especially during negotiations.

Yet another alternative is punishing professional teams with punitive damages if their doctor's conduct is not true to the profession.¹⁵² This notion is absurd, considering we already pay enough for merchandise and the chance to even see these games in person. If we have trouble affording it now, try opening up the concept of exposing teams to exemplary damages. What is that going to do to the prices already at an exorbitant level?

149 *See id.*

150 *See* Caldarone, *supra* note 73, at 149.

151 *See id.* at 150.

152 *See id.* at 150-51.

Perhaps one of the more realistic, yet still problematic alternatives, is to make the player more aware of their possibilities upon the injury, mainly in terms of their option to get a second opinion.¹⁵³ The collective bargaining agreements allow for this opportunity (as discussed earlier), and doctors could take an active role in making sure athletes take advantage of it. Despite this, the bravado of the players, along with the fear they will lose their jobs to a younger player, may not only cloud their judgment, but also convince a player it is not a viable option. This alternative helps limit the team doctor's liability¹⁵⁴, and would be a welcome change if athletes were to demand full disclosure and attempt to educate themselves on any injury, as well as demanding a second opinion.¹⁵⁵ However, the bravado will carry the day as long as younger athletes vie for the injured player's spot.

In specific terms of allowing medical malpractice suits, a suggestion has been given to establish a clear standard of care for the sports medicine field.¹⁵⁶ It could "help guide team doctors' care for patients and to help courts make decisions regarding medical malpractice litigation."¹⁵⁷ While the author is right it is "shocking" no uniform standard has existed in this field, it is almost impossible to create such a standard to cover the realm of those individuals that could be classified as a "team physician."¹⁵⁸ There is an amazing variety of specialists and other medical staff that fill the role of team doctor at any given time, and while the thought of a uniform standard of care for sports medicine may be welcome, the standard may be higher (or possibly lower) than some of the current ones existing in those varying specialties. This fault does not even take into account the chilling effect on future doctors and the almost certain rise in higher malpractice insurance (and

¹⁵³ See Polsky, *supra* note 137, at 527.

¹⁵⁴ See *id.*

¹⁵⁵ See DiCello, *supra* note 74, at 537.

¹⁵⁶ See Caldarone, *supra* note 73, at 148.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; see DiCello, *supra* note 74, at 533-34.

therefore, medical costs for all of us) making this idea, as well as the whole idea of allowing medical malpractice suits, completely impractical.

So one of the few options left in creating a new uniform system without taking radical steps is to focus upon the current Workers' Compensation schemes. One article attempts to do this, but does not quite get the right idea.¹⁵⁹ The article wishes to go the opposite direction, allowing medical malpractice suits for players, effectively ending the co-employee immunity doctrine, by expressly exempting professional athletes from the Workers' Compensation scheme, or by expressly allowing them to sue for malpractice, but still allowing recovery under the scheme.¹⁶⁰ This last alternative is doubly dangerous, as it gives lip service to the idea of amending Workers' Compensation schemes. However, while starting off in the right direction, this author is yet another who fails to notice how expensive everything will be for not just athletes, but for the rest of us, if we allow malpractice suits when a simple change to Workers' Compensation law will not only keep costs down, but protect the Greg Lotysz's of the world enough for some financial security.

B. What Is the Best Alternative?

As noted above, by allowing medical malpractice suits to be pursued by professional athletes, we as fans face an exorbitant cost increase, not only in attending their games, but also in our own lives, considering doctors will again need greater malpractice insurance, raising medical costs. This article is not intended to be a discussion on tort reform, but there is absolutely no reason to expand malpractice suits when a viable solution can be achieved through amending Workers' Compensation statutes for the lower-paid, little experienced athlete.

Several different elements must be taken into consideration, and all of them will not cost

¹⁵⁹ See DiCello, *supra* note 74, at 536-37.

¹⁶⁰ See *id.*

the system, the teams, and fellow taxpayers exorbitant amounts of money. Many of the basic ideas intertwined within this ideal statute, were suggested by Rachel Schaffer in her 2000 article, but she had each of these changes to a Workers' Compensation scheme as a separate way to amend the system.¹⁶¹ This article incorporates almost all of them into one alternative – which is the best - for the lower-paid athletes.

First and foremost, there is no question state legislatures must repeal statutory exceptions and enact laws within the Workers' Compensation schemes to include professional athletes, while banning medical malpractice suits.¹⁶² As Schaffer notes, “the fact that players consciously choose to participate in contact sports should not prevent them from receiving workers' compensation coverage.”¹⁶³ Two courts have already understood this, in determining the exclusive remedy for professional athletes' injuries is Workers' Compensation, and additionally, provided another important piece to the puzzle by noting athletes could recover under the system “based solely on their salary as an athlete prior to their work-related injury.”¹⁶⁴

When the states start enacting these laws, they should still do so with a limiting intent. In no way should *all* professional athletes be covered under the ideal Workers' Compensation statute, despite what Schaffer concludes.¹⁶⁵ No lawmaker could consciously include the right for multi-millionaires to get the opportunity for Workers' Compensation coverage and expect re-election. One state has managed to steer clear of this problem, apparently with not much of a problem.

¹⁶¹ See Rachel Schaffer, *Grabbing Them By the Balls: Legislatures, Courts, and Team Owners Bar Non-Elite Professional Athletes from Workers' Compensation*, 8 AM. U. J. GENDER SOC. POL'Y & LAW 623 (2000).

¹⁶² See *id.* at 651.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 652-53. The two cases are *Albrecht v. Industrial Commission*, and *Bayless v. Philadelphia National League Baseball Club*. *Albrecht*, 648 N.E.2d 923 (1st Dist. 1995); *Bayless*, 472 F.Supp. 625 (E.D. Pa. 1979), *aff'd*, 615 F.2d 1352 (3d Cir. 1980).

¹⁶⁵ See *id.* at 653. Schaffer feels that covering all athletes would allow the larger teams to help subsidize the ones with smaller budgets, but this is not necessarily an easy pill to swallow for the owners of those larger teams.

Michigan has a Workers' Compensation law that excludes the highly paid athlete.¹⁶⁶ It states:

[a] person who suffers an injury arising out of and in the course of employment as a professional athlete shall be entitled to weekly benefits only when the person's average weekly wages in all employments at the time of application for benefits...are less than 200% of the state average weekly wage.¹⁶⁷

This law almost meets the demand in a new system, but two hundred percent of the average weekly wage in a lot of states is not enough to cover and help athletes like Greg Lotysz. In Michigan for example, two hundred percent of the average weekly wage is \$1,449.92, which would disqualify someone that made over \$75,395.84.¹⁶⁸ Greg and other similarly situated athletes may just miss the help they deserve, and therefore be left out of recovery, unless a higher standard is set. Without going out of control, this higher level can be set at three hundred percent, but also granting the legislature the duty to re-figure this amount every five years if major discrepancies arise again.¹⁶⁹

The ideal statute should also define "in the course of employment" as meaning not just any injury suffered during a practice, scrimmage, or game, but also any further injury received during the medical treatment of that injury. The definition of "any injury" is important as well, and must include injuries caused by accidental means and those that occur during typical and usual duties, for as the Virginia Appellate Court stated, "[t]he nature of the employment and the foreseeability of a potential injury does not determine whether an injury sustained in the ordinary course of an employee's duties is an accident."¹⁷⁰

¹⁶⁶ See *id.* at 651-52.

¹⁶⁷ MICH. COMP. LAWS ANN. § 418.360 (2003).

¹⁶⁸ See *State Average Weekly Wage & Maximum Benefit Amounts from 1982 – present*, Bureau of Workers' & Unemployment Compensation, available at <http://www.michigan.gov/bwuc/0,1607,7-161-21867-38774--,00.html> (last visited Oct. 14, 2003).

¹⁶⁹ For example, as of 1998, three hundred percent of the national weekly wage (\$614) would be \$1,842, which would total an annual salary of \$95,784, while three hundred percent of the weekly wage in New York (which is important to Greg) would be \$2,346 (\$782/week), which would total an annual salary of \$121,992. See *Table: Competitive Wage Ranking of the 50 States for Years 1990, 1996 and 1998*, Wyoming Department of Employment, Research & Planning, available at <http://doe.state.wy.us/lmi/0300/tla6.htm> (last visited Nov. 12, 2003).

¹⁷⁰ Uhlenhake, *supra* note 93, at 576.

Lastly, the statute must also mandate owners do not receive an option of participating in a Workers' Compensation scheme - it must be mandatory.¹⁷¹ This will help those whose contract does not provide for much, or who is not quite eligible or vested for different schemes that appear in collective bargaining agreements. It will guarantee they are going to get something versus putting all of their eggs in one basket in an attempt to recover in a court under a medical malpractice suit. *(Attached as Appendix One is a copy of the ideal statute).*

IV. CONCLUSION

There is no question this proposal will have its doubters and critics. More than likely, critics will note there is still a line in the sand, in that even with the limit set at three hundred percent of the weekly average wage, there will be some lower-paid athletes that will not be covered. They may also say all state legislatures may not pass this, but this is where the unions must come into play. If they truly support fighters like Greg Lotysz, but still want to do what is right for the rest of society, they will lobby for their current and former members for this ideal statute.

Despite the doubts, this proposed change to Workers' Compensation schemes will cover many athletes that have previously faced a brick wall in an attempt to recover ample financial support. It will not only help these athletes, but will allow all of us to reap financial benefits in keeping our own medical costs down, considering a ban on medical malpractice suits in the professional athletics world will save us all. The new statute will also help Greg Lotysz in particular. There is no question his former salary of \$111,000 will make him eligible under the three hundred percent requirement, notably under a revised New York law (since that is where his claim is

¹⁷¹ See Schaffer, *supra* note 161, at 653.

pending).¹⁷² Under such a new statute, considering “in the course of employment” includes further injuries stemming from an injury while playing, and that wage-loss differential awards will not be precluded because of shortened work expectancy, his financial support should be enough to support his family. Even if a state opts to limit the maximum recovery under a new statute to something around ninety percent, Greg’s life in North Dakota should be financially stable, despite being unable to ever work again.¹⁷³ This also fails to note he still will receive \$1,000 a month through the National Football League’s maximum disability plan.

This article has focused upon what a lower-paid, little-experienced athlete faces when they are injured during battle and their medical treatment. While it shows how varied solutions have existed in the past and up to the present, if enough lobbying is done and legislatures dismiss problematic alternatives when considering the right solution, a new Workers’ Compensation law focusing on recovery for some professional athletes will not only save those athletes’ futures, but will also help maintain some stability in our own.

¹⁷² See *2000 Salaries*, Footballguys.com, available at <http://www.footballguys.com/salaries.cfm> (last visited Oct. 10, 2003).

¹⁷³ See *State Average Weekly Wage*, *supra* note 168. In Michigan, it appears ninety percent of the average weekly wage is the maximum amount recoverable in certain cases under the state’s Workers’ Compensation law.

APPENDIX ONE

Professional Athletes Under Workers' Compensation Statute

- (1) Any prior law exempting professional athletes from this statute is hereby revoked and no professional athlete shall be allowed to bring suit based on medical malpractice in the courts of this state regarding any injury arising out of and in the course of employment;
- (2) A professional athlete who suffers an injury arising out of and in the course of employment shall be entitled to weekly benefits only when the person's average weekly wages in all employments at the time of application of benefits are less than 300% of the state average weekly wage, with said percentage being re-evaluated every five years by the state legislature to prevent any discrepancies.
- (3) Recovery under this statute will be based on the professional athlete's salary prior to their work-related injury, and no shortened work expectancy in players' careers will preclude them from wage-loss differential awards;
- (4) A "professional athlete" means a person employed as a player by a franchise of:
 - (a) the National Football League;
 - (b) the National Basketball Association;
 - (c) the American League of Professional Baseball Clubs;
 - (d) the National League of Professional Baseball Clubs;
 - (e) the National Hockey League;
 - (f) the American Hockey League; or
 - (g) Major League Soccer;
- (5) "Arising out of and in the course of employment" means not just any injury suffered by a professional athlete during a practice, scrimmage, or game (including exhibition, regular season, and post-season games) where the athlete actively participates in such a contest, but also any further injury received during the medical treatment of the injury received during play;
- (6) "Any injury" includes injuries caused by accidental means that occur not only during unusual circumstances, but also during the typical and usual duties arising out of and in the course of employment;
- (7) The employer of any professional athlete is hereby bound by this section, and cannot opt out of this section;
- (8) This section is hereby limited by other applicable sections of the Workers' Compensation laws of this state if those areas are not covered in this section.