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If Nobody Picks Up the Ball, Is It Really a Fumble, or Is It a Forfeit? The NFL Players Association Request for Legislative Changes to the Labor-Management Relations Act of 1947

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IF NOBODY PICKS UP THE BALL, IS IT REALLY A FUMBLE, OR IS IT A FORFEIT? THE NFL PLAYERS ASSOCIATION REQUEST FOR LEGISLATIVE CHANGES TO THE LABOR-MANAGEMENT RELATIONS ACT OF 1947

I. INTRODUCTION

Bill was a successful college offensive lineman, was drafted in the second round of the NFL draft, and signed a lucrative contract laden with both salary and performance incentives payable upon completion of an initial five year term.[1] Just two games into his third season, he suffered a serious head injury during a game that eventually ended his NFL career and caused him to suffer constant headaches and confusion. Bill's doctors told him that his symptoms were directly related to his head injury. Unable to hold gainful employment as a result of his injury, Bill applied to the Bert Bell/Pete Rozelle NFL Player Retirement Plan for total disability benefits to help pay for his mounting medical and living expenses. Despite the opinion of the plan doctor that Bill was totally and permanently disabled, the plan board voted to deny full benefits.

Bill then sued the board in federal court to have the decision reviewed, but the court found that the board acted within its discretion in determining that Bill did not qualify for full benefits. Later, a rift among the board members resulted in a public revelation that the three league-appointed members voted to deny Bill full benefits under pressure from team owners.

The owners pressured these board members to consistently reduce the level of benefits paid to former players. The owners believed that if fewer benefit dollars were paid to former players, the currently active players would be less likely to seek higher benefit plan contribution levels from the owners when the collective bargaining agreement was renegotiated the following year. The players' union was furious, and called on Congress to remove the federal requirement that the league and union be equally represented on the plan board.

Bill's promise of a long NFL career and future financial stability had been dashed: once by his injury, and a second time by the improper influence placed on the board by Bill's former employers. A system

1 The characters and stories presented here are purely fictional, and are offered for illustrative purposes. However, the issues presented are not uncommon among disabled former NFL players. *See infra* Part II.C.2 (discussing litigation brought by former NFL players who are now disabled, but have been denied disability benefits by the administrative board of the Bert Bell/Pete Rozelle NFL Players Retirement Plan).

granting the players' union more control with which to watch over the disability fund of its members might have helped Bill. Yet, the risk of placing too much power in the hands of a union is a real threat to many Americans, such as those workers whose employers contribute to union-run pension plans on behalf of employees.

Wally had been a union employee at a local factory from the time of his high school graduation until his sixty-fifth birthday. At sixty-five, he was diagnosed with a number of physical ailments that forced him to retire. Wally's employer had paid into a union-run pension fund for each of its employees for the past fifty years. The same day Wally submitted the paperwork for retirement, news broke that the long-time union boss had secretly been making wasteful and fraudulent investments with the monies that Wally's employer had paid into the retirement fund. Unfortunately for Wally, Congress had long ago repealed protective legislation that would have forced the union to allow representatives of the employer to sit on the retirement fund's administrative board. Had this protection still been in place, the union boss's actions would likely have been prevented before such a vast percentage of the retirement fund was wasted. Unable to continue working and without retirement income, Wally was forced to sell his home and failed to sustain himself on social security alone.

Although the scenarios described above are fictional, they reflect real concerns among America's unionized workers. There are many retired NFL players who suffer each day from total physical disablement, caused by serious football injuries rendering them unable to earn an income.[2]

In addition to the physical pain, many of these proud and once powerful men must also suffer the pain of indigence and embarrassment because their disability plan does not provide them with the financial resources to obtain adequate care.[3] The NFL Players Association ("NFLPA") argues that federal labor law, specifically the Labor Management Relations Act of 1947 ("LMRA"), prevents the union from approving disability claims at the proper levels because it requires that unions (here, the NFLPA) and employers (here, the NFL and its member clubs) be equally represented on the disability plan board.[4] The NFLPA

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[2] *See infra* Part II.C.2 (discussing litigation brought by disabled former players against the Bert Bell/Pete Rozelle NFL Player Retirement Plan).

[3] *See generally* NFLPA WHITE PAPER (on Retired Player Benefits System) (2007), http://www.nflpa.com/whitepaper/NFLPA_White_Paper.pdf.

[4] *See* STATEMENT OF GENE UPSHAW, EXECUTIVE DIRECTOR: NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, BEFORE THE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION OF THE UNITED STATES SENATE ON OVERSIGHT OF THE NFL RETIREMENT SYSTEM 3 (2007), http://www.nflpa.com/whitepaper/Gene_Upshaw_Testimony_for_

has asked Congress to remove this requirement of the LMRA entirely, without exploring any less sweeping alternatives.[5] Congress has listened, but has been reluctant to effectuate this monumental change.[6] While the NFLPA, the NFL, and Congress each appear to see the problem as a fumble, to be recovered after careful consideration, the disabled and suffering retirees see nothing but forfeit in the headlines.[7] Clearly, an alternative solution that will help the NFLPA approve claims at the appropriate levels, while maintaining the protections intended by the joint administration requirement of the LMRA, is needed.[8]

Part II of this Note discusses the economic origins of the LMRA, as well as the corruption-preventing structure of section 302 of the Act, which prohibits payments from employers to union bosses.[9] Part II also discusses section 302's stringent requirements for acceptable employer contributions to welfare benefit funds for union employees, including the joint administration provision currently at issue with the NFLPA.[10] Finally, Part II illustrates the structure of the NFL's retirement and disability plan and discusses the most prominent legal actions brought by former players challenging the decisions of the plan's board.[11]

Part III evaluates the NFLPA's request that Congress legislatively redact the joint administration provision of section 302.[12] Part III also evaluates the NFLPA's ability to effectively approve more valid

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Senate_Hearing_re_Disability.pdf. Gene Upshaw passed away unexpectedly in August, 2008, nearly one year following this testimony. On March 15, 2009, the NFLPA elected forty-five-year-old Washington, D.C. attorney DeMaurice Smith as Upshaw's replacement. Despite the long vacancy and transition in the Executive Director position, the NFLPA has given no indication that it intends to abandon the statement or requests made by Upshaw before the Senate.

5 *See* STATEMENT OF GENE UPSHAW at 3–4.

6 Michael O'Keefe, *Congress Tells NFL to Fix Pension Disability Plan or Else*, N.Y. DAILY NEWS, Sept. 19, 2007, *available at* http://www.nydailynews.com/sports/football/2007/09/19/2007-09-19_congress_tells_nfl_to_fix_pension_disabi.html.

7 *See generally* Chuck Finder, *NFL's Disability Plan Puts Former Players Under Close Scrutiny*, PITTSBURGH POST-GAZETTE, March 14, 2005, *available at* http://www.post-gazette.com/pg/05073/471027-66.stm.

8 *See infra* Part IV (discussing the need for a carefully tailored amendment to current labor law to help disabled players, and similarly situated retirees in other industries, receive the benefits they need).

9 *See infra* Part II.A (discussing the post-WWII labor climate that gave rise to the passage of the LMRA).

10 *See infra* Part II.B (discussing interpretations of section 302 by the Supreme Court and scholarly criticism of section 302's joint administration requirement).

11 *See infra* Part II.C (discussing the Bert Bell/Pete Rozelle NFL Player Retirement Plan's history and structure, and the challenges brought by disabled former players to the plan's denials of disability claims).

12 *See infra* Part III.A (discussing the impetus behind the NFLPA's request that Congress redact section 302's joint administration provision).

disability claims if the requested change is enacted.[13] Finally, Part III evaluates both the potential negative and positive impacts on the organized labor community as a whole if the legislative redaction is passed.[14]

Part IV presents an alternative to a complete legislative redaction of the joint administration provision of Section 302, proposing an amendment to the statute that allows for shifting administrative representation based on the presence of pre-negotiated employee compensation deferments.[15]

II. BACKGROUND

Though the fierce battles waged on the fields of the National Football League each Sunday have long since ended for the league's nearly 8,000 living retired players, the war for funds to care for the injuries sustained in those battles is being fought on a daily basis.[16] The retirees claim that the NFLPA is failing in its duty to take care of its own.[17] The NFLPA, on the other hand, argues that it cannot approve as many claims as it should because federal law does not allow the disability board to be fully controlled by the NFLPA.[18] The federal law that the NFLPA claims prevents it from administering the disability plan appropriately is a specific provision in the LMRA that dictates who must sit on the disability administration board.[19] Part II.A discusses the economic and social underpinnings that gave rise to the Wagner Act amendments, commonly known as the LMRA.[20] Part II.B examines the relatively unchanged section 302 (dealing with payments to unions by employers and the administration of welfare funds) from the time of its passage in 1947 to today's interpretations and criticisms.[21] Finally, Part

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13 *See infra* Part III.B.1 (discussing the impact a legislative redaction of the joint administration provision would have on the NFLPA's ability to approve a greater number of legitimate disability claims).

14 *See infra* Parts III.B.2, III.B.3 (discussing the arguments both in favor of, and opposed to, a legislative redaction of the joint administration provision, through evaluation of the impact a redaction would have on the organized labor industries generally).

15 *See infra* Part IV (discussing a proposed amendment to current law that is much more narrowly focused than the complete redaction of the joint administration provision proposed by the NFLPA).

16 Les Carpenter, *NFL's Disability Plan is Taken to Task by Lawmakers*, SAN FRANCISCO CHRONICLE, June 27, 2007, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/27/SPGI0QM7U21.DTL&hw=disability+plan+task&sn=001&sc=1000.

17 O'Keefe, *supra* note 6.

18 *See id.* at 1; *see also* STATEMENT OF GENE UPSHAW, *supra* note 4.

19 29 U.S.C. § 141-197 (2000).

20 *See* discussion *infra* Part II.A.

21 *See* discussion *infra* Part II.B.

II.C details the evolution of disability benefits in the NFL and the NFLPA's progress and current struggle to effectively and consistently assist its disabled retirees.[22]

A. The Labor-Management Relations Act of 1947

Arguably one of the most important pieces of labor legislation in the history of the United States, the LMRA, also called the Taft-Hartley Act after its sponsors, has been the source of both tremendous praise and harsh criticism.[23] Part II.A.1 discusses both the political and labor climates in the United States in the years following World War II, which provided a basis for the development of the LMRA.[24] Part II.A.2 discusses the specific section of the LMRA that is at issue with the NFLPA, and the historical economic climate that gave rise to this section.[25]

1. The Legislative and Labor Climate in 1947

The economic impact of World War II and the continued economic growth following its conclusion created seats of power in many sectors of the American labor front, including positions of control in large labor unions.[26] As the country's manufacturing capacity grew to meet its needs, union officials gained significant control over both employers and the individual member-employees.[27] Naturally, a spike in power often translates into the potential for misuse to the detriment of opposing considerations, and this is precisely what occurred in this context.[28] In the period following the end of the war, numerous large-scale strikes spearheaded by ever-strengthening unions threatened to cripple

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22 *See* discussion *infra* Part II.C.

23 *See* discussion *infra* Part II.B.1 (discussing judicial interpretation and upholding of section 302 of the LMRA); Part II.B.2 (discussing the most prominent criticism of section 302, both at the time of its passage and today).

24 *See* discussion *infra* Part II.A.1.

25 *See* discussion *infra* Part II.A.2.

26 *See* Gerard D. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH L. REV. 285, 287–88 (1960–1961) (discussing the growing control placed in the hands of labor union leaders by the War Labor Board's union security programs designed to alleviate tensions following the war-time no-strike pledges by the AFL and the CIO).

27 *See id.* at 288. *See also* HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 273 (University of Chicago Press 1950).

28 *See* Reilly, *supra* note 26, at 288 (discussing the penchant of the newly powerful unions to resort to the use of strikes on large scales instead of submitting to less invasive and drastic measures such as arbitration).

multiple vital industries, and in turn, the national economy.[29] The growing state of unrest in industrial relations, coupled with a public perception that President Truman was unable to remedy the problem, led to a return of both houses of Congress to Republican control.[30] Not surprisingly, the shift in control of Congress led to an effort to reform the current state of labor-management relations, with a virtual mountain of legislation proposed within one week of the start of the Eightieth Congress.[31] Out of this body of proposals grew the bulk of the material that would culminate in the LMRA.[32]

2. Impetus for Section 302: The Prevention of Labor-Union Corruption

Although the LMRA made sweeping changes to the landscape of labor-management relations in the tumultuous years following World War II, only a single section of the Act, section 302, is pertinent to the

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[29] *See id*. Large scale strikes that stretched across major industries such as petroleum, coal, steel, automobiles, and shipping, threatened severe harm to the booming post-war economy. *Id*. The threat of economic shutdown was unacceptable to newly elected President Harry Truman. *Id*. Truman was so concerned about the potential for devastation to the economy from a railroad strike in 1945 that he sent an unsuccessful proposal to Congress that all individuals participating in this strike, which the President thought excessive, would be subject to conscription into the military. *Id*. A cursory glance at the labor climate in the immediate post-war years might have led to the conclusion that every industry was on-strike. *See* MILLIS & BROWN, *supra* note 27, at 311–12. The public perception of the organized labor front as a whole was founded in extreme caution, especially considering the significant impact work stoppages could have on the end-user if not resolved expediently. *Id.* at 312. Some of the more highly publicized strikes included the 113-day General Motors strike, the fifty-eight-day General Electric strike, and the 115-day Westinghouse strike. *Id.* at 312–13. Although each of these strikes was eventually resolved, real progress was not made until President Truman, by Executive Order, allowed the National Wage Stabilization Board to approve wage increase demands that were consistent with a general pattern of wage increases that had been established in the specific industry or area. *Id.* at 313. Thus, the major sticking point seemed to be a prior reluctance by the board to approve of wage increases that had no trend-backed basis. *Id*.

[30] *See* Reilly, *supra* note 26, at 289 (discussing that, although this was a significant shift in the political makeup of Congress for the first time in fifteen years, there was little indication that a labor reform bill as massive and far-reaching of the LMRA (passed as the Taft-Hartley Act) would come to fruition at all, much less within a one-year period).

[31] *Id.* More than 200 bills dealing with some type of labor-relations reform were proposed during the first week of the Eightieth Congress's initial session in January 1947. *Id.* Although a majority of these bills did not conceive of the type of sweeping reform that ultimately came to be with the passage of the LMRA, the sheer number is still a significant indicator of the belief that the country's labor structure was hanging precariously on the edge of a major collapse and would inevitably tumble over that edge absent some sort of reform. *See id. See generally* MILLIS & BROWN, *supra* note 27, at 363–64 (discussing the legislative climate and increasing sense of urgency in Congress to address the country's pressing labor issues).

[32] Reilly, *supra* note 26, at 289.

NFLPA's current problem.[33] As such, a thorough discussion of the legislative history of the entire Act is beyond the scope of this Note.[34]

Section 302 of the LMRA generally prohibits an employer from making payments, or delivering other things of value, to union heads or other employee representatives.[35] Among the chief concerns of the authors of section 302 was the potential for abuse of the enormous power labor unions gained as membership swelled during the War and following its conclusion.[36] More specifically, the general prohibition on payments to union representatives by employers was an effort to prevent extortion by union heads while threatening employers with frivolous work stoppages.[37] In addition to concerns about extortion and bribery,

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[33] STATEMENT OF GENE UPSHAW, *supra* note 4, at 3–4. Testifying before the Senate Committee on Commerce, Science, and Transportation, Mr. Upshaw specified several of the NFLPA's current problems that could be remedied by congressional action. *Id*. In addition to a reworking of the provisions of section 302 of the LMRA, Upshaw also asked Congress to enact some measure of federal oversight to standardize widely disparate state workers' compensation laws and to remove the 2002 Department of Labor regulations requiring additional steps in the review of disability claims before the board. *Id*.

[34] For a thorough discussion of the legislative history of the entire act, see generally MILLIS & BROWN, *supra* note 27, at 363–65.

[35] 29 U.S.C. § 186(a) (2000). Subsection (a) reads:

> **(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations**
>
> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
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> **(1)** to any representative of any of his employees who are employed in an industry affecting commerce; or
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> **(2)** to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
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> **(3)** to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> **(4)** to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Id.

[36] *See* Stephen Fogdall, Comment, *Exclusive Union Control of Pension Funds: Taft-Hartley's Ill-Considered Prohibition*, 4 U. PA. J. LAB. & EMPL. L. 215, 218 (2001–02).

[37] *See id*. *See also* Note, *Taft-Hartley Regulation of Employer Payments to Union Representatives: Bribery, Extortion, and Welfare Funds Under Section 302*, 67 YALE L. J. 732,

the other chief motivating factor for the enactment of section 302 was the prevention of abuse of funds paid by employers into union-operated pension and welfare funds.[38] Observing the considerable influence labor unions had gained over employers and union members, Congress was concerned about the legitimacy of union-operated pension and welfare funds.[39] Three primary concerns led to the enactment of section 302 with respect to welfare funds: funds that did not benefit employees; funds used as union war chests; and collusive behavior between unions and employers.[40]

733–36 (1958). Seeing a failure on the part of the states to effectively prevent extortion of employers, and also bribery of union officials seeking to avoid the wrath of union-forced increases in wages, benefits, and other working condition improvements, Congress enacted the prohibitions of payments in section 302 as blanket prohibitions. Note, *supra*, at 733–36. Congress intended to curb the problem by preventing all payments, but before the ink dried on the page came the realization that this type of blanket prohibition would decimate the structure of honestly operated union pension and welfare funds paid into by employers. Fogdall, *supra* note 36, at 219. *See generally* Walsh v. Schlecht, 429 U.S. 401 (1977) (reiterating the general purposes for the Act as discussed in *Arroyo v. United States*); Arroyo v. United States, 359 U.S. 419 (1959) (discussing the various factors considered by Congress in legislating the LMRA and the stated purposes of the Act).

38 93 CONG. REC. 4805 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1305 (1948) (remarks of Senator Byrd). There was significant concern of abuse, resulting from the actions of John Lewis, head of the United Mine Workers, during a threatened strike in 1946 over the establishment of a pension fund. S. REP. NO. 80-105, at 54 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 458 (1948). Lewis demanded that a pension and welfare fund be established for the miners by imposing a 7% royalty per ton of coal mined. Note, *supra* note 37, at 732 n.2. When the miners went on strike and a deal was not reached after several weeks, President Truman had the mines seized under the War Labor Disputes Act, and subsequently authorized Julius A. Krug, Secretary of the Interior, to establish the fund that Lewis requested through a five-cent royalty per ton of coal mined. Fogdall, *supra* note 36, at 222. It was this drastic government action in response to an abusive and coercive union leader that Congress wanted to prevent. *See* 93 CONG. REC. 4876 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1310–11 (1948).

39 93 CONG REC. 4876 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1310–11 (1948) (remarks of Senator Ball, the co-sponsor of the Act).

40 MATTHEW BENDER, 2-44 LABOR AND EMPLOYMENT LAW § 44.01 (2005). First, Congress wanted to ensure that the funds were actually being used for the benefit of the employees on whose behalf the contributions were made. 93 CONG. REC. 4805 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1304 (1948) (remarks of Sen. Ball). Second, Congress wanted to prevent the funds from being used by the unions as "war chest[s]," serving only the needs of union programs and not being subject to any legal rights of the individual employee. 93 CONG. REC. 4877 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1312 (1948) (remarks of Sen. Taft). In his statement, Senator Taft indicates that the funds contributed by employers typically come from a reduction in employee wages, and that to allow the funds to be controlled by the union exclusively, and used for union-wide

Despite recognizing the prevention of payments to union heads as an effective way to curtail dangerous collusive behavior, Congress also understood the need to preserve the opportunity for employers to make certain contributions, including those made to legitimately operated welfare benefit funds.[41] Although many representatives in Congress were concerned that the narrow exceptions for legitimate funds were necessary, some legislators believed that any restriction at all was excessive and could lead to a significant burden on the individual states to support retirees and disabled former workers.[42] Despite the minority's concerns, the LMRA, including section 302's prohibitions and narrow exceptions, was passed into law when President Truman's veto of the bill was overridden in June of 1947.[43]

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programs, would effectively negate all legal rights the employee might have had to receive the kinds of benefits for which the funds were originally intended. *Id*. Senator Taft does not appear to devalue completely the union-wide programs, but instead questions the dedication of the union heads to meeting the most pressing needs of its individual members. *Id*. Finally, Congress wanted to prevent collusive behavior between employers and unions, and deemed a stop on all payments to be an effective method for achieving this goal. MATTHEW BENDER, 2-44 LABOR AND EMPLOYMENT LAW § 44.01 (2005). *See also* Note, *supra* note 37, at 733.

41 *See* MILLIS & BROWN, *supra* note 27, at 561–62. Because Congress recognized that not all welfare benefit funds run by unions were operated corruptly, exceptions were included to allow employers to make contributions for the benefit of their employees, so long as certain conditions were met. *Id*. at 562. The conditions required by Congress included requirements that the payments be held in trust for the benefit of the individual employees, that there be a written agreement between the parties detailing the operation of the plan and providing each side equal representation in the administration of the fund, that there be written provisions for using neutral umpires in the event of a deadlock concerning administrative matters, and that funds paid specifically for pension or annuities be designated as such and deposited in a separate trust to be used exclusively for distribution to plan beneficiaries, and presumably not for any administrative or operation expenses. *See* 29 U.S.C. § 186(c)(5) (2000).

42 *Compare* S. REP. No. 80-105, at 52 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 458 (1948) (indicating the need to preserve the ability for employers to make contributions to welfare funds, but to ensure that the union does not strong-arm the funds into use for questionable purposes to the detriment of the individual employees), *with* H.R. MINORITY REPT. No. 80-245, at 79, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 370 (1948) (indicating that restricting the contributions at all is too extreme of a measure, and will result in employer decisions not to contribute at all, thus creating a problem for the individual states when workers are no longer able to work but have no funds on which to live).

43 *See* MILLIS & BROWN, *supra* note 27, at 392. Among the many concerns of the minority senators opposed to section 302's restrictions included the chief worry that the exceptions for welfare funds were not sufficient to entice employers to continue making contributions, or to start doing so. *See* H.R. MINORITY REPT. No. 80-245, at 79. The unavoidable result, according to the minority, would be a massive influx of requests to the states for assistance when workers reached retirement age and could no longer continue to work, but had no nest egg on which to live out their retirement years. *Id*. The states, it was suggested,

Section 302(c) of the Act lays out the various exceptions to the general proscription of payments to union representatives, including section 302(c)(5), which allows payments to trust funds so long as certain criteria are met.[44] Section 302(c)(5) specifies several criteria that must be met in order for the payment to fit within the exception. First, the funds

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would be unable to handle this crippling financial burden, and the state coffers would run dry because the state governments were not equipped to subsidize such a large percentage of the population's living expenses. *Id*. There is also an interesting implication in the minority report that employer funded pension systems were the sole solution to the problem. *Id*. There seems to be a general assumption that, absent employer funding, employees will take no affirmative steps to save funds for the sole purpose of funding retirement. *Id*.

[44] 29 U.S.C. § 186(c) (2000). Due to the prohibitive length of the nine exceptions codified in this section, only the exception pertaining to welfare benefit and pension funds will be duplicated here. Section 302(c)(5) reads:

> The provisions of this section shall not be applicable . . .
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> . . .
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> (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) *the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office*, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities[.] . . .

Id. § 186(c)(5) (2000) (emphasis added).

must be held in trust and used for the sole and exclusive benefit of the employees (the NFL Players in the present scenario), or their families and dependents.[45] Second, the details of the payment structure must be specified in a written agreement, and this is typically done in the documents creating the welfare plan itself.[46] Third, the employers and the employees (typically union heads) must be equally represented in the administration of the fund, and the written agreement must provide for the use of an impartial umpire to break deadlocks between the parties.[47] Finally, the written agreement must provide for an annual audit of the fund to ensure that the fund fiduciaries are discharging their obligations to manage the fund in good faith.[48]

B. Understanding LMRA Section 302

While the LMRA impacts nearly every facet of the union labor market, only section 302—a prohibition of payments by employers to union officials—is pertinent to this Note.[49] Part II.B.1 discusses the challenges that have been brought to the constitutionality of section 302.[50] Part II.B.2 discusses the range of scholarly criticism of section 302 in the years since it was passed.[51]

1. Case Law and Interpretations of Section 302(c)(5)

Although the exceptions set forth in section 302(c) have been expanded since its original enactment in 1947, the specific exception at issue for the NFLPA, subsection 302(c)(5), remains untouched from the original language as passed.[52] As the legislative history of the welfare fund exception of 302(c)(5) indicates, the Supreme Court shared Congress's concerns regarding both the power of union officials and employers, with respect to the abuse of these funds to the detriment of

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45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *See* discussion *infra* Part II.C (discussing the NFLPA's need to comply with section 302 in administering its disability plan).
50 *See* discussion *infra* Part II.B.1.
51 *See* discussion *infra* Part II.B.2 (the scholarly criticisms range considerably, from arguments that the section should be altered slightly to better meet its goals, to arguments that section 302 should be eliminated entirely for failure to meet any of Congress's objectives in passing it).
52 *Compare* Labor-Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, *with* 29 U.S.C. § 186(c)(5).

individual employees.[53] Although the Supreme Court has not ruled on the constitutionality of section 302, several lower federal courts have upheld the provision against a litany of constitutional attacks.[54] The Supreme Court has, however, made several important determinations regarding the scope and specific meaning of 302(c)(5) that are pertinent to the specific problem the NFLPA has asked Congress to address.[55]

In *Allied Chemical & Akali Workers v. Pittsburgh Plate Glass Co.*,[56] the Supreme Court determined that the section 302(c)(5) requirement that the fund be for the "sole and exclusive benefit of the employees[]" applied to retirees.[57] The Court held that retired workers were to be considered employees for the purpose of section 302(c)(5), and were entitled to the benefits that were negotiated while they were active employees.[58] While the inclusion of retirees under the protections of section 302(c)(5) is relevant to this Note, even more relevant is the Supreme Court's lengthy discussion in *NLRB v. Amax Coal Co.*,[59]

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[53] See discussion *supra* Part II.A.2 regarding the legislative history of the LMRA. *See generally* David B. Sweet, Annotation, *Supreme Court's Construction and Application of the § 302 of Labor Management Relations Act of 1947, as amended (29 USCS § 186), concerning Restrictions on Financial Transactions*, 124 L. Ed. 2d. 789, § 5 (discussing the Supreme Court's consistency in recognizing the original intent of section 302 as indicated in the legislative histories from the Eightieth Congress).

[54] *See generally* United States v. Ryan, 350 U.S. 299 (1956) (upholding the statute as not unconstitutionally vague, not violative of Congress's interstate commerce powers, not violative of the Fifth and Sixth Amendments' protections requiring both certainty of the offense charged and a clear standard for guilt, and not violative of the due process protections afforded by the Fifth Amendment); United States v. Carter, 311 F. 2d 934 (6th Cir. 1963), *cert. denied* Felice v. United States, 373 U.S. 915 (1963) (upholding the provision against a vagueness attack with regard to who would be considered an agent or representative of an employer for purposes of making payments to union officials); United States v. Lavery, 161 F. Supp. 283 (M.D. Pa. 1958) (upholding the section as not violative of the Fifth and Sixth Amendments for vagueness, and not generally violative of Congress's legislative powers); United States v. Connelly, 129 F. Supp 786 (D.C. Minn. 1955) (upholding the section as not placing prohibitively rigid restrictions on activities between labor representatives and employers as compared to other individuals in business relationships).

[55] *See* discussion *infra* part II.B.2 (discussing the Supreme Court's interpretations of the requirements listed in the section 302(c)(5) exception for welfare benefit funds).

[56] 404 U.S. 157 (1971).

[57] *Id.* at 170 n.10. *Allied Chemical* generally focused on a question of who may be considered an employee for purposes of certain provisions of the National Labor Relations Act. *See generally id.* Although the court defined an employee several times throughout the opinion as someone who works for another for hire (thus excluding retirees), the court did include retirees in the section 302(c)(5) exception that is pertinent to this Note. *Id.*

[58] *Id*. at 170.

[59] 453 U.S. 322 (1981).

illustrating the nature of the fiduciary duties of trustees appointed by management and the unions.[60]

In *Amax Coal*, the Supreme Court clarified whether a trustee's fiduciary duty is strict with respect to a fund's beneficiaries, holding that the fiduciary duties of the plan trustees trump any interest the appointing party might seek to have the trustee advance in the administration of the fund.[61] The *Amax Coal* Court illustrated several

[60] *See generally id.* The NFLPA's concerns are focused on a perception that the requirement that the players' disability fund be equally administered prevents retired players who meet the criteria to receive disability benefits from receiving those funds based on a duty of the league-appointed trustees to assume, as fiduciary concerns, the position of the league with respect to the disbursement of funds. *See* STATEMENT OF GENE UPSHAW, *supra* note 4, at 3. *See also* NFLPA WHITE PAPER, *supra* note 3, at 8–10.

[61] *Amax Coal*, 453 U.S. at 331–32. In *Amax Coal*, the plaintiff owned a group of coal mines that it joined with other companies as members of a national multi-employer bargaining group for the purpose of collective bargaining with the United Mine Workers of America, the employee union. *Id.* at 325. The members of the multi-employer unit each contributed, as required by the Collective Bargaining Agreement (CBA), to the union's national pension and welfare fund, a section 302(c)(5) compliant fund. *Id.* The United Mine Workers' National fund complied with all of the requirements set forth in section 302(c)(5), with the administration of the fund falling to a board of trustees selected in equal numbers by the union and the multi-employer bargaining unit. *Id.* When Amax opened a new mine, it negotiated a separate CBA with the union for the workers of the new mine, and did not join the multiemployer bargaining unit with respect to the new mine. *Id.* at 326. Although the CBA negotiated between Amax and the employees of the new mine was separate from the national multiemployer CBA, the provisions were largely identical, including the negotiated contributions Amax would make to the union welfare trust fund for the benefit of the employees of the new mine. *Id.* Following a strike and failed negotiations for a new CBA, Amax filed an unfair labor practice claim against the union, alleging that the union illegally attempted to coerce Amax to continue contributions to the national welfare fund despite Amax's offer to establish a separate fund for the benefit of the employees of the new mine. *Id.* at 326–27. Amax wanted to establish a separate fund for the employees of the new mine because it felt that, as a separately bargaining employer, continued contributions to the union's national fund under the multiemployer CBA would unfairly prevent Amax from selecting a trustee for the funds benefitting the employees of the new mine. *Id.* at 326. Following a ruling by the National Labor Relations Board ("NLRB") that the union had acted legally in its bargaining, the United States Court of Appeals for the Third Circuit reversed and the Supreme Court granted certiorari, only to reverse again. *Id.* at 327–28. The NLRB decision that the union had acted legally in its demands that Amax contribute to the national fund for the benefit of the new mine's employees rejected Amax's argument that it would be unfair to force Amax to contribute for the benefit of those specific employees because it could not appoint a trustee to act as a fiduciary for those specific funds. *Id.* at 327. The NLRB determined that a trustee, despite being appointed by a certain party, owes an undivided fiduciary duty to the interest of the beneficiaries of the fund. *Id.* Thus, the NLRB concluded that although the trustee can consider the interest of the party that appointed him, he would breach his fiduciary duty if he placed that interest above the interest of the beneficiaries. *Id.* Based on this determination, Amax's prior participation in the selection of the employer-appointed trustee was sufficient to ensure that a trustee of Amax's choosing was in place to adequately consider Amax's interests to the extent necessary. *Id.* In reversing the NLRB decision that the union acted legally in its

important points with respect to the fiduciary duty of plan trustees that reach the heart of the NFLPA's concerns about the effects of joint administration of welfare benefit plans.[62] First, the Court indicated that there is no evidence in the legislative history that Congress ever intended the management-appointed trustees of 302(c)(5) funds to act in the interest of management, or be influenced by management.[63] In making this determination, the Court rejected the argument that Congress's use of the word "representative" was intended to indicate a duality of fiduciary duty to the beneficiaries and an agency relationship to the management.[64] Next, the Court indicated that the strict fiduciary standards implied in section 302(c)(5) were codified with respect to 302(c)(5) plans with the passage of the Employee Retirement Income Security Act of 1974 ("ERISA").[65] The Court held that ERISA, in

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bargaining, the United States Court of Appeals for the Third Circuit held that a fund trustee appointed by management had a dual duty to act as both a fiduciary for the employee-beneficiaries, and as an agent of the employer(s) that had appointed to trustee to the board. *Id.* at 328. The court indicated that the fiduciary duty to the beneficiaries was in no way diminished by the obligation to act as an agent for the appointing party, and that trustees are obligated to administer the funds so as to advance the interests of the appointing party to the extent that a breach of the fiduciary duty to the beneficiaries will not result. *Id.*

[62] *See* discussion *infra* Part II.C.3 (discussing NFLPA concerns over management-appointed trustees and their ability to effectively participate in the decision to disperse disability funds).

[63] *Amax Coal*, 453 U.S. at 331. *But cf.* Associated Contractors of Essex Cty., Inc. v. Laborers Int'l Union of N. America, 559 F.2d 222, 228 (3d. Cir. 1977) (indicating that, "Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them[]"). Although the *Associated Contractors* court is referring to the bargaining process concerning amendments to the plan, it is likely that this understanding of quasi-agency would extend to the administrative activities of plan fiduciaries outside of CBA negotiations. *See id.*

[64] *Amax Coal*, 453 U.S. at 331 n.13. The court indicated that the equal representation requirement does not prescribe an agency relationship to management on the part of the management-appointed trustee, but rather serves to prevent misuse of the funds by union officers. *Id.* Furthermore, the court explained that a trustee appointed by management only represents the management to the extent that he serves to prevent the union-appointed trustees from abusing the funds contributed by the employer. *Id.* *See also* Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) (Cardozo, C.J.) (discussing the strict enforcement of the rule against a trustee dividing his loyalty); RESTATEMENT (SECOND) OF TRUSTS: DUTY OF LOYALTY § 170(1) (1959).

[65] *Amax Coal*, 453 U.S. at 332. "Whatever may have remained implicit in Congress's view of the employee benefit trustee under the act became explicit when Congress passed the Employee Retirement Income Security Act of 1974[.]" *Id.* In determining that ERISA was a formal codification of the implied common-law law duties of fiduciaries for Section 302(c)(5) plans, the Court relied on three different sections of ERISA:

> Section 404(a)(1) of ERISA requires a trustee to "discharge his duties . . . solely in the interest of the participants and

conjunction with section 302(c)(5), makes clear that both union-appointed and management-appointed trustees are not the bargaining parties with respect to the contract between the two sides.[66] Thus, the duties of the trustees extend only to enforcement of the specific portions of the CBA concerned with the terms of the welfare or retirement fund, and not so far as to create an agency relationship whereby the interests of the appointing party are a factor in administration of the fund.[67]

In addition to the Supreme Court's clarification of the fiduciary obligations of management and union administrative appointees in *Amax Coal*, the 302(c)(5) requirement of equal employer/employee representation has been held to be an absolute standard for purposes of compliance with the Act.[68] Even the slightest evidence indicating that a change in the administration of a plan has caused an imbalance of representational power requires the change to be carefully scrutinized for compliance and adherence to Congress's intent.[69] As such, any revelation of imbalance upon review will cause the plan to violate

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> beneficiaries . . . ." 29 U.S.C. § 1104(a)(1). Section 406(b)(2) declares that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. § 1106(b)(2). Section 405(a) imposes on each trustee an affirmative duty to prevent every other trustee of the same fund from breaching fiduciary duties, including the duty to act solely on behalf of the beneficiaries. 29 U.S.C. § 1105(a).

Id. at 332–33 (footnote omitted).

66 *Id.* at 336.

67 *Id.* at 336–37. *But cf.* Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581, 591–92 (1993) (holding that the *Amax Coal* decision did not create a statutory authorization to enforce trust obligations of plan fiduciaries, but rather specified that section 302(c)(5) was merely a statement of trust obligations necessary to obtain an exemption). Despite *Local 144*'s reigning-in of *Amax Coal*, *Amax Coal* remains valid precedent for two of its important determinations. *See* Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993). First, *Concrete Pipe* affirms the *Amax Coal* determination regarding the antithetical correlation between the fiduciary duty of a management-appointed trustee and an agency relationship between management and the appointee. *Id.* at 616. Second, *Concrete Pipe* approves the *Amax Coal* holding that ERISA codified the 302(c)(5) fiduciary standards for trustees. *Id.*

68 *See Associated Contractors*, 559 F.2d at 227 (discussing changes in representation structures under 302(c)(5) exempt plans as requiring careful scrutiny).

69 *Id*. The *Associated Contractors* Court indicated the importance of such careful scrutiny when it held as follows:

> The requirement that employers and employees be equally represented in the joint administration of trust funds is thus central to the Congressional scheme set forth in section 302. Any amendment to a trust fund agreement which even slightly restructures the representation of employers and employees in the fund administration must be carefully scrutinized[] . . . ."

Id.

302(c)(5) as being contrary to the "thoughtful safeguards Congress built into this social legislation."[70]

2. Criticism of Section 302

Although Section 302(c)(5) has remained unaltered from its original form in the sixty years since its passage, scholarly criticism of the provision has been anything but scarce.[71] The general section 302 prohibition on payments and the narrow welfare fund exception have been characterized, inter alia, as restrictive of the bargaining process, under-inclusive, over-inclusive, superfluous, restrictive of legitimate activity, contradictory to federally encouraged practice, and generally vague.[72] While none of these criticisms should be haphazardly rebuffed without consideration of their individual merit, the absence of an amendment to the original 302(c)(5) language is at least somewhat indicative of Congress's perception that the provision continues to serve its intended purpose effectively.[73]

Although a number of authors have proposed legislative changes to clarify and narrow the meaning behind section 302 and its exceptions, others have suggested a complete repeal of certain provisions, citing

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70 *Id.* (explaining that when a court reviews a plan change for compliance with the equal representation requirement, the court must look beyond mere technical compliance and instead evaluate the plan's scheme for "meaningful adherence to the Congressional command."). The *Associated Contractors* court, likely relying on the voluminous legislative history of section 302(c)(5), seems to indicate that Congress did not pass such restrictive legislation without concern for the possibility that it could hinder the financial well-being of beneficiaries of legitimate funds. *Id.* As such, the court perceives, through the available histories, that Congress inserted the restrictions calling for joint representation after carefully considering the potential negative ramifications for overly burdensome restriction. *Id.*

71 *See generally* Megan Wallace, *An Injustice to Section 302: The Full-Time Union Representative Compensated by the Employer*, 8 T.M. COOLEY J. PRAC. & CLINICAL L. 277 (2006) (discussing the generally vague nature of section 302); Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018 (1998); Fogdall, *supra* note 36 (discussing the restrictive, over-inclusive, under-inclusive, and superfluous nature of section 302(c)); Note, *supra* note 37 (discussing section 302 as restrictive of legitimate activity and contradictory to federally encouraged practice of creating welfare funds for employees).

72 *See* Wallace, *supra* note 71, at 303–04 (discussing the generally vague nature of section 302); Fogdall, *supra* note 36, at 223–34 (discussing the restrictive, over-inclusive, under-inclusive, and superfluous nature of 302(c)); Note, *supra* note 37, at 737–38 (discussing section 302 as restrictive of legitimate activity and contradictory to federally encouraged practice of creating welfare funds for employees).

73 *Cf.* Wallace, *supra* note 71, at 303 (discussing the conflicting judicial interpretations of another section 302(c) exception and suggesting indirectly that Congress's inaction in amending section 302 in the face of fifty years of labor and union evolution indicates a belief that the statute is functioning as codified).

fatal, irreparable flaws.[74] Perhaps the most basic criticism, for NFLPA purposes, is that the equal representation requirement of 302(c)(5) makes a flawed assumption that a union is ill-equipped morally, ethically, and tactically to administer a fund on its own.[75] This criticism maintains that not only are union leaders better attuned to the needs of those they represent, but that their elected status creates a built-in accountability standard that would encourage proper administration and eliminate the need for a heavy-handed federal mandate on administrative structure.[76] The NFLPA's argument will rely heavily on the criticism that 302(c)(5) is over-inclusive in its prohibitions, and also on the notion that the presumption of corruption on which the provision is based relies on assumptions grounded in irrational, baseless fear.[77]

C. The Bert Bell/Pete Rozelle NFL Player Retirement Plan

Notwithstanding the longevity of the original language of section 302(c)(5), there has been criticism of the requirements for plans to meet the 302(c)(5) exception.[78] The NFLPA recently joined the critics when then-Executive Director Gene Upshaw testified before the Senate Committee on Commerce, Science, and Transportation on September 18, 2007.[79] While the NFLPA appears to surficially understand the necessity of protecting funds contributed by employers from abuse at the hands of

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74 *See* Fogdall, *supra* note 36, at 234.

75 *Id.* at 227 (discussing the over-inclusive nature of the section 302(c)(5) equal administration requirements).

76 *Id. See also supra* note 67 (discussing the *Local 144* decision limiting the use of section 302 for abuse of fiduciary status actions). *But see* Schwab & Thomas, *supra* note 71, at 1078 (discussing the ERISA codification of section 302(c)(5) fiduciary duties as incentive for employers to embrace the joint administration requirement and become more involved in the administration of union welfare benefit plans).

77 *See* Fogdall, *supra* note 36, at 228. Fodgall asserts that no empirical data exists to substantiate the presumption that union control of employer contributions is an automatic trigger for abuse. *Id.* Fogdall argues further that the absence of a test period or other track-record of exclusive union management of employer contributions to funds makes proof of the tendency for abuse difficult, despite the well-publicized examples of Jimmy Hoffa-type union improprieties. *Id.; see also id.* (discussing Jimmy Hoffa's leadership of a Teamsters' pension fund and his improper use of the funds to expand his own influence over business communities in major American cities, and to extort payments from the fund to his personal accounts under the guise of consulting fees).

78 *See* discussion *supra* section II.B.2 (highlighting the criticisms of section 302(c)(5) in both the original legislative histories and modern evaluations).

79 *See generally* STATEMENT OF GENE UPSHAW, *supra* note 4. Upshaw was joined at the hearings by NFL Commissioner Roger Goodell and several retired NFL players including Hall of Famers Mike Ditka, Gale Sayers, and several other former players. *See* Michael McCann, NFL Retirement System Not as Bad, or Good, as Argued, SPORTS ILLUSTRATED (Sept 18, 2007), *available at* http://sportsillustrated.cnn.com/2007/writers/michael_mccann/09/18/hearings/index.html.

union officials, it nonetheless criticizes 302(c)(5) as unnecessarily restrictive of all union welfare plans, regardless of the specific structure of negotiated contributions and the strict limits placed upon alterations to the agreement.[80] In order to better formulate an analysis of the impact that an amendment to section 302(c)(5) would have on the NFLPA's ability to better meet the needs of its disabled retirees, a thorough discussion of the NFL's current disability plan is necessary.[81] Part II.C.1 discusses the structure of the NFL's current disability plan, including the application and approval process involving the disability board of trustees.[82] Part II.C.2 summarizes the most prominent challenges made to rulings of the full disability board, including recent appeals to the Federal Circuit Courts.[83] Part II.C.3 discusses the lack of remedies for retired players whose claims have been denied by the board, eliciting the NFLPA's request that Congress take legislative action.[84]

1. Structure of the Bert Bell/Pete Rozelle NFL Player Retirement Plan

The NFLPA first collectively bargained for a retirement, disability, and benefit plan for former players when the union and NFL agreed to the Bert Bell NFL Player Retirement Plan in 1962.[85] The Bell Plan provided enhancements to the earlier, rather limited NFL plan.[86] It was not until 1989, however, that a new plan was negotiated to further

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80 *See* STATEMENT OF GENE UPSHAW, *supra* note 4, at 3. Upshaw indicated that the NFL CBA creates a unique situation in that the employer contributions to the NFLPA plan are fixed as part of player compensation, and the players themselves make the determination as to what portion of their compensation will be redirected to the plan. *Id*. at 3. Upshaw implied in his statement that the section 302(c)(5) restrictions would function better if considerations were made for situations in which employer contributions are fixed, as these situations lessen the potential for the employer-appointed plan fiduciaries to make an attempt to quell the need for further employer contributions through the unfair denial of benefits. *Id*.

81 *See* discussion *infra* Part III.

82 *See* discussion *infra* Part II.C.1 (discussing the Bert Bell/Pete Rozelle NFL Player Retirement Plan and its structure).

83 *See* discussion *infra* Part II.C.2 (discussing litigation against the Plan by former NFL players challenging denials and insufficient awards of disability benefits).

84 *See* discussion *infra* Part II.C.3 (discussing the NFLPA's requests for legislative change to the LMRA).

85 McCann, *supra* note 79, at 3. In 1959, the NFL did agree to a limited retirement plan for former players, but this plan was modest at best. *Id*. The 1959 plan included only players active at the time, leaving players who had already retired without access to retirement benefits. *See* NFLPA WHITE PAPER, *supra* note 3, at 5. Additionally, despite the 1962 negotiation of the collectively-bargained Bert Bell plan, the NFL and NFLPA did not include the pre-1959ers in a retirement benefits plan until a new collective bargaining agreement was negotiated in 1993. *Id*.

86 *See* McCann, *supra* note 79, at 3.

supplement the benefits available to retired players.[87] The new plan, called the Pete Rozelle NFL Player Retirement Plan, again provided significant enhancements in benefits for retired players.[88] Finally, in 1994, the Bell and Rozelle plans were merged to create a single retirement and disability plan.[89]

The current version of the plan provides retirement, disability, and other benefits for all retired NFL players who have met certain vesting requirements.[90] Specifically, the disability system offers former players, who meet the requisite standards, options for both total and permanent ("T&P") and partial disability benefits, depending on the facts of each player's case as to his ability to work.[91] One feature unique to the Bell/Rozelle Plan is the absence of a requirement that the disability claimed be suffered during employment.[92] Indeed, the cause of the disability has no effect on eligibility to receive benefits under the plan, but simply impacts the level of benefits for which the player is eligible.[93]

T&P disability benefits are available for retired players who are completely unable to work, and are designed to serve as income-

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[87] *See id.* (discussing the creation of the Pete Rozelle plan).

[88] *See id.* (discussing the creation of the Pete Rozelle plan).

[89] *See id.*

[90] NFLPA WHITE PAPER, *supra* note 3, at 5. The retirement portion of the plan provides for severance guidelines, pension, annuity, 401(k), and a Health Reimbursement Account for qualifying medical expenses. *See* FACTS ABOUT THE NFLPA'S RETIRED PLAYER BENEFITS, *available at* http://www.nflpa.com/pdfs/NewsAndEvents/Facts_about_the_NFLPA's_Retired_Player_Benefits.pdf. A player is vested in the plans if he has logged at least three "seasons" of time in the NFL. NFLPA WHITE PAPER, *supra* note 3, at 9. A player is deemed to have earned a "season" for vesting purposes if he is paid for at least three games during that season. *Id.* It can be inferred from the NFLPA documentation and requirements for vesting that a player needs to participate in three games in order to earn a "season[.]" *See generally* NFL COLLECTIVE BARGAINING AGREEMENT, AMENDED 2006, http://www.nflpa.com/pdfs/Agents/CBA_Amended_2006.pdf.

[91] *See* NFLPA WHITE PAPER, *supra* note 3, at 5. The total and permanent (T&P) benefits are divided into four categories based on the nature of the injury causing the disability and the timeframe in which the disability effectively prevents the player from earning income, necessitating a claim to the system. *Id.* at 8. The partial disability benefits, also called "Line of Duty" benefits, are made available to players who are injured significantly while they are still active, with the payment amounts varying based on years of service, the reporting timeframe, and other factors. *Id.* at 9–10.

[92] *See id.* at 5. The NFLPA points out that its plan is quite unusual in that it harbors no requirement that a disability occur during a player's active employment with a NFL team. *Id.* On the contrary, a player can become disabled through a latent football related injury or a completely non-football related injury many years later, and he will still qualify for some level of disability benefits under the system. *Id.* If the disability is unrelated to football, the level of payable benefit will, in most cases, be lower. *See id.* *See also* discussion *infra* at Part II.C.I (illustrating the different levels of benefits the committee may dispense based on the application and findings).

[93] *See* NFLPA WHITE PAPER, *supra* note 3, at 6.

replacement plans in the absence of an ability to work even a desk job.[94] There are four categories of T&P benefits available: Active Football Benefits; Active Non-Football Benefits; Football Degenerative Benefits; and Inactive Non-Football Benefits.[95] In the alternative to T&P benefits,

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[94] *Id.* at 7. Although the T&P plan is designed for income replacement, it is incompatible with the NFLPA's other income replacement plan—the standard pension available to all vested players. *Id.* at 8. The NFLPA will not allow a retired player who has already begun to receive his pension to apply for disability benefits, regardless of the severity or nature of the disability. *Id*. Because a retired player automatically begins to receive his pension at age 55 under the pension plan, he will be ineligible for any disability benefits claimed after that point. *Id*. A player is also entitled to file a claim for receipt of his pension prior to attaining age 55. FACTS ABOUT THE NFLPA'S RETIRED PLAYER BENEFITS, *supra* note 90, at 1. If the player chooses this option, he effectively cuts off his opportunity to apply for future disability benefits because the plan does not allow for dual receipt of pension and disability benefits. *Id*.

[95] NFLPA WHITE PAPER, *supra* note 3, at 8. Active Football disabilities are disabilities related to the player's participation in the NFL. *Id.* Although awards for disabilities in this category are substantially higher than any of the other three categories, the criteria for qualification are steep, requiring a finding of total and permanent disability within the six months following the end of the player's NFL career. *Id.* The payment for former players awarded Active Football benefits is not a product of years of service or any other vesting requirement. *Id.* A retired player is paid $224,000 per year under the plan upon a finding of total and permanent disability, and is eligible for this full payment after an appearance in only one game in the league. *Id.* This level of disability is similar to the pension and disability plans available to Major League Baseball ("MLB") players under the MLB collective bargaining agreement. *See* McCann, *supra* note 79, at 5. McCann discusses the relative strength of the MLB plan as compared to the NFL plan by pointing out that, unlike the NFL, a former MLB player need not prove that his disability resulted from a baseball related injury to receive the highest benefit level. *Id.* McCann also indicates that what he terms baseball's "Moonlight Graham provision" (in reference to a character from the movie *Field of Dreams*) is so lucrative that a player can spend as little as one day at the Major League level and be fully vested with respect to both the retirement and disability plans. *Id.* The next level of benefit available, active non-football disabilities, also dispenses with the vesting requirement, but pays nearly $90,000 per year less in benefits than Active Football disabilities. NFLPA WHITE PAPER, *supra* note 3, at 8. The predetermined annual benefit amount for a player awarded active non-football disability is $134,000, but could be adjusted higher based on the benefit credits a player has earned for time in the league. *Id.* The third category, football degenerative disabilities, appears designed to address latent injuries that a player suffers while playing in the NFL, but that do not bring about total or permanent disability until later than six months after the player has retired from the NFL. *Id.* Football degenerative benefits, although paying only $24,000 less per year than active non-football benefits, allow the retired player to file a claim if he becomes totally and permanently disabled within fifteen years following the end of his NFL career due to a football-related injury. *Id.* Football-degenerative disabilities pay at an annual rate of $110,000. *Id.* Unlike the first two categories of disability, the Football-degenerative category requires that a player be "vested" in order to be eligible for benefits. *Id.* at 9. The final category of benefits is inactive non-football related disability benefits. *Id.* at 8. Paying less than one-fifth of the allowable benefit amount for football-degenerative disabilities, inactive benefits allow a player to file for benefits at any time during his life if he is ineligible for one of the other three T&P categories. *Id.* at 8–9. The annual benefit amount for the inactive non-football related benefits is $18,000 per year (or $21,000 per year if the

retired players who are not found to be totally and permanently disabled may qualify for partial disablement Line of Duty benefits.[96] Line of Duty benefits are available to players who suffer a "substantial disablement" within the guidelines established by the American Medical Association.[97] The major difference between Line of Duty benefits and T&P benefits lies in the length of time the benefit is available and the threshold the player must meet in order to qualify.[98]

Similar to disability plans in many other industries, when a former player applies for benefits under the Bell/Rozelle Plan, he must complete a specified procedure before the claim will be considered.[99] Following application, the former player is sent to a plan neutral physician for an initial medical examination.[100] A two-person

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application was filed on or after April 1, 2007). *Id.* at 8. The inactive non-football category is also subject to the same vesting provisions as the football-degenerative benefits category. *Id.* at 9.

[96] *Id.*

[97] *Id.* According to the NFL, most injuries suffered by NFL players are orthopedic in nature, leading the NFLPA and the League to adopt the American Medical Association guidelines for measuring levels of impairment for orthopedic injuries. *Id.* Any player who meets one of the following guidelines will be eligible to receive Line of Duty benefits:

> A 38% or greater loss of use of the entire lower extremity; [a] 23% or greater loss of use of the entire upper extremity; [a]n impairment to the cervical or thoracic spine that results in a 25% or greater whole body impairment; [a]n impairment to the lumbar spine that results in a 20% or greater whole body impairment; or [a]ny combination of lower extremity, upper extremity, and spine impairments that results in a 25% or greater whole body impairment.

Id. at 9–10. Additionally, "[u]p to three percentage points may be added to the impairment ratings of a player if he experiences excess pain." *Id.* at 10.

[98] *See id.* at 9. *See also* NFL CBA, *supra* note 90, at 133 (explaining the benefit credit system and its use for partial disability determinations). Actual payment amounts for an approved claim for Line of Duty benefits are calculated based on the player's accrued benefit credits. *Id.* For each season in which a player has been paid for at least three games, that season will be a credited season for benefit credit purposes. *Id.* *See also* NFLPA WHITE PAPER, *supra* note 3, at 9. Over the history of the NFLPA's renegotiated Collective Bargaining Agreements with the NFL teams, the credit amount assigned for each earned benefit credit has increased. *See* NFL CBA, *supra* note 90, at 133. The amount awarded under the current CBA for each benefit credit earned is as follows:

[Credited Season in Plan Year]	[Benefit Credit (per month)]
Before 1982	$250
1982 through 1992	$255
1993 and 1994	$265
1995 and 1996	$315
1997	$365
1998 and later seasons	$470

NFLPA WHITE PAPER, *supra* note 3, at 22.

[99] *Id.* at 10.

[100] *Id.* The physician is considered to be plan neutral based on his/her joint appointment by the full Retirement board consisting of NFL and NFLPA appointed-members. *Id.*

committee, comprised of one NFL- and one NFLPA-appointed member, reviews the results of the initial medical examination and other application materials, and then makes a determination as to whether benefits should be awarded.[101] If the claim is denied, the player may appeal to the full retirement board for review.[102] On appeal, the full board reviews all materials from the record of the application, and any other information available from the player or other sources.[103] Additionally, the full board gives no deference to the decision of the Initial Claims Committee, and instead conducts a "full and fair and totally independent review."[104] If a full board denies the player's claim, the decision is considered final, and the player's only remaining remedy is an appeal to the federal court system.[105] The full retirement board of the Bell/Rozelle Plan, in compliance with section 302(c)(5) of the LMRA, is made up of six voting members.[106] Each side, the NFLPA and the NFL, appoints three members to the board, which oversees not only the evaluation of claims, but also the general administration of the plan and fund, as well as fund investment decisions.[107]

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101 *Id.*

102 *Id.* at 11. A claim is considered denied if the Initial Claims Committee is unanimous in its denial, or if there is a deadlock between the two members. *Id.* at 10. A player also has the right to appeal an approval by the Initial Claims Committee that he feels does not adequately meet his needs. *Id.*

103 *Id.* at 11. The full board will consider information not seen by the Initial Claims Committee. *Id.* On appeal the player is also sent to one or more plan neutral physicians (but not the same physician who conducted the initial medical examination) for additional medical examinations. *Id.*

104 *Id.* The review conducted by the full board is similar to *de novo* judicial review, which is defined as "A court's nondeferential review of an administrative decision, usu. through a review of the administrative record plus any additional evidence the parties present." BLACK'S LAW DICTIONARY 392 (3d. Pocket ed. 2006).

105 NFLPA WHITE PAPER, *supra* note 3, at 12. The plan also provides provisions for resolving 3-3 deadlocks between the members of the full board. *Id.* In the event that the deadlock arises over a medical issue, the player may be sent to the plan's top pre-approved neutral physician for a final examination to answer the specific questions troubling the board. *Id.* at 11–12. If this method is used to resolve the deadlock, the decision of the physician is binding upon the full board. *Id.* at 12. In the rare event that a final examination by the physician is not requested by either side, the deadlock between the members of the board may be resolved by binding arbitration. *Id.*

106 *Id.* at 11. The six-member board is made up of three NFLPA-appointed and three NFL-appointed trustees, with the current board containing two team owners and a team president (the NFL appointees), and three former players who each have extensive experience working with the NFLPA (the NFLPA appointees). *Id.*

107 *See id.* *See also* STATEMENT OF GENE UPSHAW, *supra* note 4. The NFLPA appointees on the current board include Tom Condon (an eleven year player, past President of the NFLPA, a current attorney and a top football agent with Creative Artists Agency); Jeff Van Note (who played for the Atlanta Falcons for eighteen years, and was also a President of the NFLPA during his playing career); and David Duerson (an eight year NFL player,

2. Litigation by Former Players

Despite the best efforts by retirement and disability administrative boards to fulfill their fiduciary obligations, those seeking payments sometimes believe a denial of their claim was erroneous.[108] In the NFL, as in many other industries, when a beneficiary believes a claim was denied erroneously, he may appeal to the federal court system for review of the board's decision.[109] According to the NFLPA, there have been twenty-five decisions issued by federal courts in response to retiree appeals of claim denials since the Bell and Rozelle plans were combined in 1994.[110] Of these decisions, all but one has been resolved in favor of

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Harvard Business School graduate, and current businessman). NFLPA WHITE PAPER, *supra* note 3, at 11. The NFL-appointed board members include William Bidwill (the owner of the Arizona Cardinals); Clark Hunt (the owner of the Kansas City Chiefs); and Dick Cass (the President of the Baltimore Ravens). *Id*.

[108] *See, e.g.*, Washington v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 504 F.3d 818 (9th. Cir. 2007) (challenging a denial of benefits and alleging breach of fiduciary duty when the board failed to disclose its criteria for evaluating benefit claims); Jani v. Bell, 209 F. App'x 305 (4th Cir. 2006) (alleging that the board abused its discretion when it denied benefits absent the support of any substantial evidence); Johnson v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 468 F.3d 1082 (8th Cir. 2006) (challenging a finding that the board abused its discretion when it relied on evidence that a former player was employed in finding that he was not totally and permanently disabled, based on MAP reports); Williams v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 61 F. App'x 362 (9th Cir. 2003) (alleging the board erred when it relied on evidence that a player was capable of sedentary work to demonstrate employability, and thus a lack of total and permanent disability); Obradovich v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 48 F. App'x 255 (9th Cir. 2003) (alleging that the board erred when it submitted to a MAP only the question of whether the plaintiff was disabled, and not the question of when he became disabled); Youso v. Bert Bell NFL Player Ret. Plan, 242 F.3d 379 (8th Cir. 1999) (alleging board error in relying on medical evidence indicating that only part of plaintiff's injuries were covered under the plan); Sweeney v. Bert Bell NFL Player Ret. Plan, 156 F.3d 1238 (9th Cir. 1998) (alleging error when the board awarded a lower class of benefits to a plaintiff based on evidence that the plaintiff was capable of earning income, and was therefore not totally and permanently disabled); Smith v. Bell, 125 F.3d 859 (9th Cir. 1997) (alleging that the board erred when it relied on medical evidence to determine later onset date of total and permanent disability than claimed by plaintiff); Brumm v. Bert Bell NFL Ret. Plan, 995 F.2d 1433 (8th. Cir. 1993) (arguing that the board erred when it applied an unreasonable interpretation of the plan language, resulting in an arbitrary and capricious denial of benefits); Green v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, No. CIV.A.3:98-CV-2235-D 1999 WL 417925 (N.D. Tex June 22, 1999) (arguing that the board erred when it interpreted plan language to determine that the plaintiff was not vested for purposes of meeting plan benefit criteria).

[109] *See* 29 U.S.C. § 1001 (2000) (presenting congressional findings that access to federal courts is necessary for proper adjudication of claims of improper benefit denials). Like many retirement and welfare benefit plans, the Bert Bell/Pete Rozelle Ret. Plan is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). *Id*. *See also* NFLPA WHITE PAPER, *supra* note 3, at 11–12.

[110] NFLPA WHITE PAPER, *supra* note 3, at 12.

the Plan.[111] Although each of these appeals varies based on the specific facts, a significant number of these appeals have centered on recurrent issues that mandate further discussion in order to better understand the issues to which the NFLPA and its members seek resolution.[112]

The most frequent allegations to appear in appeals of benefit denials by the Bell/Rozelle Plan board are those of abuse of discretion in denying the claim.[113] Because the Bell/Rozelle Plan is considered an "employee welfare benefit plan" as defined by ERISA, the plan is subject to governance by ERISA, and its administrators are subject to the fiduciary standards imposed by ERISA.[114] As such, judicial review of retirement board decisions claimed to result from abuse of discretion are subject to ERISA's standard of review as interpreted by the United States

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[111] *Id*. *See also Jani*, 209 F. App'x 305. *Jani* is the appeal filed by the estate of the late "Iron Mike" Webster, center for the Pittsburgh Steelers from 1974 through 1988. *Id*. at 307. The *Jani* court upheld a district court ruling that the board abused its discretion in denying Webster a higher level of benefits. *Id*. at 320. *Jani* is the only case in which a final disposition has ruled in favor of the appealing player and not the plan.

[112] See *infra* note 113 (discussing cases which deal with the issue of abuse of discretion by the retirement board in denying claims).

[113] The following cases all had as the primary issue allegations of abuse of discretion by the board in denying claims for benefits. *See Washington*, 504 F.3d 818; *Jani*, 209 F. App'x 305; *Johnson*, 468 F.3d 1082; Boyd v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 410 F.3d 1173 (9th Cir. 2005); *Williams*, 61 F. App'x 362; *Obradovich*, 48 F. App'x 255; Courson v. Bert Bell NFL Player Ret. Plan, 214 F.3d 136 (3d. Cir. 2000); *Youso*, 242 F.3d 379; *Sweeney*, 156 F.3d 1238; *Smith*, 125 F.3d 859; *Brumm*, 995 F.2d 1433; *Green*, No. CIV.A.3:98-CV-2235-D 1999 WL 417925.

[114] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001(1) (2000). ERISA's coverage extends to employee welfare benefit plans, as included in the following definition:

> The terms "employee welfare benefit plan" and " "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1). The definition of "employee welfare benefit plan" explicitly covers plans created under 29 U.S.C. § 186(c), the codified location of § 302(c) of the original Taft-Hartley legislation, and thus reaches the Bell/Rozelle Plan by explicit reference. 29 U.S.C. § 1002(1).

Supreme Court in *Firestone Tire & Rubber Co. v. Bruch*.[115] In *Firestone*, the Court determined that, unlike a federal appellate court's review of a district court's grant of summary judgment—which is subject to a de novo standard—the review of a plan administrator's decision may be subject to a less-exacting standard.[116] The *Firestone* Court held that, where a plan bestows upon its administrator or fiduciary the discretion to interpret the plan and determine eligibility for benefits, the administrator's determinations will not be reviewed under the de novo standard but will instead be reviewed under an abuse of discretion standard.[117]

In *Courson v. Bert Bell NFL Retirement Plan*,[118] the Court of Appeals for the Third Circuit reviewed the Bell Retirement Plan board's denial of benefits to former Pittsburgh Steelers and Tampa Bay Buccaneers offensive lineman Stephen Courson under the standard mandated by *Firestone*.[119] The *Courson* court articulated the highly deferential abuse of discretion standard as proper when reviewing a determination of the Bell/Rozelle Plan board.[120] As referenced in *Courson*, the standard requires that a plan administrator's decision "may be disturbed only if it is without reason, unsupported by substantial evidence, or erroneous as a matter of law."[121] In addition to *Courson*, many other courts reviewing claims by former players who were denied benefits have also indicated that the above articulation of the abuse of discretion standard is proper.[122] The Court in *Courson* further reasoned that a decision is

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115 489 U.S. 101 (1989). In *Firestone*, the Court granted certiorari to determine the proper standard of review for a federal court when a plan administrator, trustee, or beneficiary challenges an administrative determination relating to interpretation of the plan. *Id*. at 108.

116 *See id*. at 115 (discussing the availability of a less-invasive standard of review when the plan has entrusted the administrator or fiduciary with discretionary authority to review eligibility and interpret plan provisions). *See also* Canseco v. Constr. Laborers Pension Trust for S. Cal., 93 F.3d. 600, 605 (9th Cir. 1996) (discussing the abuse of discretion standard as the proper standard of review for plans entrusting discretion to fiduciaries).

117 *Firestone*, 498 U.S. at 115. The *Firestone* Court discusses the origin of the arbitrary and capricious standard as a means for a federal court to assert jurisdiction over suits against plans arising under the section § 302(c) exceptions in the LMRA. *Id*. at 109. *See also* Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048 (7th Cir. 1987).

118 214 F.3d 136 (3d. Cir. 2000).

119 *See id*. at 142 (citing Mitchell v. Eastman Kodak Co., 113 F.3d 433, 437–38, n.4 (3d. Cir. 1997) (citing *Firestone*, 498 U.S. at 115)).

120 *See Courson*, 214 F.3d at 142. *Cf.* Boyd v. Bert Bell/Pete Rozelle NFL Players Ret. Plan, 410 F.3d 1173, 1178 (9th Cir. 2005) (citing *Firestone*, 489 U.S. at 115; Jones v. Laborers Health and Welfare Trust Fund, 906 F.3d 480, 482 (9th Cir. 1990)) (indicating that a collectively-bargained for review process and grant of discretion to plan administrators will not be upset by the courts unless an abuse of discretion is obvious).

121 *See Courson*, 214 F.3d at 142 (quotations omitted).

122 See Jani v. Bell, 209 F. App'x 305, 320 (4th Cir. 2006) (affirming a district court decision finding that the board did abuse its discretion when it denied benefits absent the support of

"supported by 'substantial evidence [only] if there is sufficient evidence for a reasonable person to agree with the decision.'"[123] The abuse of discretion standard was further clarified in *Youso v. Bert Bell NFL Retirement Plan*[124] where the court held that in applying the standard a court must not substitute its own weighing of the evidence for the weighing done by the plan administrator.[125] Rather, the court must

any substantial evidence); Johnson v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 468 F.3d. 1082, 1088 (8th Cir. 2006) (affirming a finding that the board did not abuse its discretion when it relied on substantial evidence that a former player was gainfully employed and was not totally and permanently disabled, based on MAP reports); Williams v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 61 F. App'x 362, 362–63 (9th Cir. 2003) (holding that the board did not abuse its discretion in denying benefits when it reasonably relied on substantial evidence that player was capable of sedentary work to demonstrate employability, and thus has a lack of total and permanent disability); Obradovich v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 48 F. App'x 255, 257 (9th Cir. 2002) (holding that the board's decision was reasonable and supported by substantial evidence when a MAP opinion was followed on the question of whether the plaintiff was disabled); Youso v. Bert Bell NFL Player Ret. Plan, 242 F.3d 379, 379 (8th Cir. 1999) (affirming the district court's ruling that the board did not abuse its discretion in denying benefits based on substantial medical evidence that only part of the plaintiff's injuries were covered under the plan); Sweeney v. Bert Bell NFL Player Ret. Plan, 156 F.3d 1238, 1238 (9th Cir. 1998) (holding that the board did not abuse its discretion when it awarded a lower class of benefits to the plaintiff based on substantial evidence that the plaintiff was capable of earning income, and was therefore not totally and permanently disabled); Smith v. Bell, 125 F.3d 859 (9th Cir. 1997) (holding that the board did not abuse its discretion when it relied on substantial medical evidence to determine later onset date of total and permanent disability than claimed by the plaintiff); Brumm v. Bert Bell NFL Ret. Plan, 995 F.2d 1433, 1440 (8th. Cir. 1993) (holding that the board did abuse its discretion when it applied an unreasonable interpretation of the plan language, resulting in an arbitrary and capricious denial of benefits); Green v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, No. CIV.A.3:98-CV-2235-D 1999 WL 417925, at *4 (N.D. Tex 1999) (holding that the board did not abuse its discretion when it relied on a reasonable interpretation of plan requirements to determine that the plaintiff was not vested for purposes of meeting plan benefit criteria).

[123] *Courson*, 214 F.3d at 142 (citing Daniels v. Anchor Hocking Corp., 758 F. Supp. 326, 331 (W.D. Pa. 1991)). The court ultimately upheld the retirement board's decision to deny benefits to Courson when it found that the board went to great lengths to gather substantial evidence, medical and non-medical, that it then reasonably relied on to deny the claim. *Id.* at 148. *See also Johnson*, 468 F.3d 1082, 1085 (holding that a finding by the district court of no abuse of discretion will be upheld if a reasonable person *could* have reached a similar decision as the board based on the available evidence, not if a reasonable person *would* have reached a similar decision (emphasis supplied)). *See generally Courson*, 214 F.3d at 146. Courson claimed that, inter alia, the board's denial of benefits was arbitrary and capricious when it disregarded his contention that the Steelers' policy of furnishing a maximum of two beers per player following home games was evidence of League facilitation and supervision of Courson's alcoholism.

[124] 242 F. 3d 379.

[125] *See id.* (explaining that although the court might reach a different conclusion when reviewing the evidence anew, the court is constrained to review the board's evaluation when the board is given discretion to decide claims). *But cf. Green*, 1999 WL 417925 at *2 (indicating that although the court is bound to apply the abuse of discretion standard in

evaluate the administrator's review of evidence, although it may consider outside evidence to determine whether abuse of discretion occurred.[126] When a court reviews a denial of benefits for abuse of discretion, a finding that the decision reached by the board was directly contrary to the evidence in the record will not automatically indicate an abuse of discretion.[127] In *Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan*,[128] the court laid out a slightly different abuse of discretion standard when it held that an ERISA administrative board abuses its discretion only when it "(1) renders a decision without explanation, (2) construes provisions of the plan in a way that conflicts with the plain language of the plan, or (3) relies on clearly erroneous findings of fact."[129] The *Boyd* court continued, indicating that "[a] finding is clearly erroneous when although there is evidence to support it, the reviewing [body of] the entire evidence is left with the definite and firm conviction that a mistake has been committed."[130] Thus, the *Boyd* court illustrates the incredibly stringent standard of proof that a former player appealing the board's decision must meet if the player is to prevail on an abuse of discretion claim.[131]

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determining whether the plan administrator's review of the evidence was arbitrary and capricious, the court may consider evidence outside the administrative record to evaluate whether the board abused its discretion).

126 *Youso*, 242 F.3d at 379; *see also Green,* 1999 WL 417925 at *2.

127 Boyd v. Bert Bell/Pete Rozelle NFL Players Ret. Plan, 410 F.3d 1173, 1178 (9th Cir. 2005) (quoting Taft v. Equitable Life Assurance Soc'y, 9 F.3d 1469, 1473 (9th Cir. 1993)). The *Boyd* court held that a decision contrary to the evidence in the record must be accompanied by a lack of explanation, a misconstruing of the plain language of the plan, or a reliance on clearly erroneous findings of fact. *Boyd*, 410 F.3d at 1178 (citing Bendixen v. Standard Ins. Co., 185 F.3d 939, 944 (9th Cir. 1999); Atwood v. Newmont Gold Co., 45 F.3d 1317, 1323–24 (9th Cir. 1995)). The *Boyd* court also held that a fiduciary under ERISA is under obligation to guard the assets of the plan against claims that are improper. *Boyd*, 410 F.3d at 1178. In addition, the court held that an ERISA fiduciary is under a similar obligation to pay claims that are legitimate. *Id*. Further, *Boyd* held that the primary goal of ERISA was to provide a method of dispute resolution for workers and beneficiaries that was both inexpensive and expeditious. *Id*. By applying a standard of review deferential to the board, the court assists in furthering that goal. *Id*.

128 410 F.3d 1173.

129 *Id*. at 1178.

130 *Id*. (alteration in original).

131 *See* McCann, *supra* note 79, at 3. McCann discusses the test laid out in *Boyd* requiring a finding of either a decision without explanation, a misconstruing of the plain language of the plan, or a reliance on clearly erroneous findings of fact. *Id*. McCann continues, indicating that given the deference typically afforded to ERISA plan fiduciaries, proving any one of the three elements of the test from *Boyd* is highly unlikely. *Id*. As such, McCann asserts that an appeal to the federal court system is not likely, except in clear cut-situations, to net a victory over the board for a retired player. *See id*. at 4 (discussing the improbability of reversal on appeal).

Although allegations of abuse of discretion in denying claims are the most common procedural complaints on appeal, the most common substantive complaint accompanying these allegations is erroneous determination of the onset date of disabilities for purposes of retroactive payment.[132] The Bell/Rozelle Plan allows the board to seek the evaluation of a medical advisory physician ("MAP") when the board is deadlocked on a claim over a medical issue, and the MAP determination is binding on the board.[133] However, confusion as to the proper solicitation of a MAP opinion has resulted in onset date appeals.[134] In *Obradovich v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*,[135] the Ninth Circuit upheld the district court's ruling that the board did not abuse its

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132 Many of the appeals filed by former players do not allege a total denial of benefits, but rather allege that the board awarded benefits erroneously with respect to determining when the disability first occurred. *See, eg.*, Washington v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 504 F.3d. 818 (9th Cir. 2007) (challenging the board's failure to follow precedent when determining criteria for awarding benefits retroactively); Jani v. Bell, 209 F. App'x 305, 306 (4th Cir. 2006) (challenging the board's determination that a lower class of benefits was proper when it failed to consider evidence that would have placed the onset date of injury within the window for a higher class of benefits); Johnson v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 468 F.3d. 1082, 1086–87 (8th Cir. 2006) (alleging that the board erroneously relied on evidence of a player's capability for earning income as sufficient to deny retroactive benefits); *Boyd*, 410 F.3d at 1177 (alleging that the board erred in denying a lower level of benefits when it determined that player's disability arose from events occurring following his NFL playing career); Obradovich v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 48 F. App'x 255 (9th Cir. 2002) (alleging that the board erred in submitting only the question of whether the player was disabled, and not when he became disabled, to the MAP physician); Courson v. Bert Bell NFL Player Ret. Plan, 214 F.3d 136, 141 (3d. Cir. 2000) (alleging that the board erred in attributing player's alcohol-related disabilities to events occurring after his NFL playing career had ended, resulting in a lower level of benefits); Youso v. Bert Bell NFL Player Ret. Plan, 242 F.3d 379 (8th Cir. 1999) (alleging that the board erred when it determined that a fall happening almost fifteen years following the end of the player's career was not the result of football injuries, despite evidence that the fall occurred as a result of a disability directly linked to a football injury); Sweeney v. Bert Bell NFL Player Ret. Plan, 156 F.3d 1238 (9th Cir. 1998) (alleging board error in a finding that sporadic work resulting in minimally gainful employment was sufficient to determine that a player was not totally and permanently disabled during a certain period); Smith v. Bert Bell/Pete Rozelle NFL Ret. Plan, 125 F.3d 859 (9th Cir. 1997) (alleging that the board erred when it determined that the onset date of disability was many years after the on-field injury that ended the player's career, despite evidence that the player had found work as an actor and talent agent in the seven years following the end of his NFL playing career).

133 NFLPA WHITE PAPER, *supra* note 3, at 12. A MAP's opinion will almost always resolve a conflict. *Id*.

134 In *Obradovich*, the Ninth Circuit reviewed a former player's claim that the board had abused its discretion in not following a MAP's determination of the onset date of Obradovich's disability. 48 F.Appx. at 256. *See also Johnson*, 468 F.3d. at 1086 (alleging that the MAP opinion sought by the board was not as thorough or substantial as the board would need to realistically review the plaintiff's claim for benefits).

135 48 F. App'x 255.

discretion when it declined to follow a MAP's opinion, thus reiterating the board's wide discretion in determining an applicant's qualifications for disability benefits.[136] The court indicated that the board submitted to the MAP only a question as to *whether* Obradovich met the plan's definition for T&P disablement—not *when* he became totally and permanently disabled.[137] The court determined that when the plan grants full discretion to approve claims to the board, this includes the right to employ available assistance (such as the MAP) only to the extent that the board deems necessary.[138]

Although the NFLPA's statement to Congress did not make facial allegations of breach of fiduciary duty by the NFL-appointed members of the plan administrative board, there appears to be an underlying concern regarding a potential conflict of interest giving rise to the denial of claims by these appointees.[139] This type of concern has been litigated only one time by a former player appealing a denial of benefits.[140] In

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[136] *See id.* at 256 (explaining the difference between determination of disability in general and determination of onset date).

[137] *Id.* at 256. The court explains that the board, given its wide discretion in making benefit award determinations, may sever the question of whether a player meets the T&P disablement definition from the question of when that player actually became totally and permanently disabled. *Id.* If the board elects to separate these two questions, it retains its discretion to rule on the question it did not submit to the MAP. *Id.* Thus, if a board chooses, as the board in *Obradovich* did, to submit to the MAP only a question of whether the player meets the T&P qualifications, the board is under no obligation to rely on the MAP opinion as to when the disablement occurred. *Id.* If a player appeals the board decision in a case like this, the reviewing court may review the board's decision only as to the question it submitted to the MAP (here the *whether* question) for abuse of discretion, and must give the board full deference with respect to the other question it chose not to submit (here the *when* question). *Id.*

[138] *See id.* (discussing the plan provisions that allow the board to use a MAP to answer questions regarding certain medical issues, and the nature of the MAP determinations as binding on the board). *See also Johnson*, 468 F.3d. at 1086; Courson v. Bert Bell NFL Player Ret. Plan, 214 F.3d 136, 144–45 (3d. Cir. 2000).

[139] *See* STATEMENT OF GENE UPSHAW, *supra* note 4, at 3. While Upshaw denied believing that any of the NFL-appointed fiduciaries breached their duty, there is likely no other explanation for his request that Congress actively legislate to remove the 302(c)(5) equal representation requirement. *Id.* Upshaw couched his request under the rubric of personal ability to understand the needs of disabled players when he said that the NFLPA appointees, as former players themselves, are better able to understand when benefits should be awarded. *Id.* Although he did not state this position overtly, Upshaw likely feared that, despite the fixed nature of employer contribution levels to the plan, the interest of the NFL appointed fiduciaries may sway to denying benefits surreptitiously, in an indirect effort to reduce the likelihood of future requests for increased contributions. *See id.*

[140] *See generally Johnson* , 468 F.3d 1082. The plaintiff in *Johnson*, former player Daniel Johnson, alleged abuse of discretion by the board when his claim for retroactive benefits was denied. *Id.* at 1085. Johnson argues, similar to the argument in *Obradovich*, that the board abused its discretion when it relied on a MAP for determination of only whether Johnson met the disability standards, but not for when his disability began. *Id.* at 1086.

Johnson v. Bert Bell/Pete Rozelle NFL Player Retirement Plan,[141] the court addressed whether a conflict of interest could exist on the board when the requirements of section 302 were followed, and held that equal representation of both parties on the board, combined with deadlock-breaking procedures, sufficiently demonstrated that a conflict of interest was not present.[142] Thus, compliance with the 302(c)(5) requirements for board composition has been held not to indicate a per se conflict of interest among the board, or even a suspicion of a conflict of interest.[143]

3. The Current Controversy and Requested Remedy

The NFLPA is presented with a unique problem pitting loyalty against its moral compass.[144] The NFLPA and the NFL are equally represented on the Bell/Rozelle Plan administrative board, in compliance with 302(c)(5).[145] The disability benefits are designed to assist former players, and yet the NFLPA, as equal administrator, only grants active players the right to vote in elections that impact the selection of NFLPA representatives on the retirement board.[146] Retirees

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141 468 F.3d 1082.

142 *Id.* Daniel Johnson appealed the district court's ruling that the board did not abuse its discretion, arguing that a standard less deferential than the abuse of discretion standard should apply, because a potential conflict of interest was present. *Id.* at 1086. *See also* Tillery v. Hoffman Enclosures, Inc., 280 F.3d 1192, 1197 (8th. Cir. 2002) (holding that the presence of a conflict of interest may require the application of a less deferential standard). Johnson based his argument on the board's composition, presumably contending that the NFL-appointed members had a conflict of interest between upholding their fiduciary duty to the beneficiaries and serving the interests of the appointing party. *Johnson*, 468 F.3d at 1086. The court, however, rejected Johnson's argument and held that there was no conflict of interest because the board had equal representation of the NFL and NFLPA, was required to reach a majority vote on decisions, and had resources such as binding MAP decisions to break deadlocks. *Id.* (citing Manny v. Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, 388 F.3d 241, 243 (7th Cir. 2004); *Courson*, 214 F.3d at 143). The court went on to say that the obvious lack of a conflict of interest required the application of the more deferential abuse of discretion standard when reviewing the board's denial of benefits. *Id.*

143 *Cf. Johnson*, 468 F.3d at 1086. Although the Johnson court does not reference the 302(c)(5) requirements explicitly, there can be little doubt that the court was discussing these same requirements when explaining that equal representation and deadlock resolution procedures in the form of binding MAP opinions are indications that no conflict of interest could survive to negatively impact a beneficiary. *See id.*

144 *See* McCann, *supra* note 79, at 3 (discussing the various factors influencing the NFLPA's representation of retirees).

145 See discussion *supra* Part II.C.1 regarding the structure of the Bell/Rozelle Plan.

146 *See* NFL PLAYERS' ASSOCIATION CONST. Article II Cl. 2.01.

> Any person who is employed as a professional football player by a member club of the NFL shall be eligible to be an active member of the NFLPA, including any player who is a party to an NFL Player

are thus unable to directly influence the selection of the representatives that the NFLPA appoints to the board.[147] The outcry from retirees who have been denied benefits and claim the NFLPA is failing its moral duties is building at a fever pitch.[148] In response, the NFLPA has said that it is committed to meeting the disability needs of the plan for which it bargained so stringently, and the presence of NFL-appointed representatives on the administrative board is the true cause of the denials.[149] Thus, under the presumption that legislative action unmaking sixty years of valid law is the only viable solution to the problem, the NFLPA has asked Congress to alter section 302(c)(5) to allow the NFLPA to stack the board with only union appointees.[150] It is the fourth quarter, and the two-minute drill down the slippery slope has begun.

III. ANALYSIS

Many disabled former players have no alternative but to wait anxiously, and perhaps indefinitely, as the NFLPA makes a ceremonial effort to improve access to benefits, while refusing to give the retirees any meaningful level of direct control over their future financial security.[151] As discussed, the NFLPA asserts that its hands are tied by federal law; the problem of repeated denials of proper benefits will be solved only if Congress creates an exception for the NFLPA plan in

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> Contract. A player actively seeking employment as a professional football player shall also be eligible to be a member of the NFLPA.

NFL PLAYERS' ASSOCIATION CONST. Article II Cl. 2.01 (2007). *See also* NFL PLAYERS' ASSOCIATION CONSTITUTION Article II. Cl. 2.11, which states that retired members of the NFLPA have the right to "be represented on the Bert Bell/Pete Rozelle NFLPA Retirement Board by a retired member appointed by the NFLPA *active Board of Player Representatives*." *Id.* at § 4 (emphasis added).

147 *See id.* § 4.

148 *See generally* McCann, *supra* note 79; O'Keefe, *supra* note 6; Les Carpenter, *NFL Disability Plan Draws Congressional Attention*, WASHINGTON POST, June 26, 2007, at E01; Les Carpenter, *Plan Eases NFL Disability Process*, WASHINGTON POST, June 21, 2007, at E01; Finder, *supra* note 7.

149 *See* STATEMENT OF GENE UPSHAW, *supra* note 4, at 3–4 (discussing the need for legislative elimination of section 302(c)(5)'s joint administration provision).

150 *Cf. id*. at 3 (indicating that the presence of NFL appointees on the board is the sole cause of the NFLPA's inability to award benefits at the levels requested by disabled players).

151 *See supra* notes 6, 146 (discussing the laundry list of accusations leveled at the NFLPA by former players, including the most serious charge: that the NFLPA is loyal only to its dues paying members—the current players—and has no incentive or desire to assist disabled retired players who are unable to work and in real danger of losing what little assets they have remaining).

response to the plan's unique structure.[152] However, the exception requested by the NFLPA calls for a total redaction of the section 302(c)(5) joint administration provision, a change that would undoubtedly have a significant impact on the entire organized labor community.[153] Clearly, if a legislative solution to the plight of the former players is to be implemented, it must meet the specific needs of the NFLPA and also minimize the negative effects on the members of the labor community who benefit from section 302(c)(5)'s current form.[154] Part III.A evaluates the reasoning behind the NFLPA's request for change, while Part III.B analyzes the impact a legislative change to Section 302(c)(5) will have on the NFLPA and the general labor landscape as a whole.[155]

A. Analyzing the NFLPA Argument in Support of Legislative Change

The NFLPA has made a simple yet inescapably vague request that Congress enact legislation that amends or eliminates section 302(c)(5).[156] The late NFLPA Executive Director Gene Uphsaw stopped well short of a complete and thorough request for Congressional assistance when he asked for a solution only to the problems he claimed were caused by the joint administration requirement.[157] Although the NFLPA offered no assistance to Congress in the form of a proposed legislative amendment or redaction, Upshaw did extend perfunctory courtesy by articulating the two negative impacts the NFLPA believes section 302(c)(5) has on its

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152 *See* discussion *supra* section II.C.3 (detailing the implicit NFLPA contention that legislation allowing the NFLPA full control over the administration of the union's disability plan is the only plausible solution to the problem).

153 *See* discussion *infra* section III.B (detailing the widespread impact likely to result from a total legislative redaction of section 302(c)(5)).

154 *See* discussion *infra* Part IV (discussing the minimal alterations to section 302(c)(5) that will accomplish the NFLPA's goal of increased union control and prevent significant harm to other labor industries that benefit from 302(c)(5) as written).

155 *See infra* Parts III.A, III.B (discussing a potential redaction of the joint administration provision of section 302(c)(5) and the ramifications of that redaction).

156 *See* STATEMENT OF GENE UPSHAW, *supra* note 4, at 3. Upshaw made his request for legislative action with no accompanying suggestion to Congress as to how to rewrite or amend the statute to achieve the desired outcome. *Id.* at 3–4. As such, Congress is given only a result and is asked to formulate a legislative solution consistent with that result. The vagueness with which Upshaw presented his request to Congress may provide fuel to the argument of former players who feel that the NFLPA is operating only on a self-serving basis, and is therefore not exerting extraordinary efforts to solve the problem. *See* O'Keefe, *supra* note 6.

157 See *supra* notes 149–50, 157 and accompanying text (discussing the vague request for a remedy).

ability to fairly administer the disability plan.[158] First, Upshaw expressly denied suspicion that the NFL-appointees breached their fiduciary duties in denying benefits, but implied a conflict of interest between the NFL-appointees' fiduciary duties and league interests through his statement indicating that the players are the party actually controlling contribution levels.[159] Second, Upshaw argued that section 302(c)(5) is over-inclusive in that it does not consider that the players are the true decision-makers funding the system when it imposes the joint administration requirement.[160]

From a textual perspective, the NFLPA's argument that the NFL-appointees breach their fiduciary duties to plan beneficiaries when denying benefits is at best clandestine, evidenced by Upshaw's apparent fear of making an outright accusation.[161] In fact, Upshaw blatantly denied espousing the belief that a conflict of interest exists among the NFL appointees.[162] Yet, there appears to be no other viable explanation for the request that Congress remove the mandate that the NFLPA allow three NFL appointees to sit on the board.[163] Surprisingly, given the fogginess of Upshaw's accusations, there is some evidence to indicate a genuine reason for heightened concern.[164]

Although Daniel Johnson is the only retired player to directly allege a conflict of interest on the board, the significant number of benefit denials and onset date/benefit level disputes can be circumstantially tied to the theory that NFL-appointees may be serving league interests when awarding lower benefit levels, or when denying benefits altogether.[165] The basis for this argument lies in the theory that the NFL has an interest

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158 *See* STATEMENT OF GENE UPSHAW, *supra* note 4, at 3–4 (defining the league contributions for the NFLPA plan as player-approved diversions of player income, and also vaguely skirting the issue of breach of fiduciary duty by league appointees).

159 *Id.* at 3.

160 *Id.* at 4.

161 *See* O'Keefe, *supra* note 6, at 1 (discussing Gene Upshaw's position that because the NFLPA is being blamed, improperly, for the denial of benefits, the NFLPA ought to have the sole voice in administering the plan).

162 *See* STATEMENT OF GENE UPSHAW, *supra* note 4, at 3 (denying that he believes a breach of fiduciary duty has occurred on the board).

163 *See supra* note 139 and accompanying text (discussing the underlying perception of some level of bad faith on the part of the NFL-appointees, whether overt or subtle).

164 *See* discussion *infra* Section III.A (discussing the appointment of the NFL representatives to the Plan board as creating conflicting fiduciary and agency relationships among these representatives, leading to the improper denial of benefits and a breach of fiduciary duty).

165 *See supra* note 139 (discussing the possibility that NFL-appointees may advocate to the other board members a denial or reduction in benefit levels in the interest of limiting the increase in plan funding requests from the NFLPA when the next renegotiation of the collective bargaining agreement is imminent).

in limiting the number and value of disability awards in order to preserve similar contribution levels when the next collective bargaining agreement ("CBA") is negotiated.[166] By extension, the NFL-appointees are then induced by an illusory agency relationship to the NFL to further this interest by downgrading or voting against awards when possible.[167] Specifically, the collection of cases claiming minimal awards based on erroneous onset date determinations provide fodder for the conflict of interest theory.[168] The concept is quite simple—the NFL-appointees are keenly aware of the track record of the federal courts in deferring to the board's discretion on benefit determinations, and they use this deference to rely on insufficient evidence, knowing the likelihood of judicial reversal is slim.[169] The NFLPA has not yet made this argument, nor is it likely to in such direct terms given the need to tread lightly in order to avoid a complete breakdown in future CBA negotiations.

Although there is circumstantial support for the argument that the NFL-appointees are fulfilling the owners' subversive motivations, the foundation for the argument is unstable at best.[170] Most notably, the Court in *Amax Coal* expressly clarified the one-way street of a plan trustee's loyalty when it held that "[u]nder principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the

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[166] *See supra* note 139. The costs of benefits paid to disabled players come directly from the portion of shared revenues allocated for overall player compensation. NFLPA WHITE PAPER, *supra* note 3, at 4. Because the percentage allocated to player compensation is fixed in the CBA, there are no circumstances under which the owners will be required to increase contributions during the remaining active period of the current CBA. *Id.* Logic dictates, however, that if a significant spike in paid benefits occurs, the NLFPA will likely insist on a higher percentage of shared revenues for player compensation in order to cover the increase in benefits costs, rather than asking the current players to defer a greater percentage of their compensation to the plan. *See id.*, at 4–5 (discussing the increase in benefits obtained by the NFLPA over the years as successive CBAs were negotiated).

[167] *See supra* note 139.

[168] *See supra* note 132 and accompanying text (discussing the prevalence of challenges to onset state determinations, and specifically, the sparing use of MAP opinions when deciding medical questions of the existence and onset date of a disability).

[169] *But cf.* Johnson v. Bell, 468 F.3d 1082, 1086 (8th Cir. 2006) (discussing the presumption that the board acts with discretion, and the granting of deference to board decisions, as tenets of the concept of fiduciary status and duty in America.) Furthermore, the *Johnson* court appeared to indicate that the board's compliance with section 302(c)(5) is an indication of a per se lack of conflicting interest, thus painting the requirements of 302(c)(5) as the sole indicators of proper fulfillment of fiduciary duty to plan beneficiaries. *Id.* at 1086.

[170] *See supra* notes 68–70 and accompanying text (discussing the equal representation provision as a nearly flawless safeguard against the infiltration of conflicting interests, resulting in a heavy burden of proof for the NFLPA to sustain the argument).

trust, to the exclusion of the interests of all other parties."[171] While a NFL-appointed trustee is only human, and therefore susceptible to the temptation to serve league interests, the disincentive to doing so was made quite powerful by the *Amax Coal* Court's holding that enforcement of the rule against division of loyalties is to be nothing less than inflexible.[172] Additionally, *Amax Coal* removed any doubt as to the availability of punishment for violation of the prohibition against dual loyalties when it held that ERISA expressly incorporated the implicit fiduciary duties of 302(c)(5).[173]

Given the stiff penalties imposed by ERISA for a breach of fiduciary duty, it is unlikely that any of the NFL-appointed trustees would risk advancing the NFL's interests over those of the fund beneficiaries.[174] The plan's requirement that any award or denial of benefits be the decision of a majority of the board further diminishes the probability that a conflict of interest could impact the board's decision.[175] The possibility of coercion on the part of the NFL-appointees notwithstanding, the only remaining impact a conflict of interest could possibly have is to force a board deadlock and, in turn, a submission of the claim to a MAP.[176] Given the extremely rare necessity for arbitration of board deadlocks, the

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171 National Labor Relations Board v. Amax Coal, 453 U.S. 322, 329 (1981). *See also* RESTATEMENT (SECOND) OF TRUSTS: DUTY OF LOYALTY § 170(1), *supra* note 64.

172 *Amax Coal,* 453 U.S. at 329–30. "To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.'" *Id.* (quoting Meinhard v. Salmon, 164 N.E 545, 546 (N.Y. 1928) (Cardozo, C.J.)). The *Amax Coal* court expounds on this idea when it holds that, "[a] fiduciary cannot contend 'that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one[.]'" *Amax Coal*, 453 U.S. at 330 (quoting Woods v. City National Bank & Trust Co., 312 U.S. 262, 269 (1941)).

173 *See supra* note 65 and accompanying text (discussing the codification of section 302(c)(5)'s fiduciary standards in ERISA and ERISA's function as an insulator of trust interests from those of the employer).

174 *See* Fogdall, *supra* note 36, at 234 (discussing the sufficiency of ERISA's penal scheme for deterring a breach of fiduciary duty by a union head, and indicating the superfluous nature of section 302(c)(5) in this regard).

175 *See* STATEMENT OF GENE UPSHAW, *supra* note 4, at 3–4 (discussing the requirement that a majority of the board agree before a result will be entered awarding or denying benefits). *See also* Johnson v. Bell, 468 F.3d. 1082, 1086 (8th Cir. 2006) (discussing the deadlock resolution procedures of the plan as preventing tainted claim outcomes resulting from a conflict of interest on the board).

176 *See* NFLPA WHITE PAPER, *supra* note 3, at 12 A non-medical board deadlock is not submitted to a MAP, but is rather submitted to a binding arbiter. *See id.* at 11–12 (indicating that a resort to binding arbitration to resolve a deadlock between members of the board on a non-medical question is extremely rare, having been necessary only one time since the early 1990s).

majority vote requirement seems to be functioning as a supplementary deterrent to allowing a conflict of interest to influence board votes.[177]

Although the conflict of interest argument has not been overtly asserted by the NFLPA, a feasible alternative argument suggests that the Bell/Rozelle Plan is outside the scope of section 302(c)(5).[178] The argument posits that, due to the structure of the contributions in the Bell/Rozelle Plan as voluntary deferments by the players, the Plan itself should not be governed by section 302(c)(5).[179] This argument indicates that the funds contributed are no longer attributable to the owners, thereby removing them from section 302(c)(5) control.[180] Viewed in a light most favorable to the players, it is conceivable that the structure of the contribution system would place the NFLPA plan outside the scope of not only the 302(c)(5) exception, but also the general section 302 prohibition on payments.[181] If the NFLPA could successfully make this

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177 NFLPA WHITE PAPER, *supra* note 3, at 12 (indicating that only once in the fourteen year period from 1993–2007 has the arbitration procedure been necessary to break a deadlock on the board).

178 *See* STATEMENT OF GENE UPSHAW, *supra* note 4, at 3–4 (arguing that the NLFPA plan is different from those intended to be governed by 302(c)(5) in that the players are funding the system through payroll deferrals of pre-negotiated owner contributions to the overall player compensation pot, and thus the players should retain complete fiduciary responsibility for the administration of the fund).

179 *See id*. (arguing that because active players fund the system through payroll deferments, active players should be given complete control over the administration of the fund). The structure of the NFL's compensation system is quite different from the plans collectively bargained for in other industries that employ union labor. *See* NFLPA WHITE PAPER, *supra* note 3, at 4 (discussing the pre-negotiation of revenue sharing percentages dedicated to player compensation). This differs from the more typical negotiations in most organized labor unions, where the union negotiates compensation levels directly, as opposed to negotiating a pool of revenues available for employers to use when bargaining with individual employees for compensation. *Id.* The NFL CBA currently allots sixty percent of the league's shareable revenues for player compensation. *Id.* Of that allotment, active players collectively choose what percentage will be deferred to the retirement and disability plans for use by former players. *Id.* During 2006, active player deferments to the plan totaled $147.5 million, an average deferment of $82,000 annually by each active player. *Id*. Of the $147.5 million in deferments, $20 million was earmarked specifically for disability payments for former players, while $96.5 million went to retirement benefits, and the remaining $31 million went to specific medical benefits in the areas of health reimbursement accounts, a special dementia health plan, and a program of fully-paid health-care premiums for the first five years following retirement. *Id*.

180 *See id*.

181 *See* 29 U.S.C. § 186 (2000). *See also* discussion *supra* Part II.A.2 (discussing the prohibition of payments as a tool to forestall union extortion, employer coercion, and union abuse of welfare benefit funds). Section 302 would seem to be out of bounds in situations where employees are collectively deferring portions of their guaranteed income to a welfare benefit plan for the sole and exclusive benefit of that same body of employees. *See* Note, *supra* note 37, at 741–742 (discussing the limited scope of section 302 and the possibility that the proscription of payments may not govern those situations where the

argument, then the need to petition Congress to alter section 302 is extinguished. Yet, the argument has been advanced only implicitly, ironically in Gene Upshaw's statement asking Congress for legislative action.[182] Moving forward, the legislative alternative for resolution of the NFLPA's conundrum must be analyzed for its impact on the country's labor climate.[183]

B. Legislative Redaction of the Joint Administration Provision

The legislative change requested by the NFLPA would, on its face, alter only one element in the four exception criteria of section 302(c)(5).[184] The redaction of only the joint administration requirement would leave intact the remaining section 302(c)(5) safeguards intended by Congress.[185] Although the NFLPA believes this change would bolster its

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union officials are acting as independent fiduciaries rather than bargaining representatives).

182 *See* STATEMENT OF GENE UPSHAW, *supra* note 4, at 3–4 (discussing the Bell/Rozelle Plan's status as potentially outside the control of section 302(c)(5)).

183 *See* discussion *infra* Part III.B (discussing the removal of the joint administration requirement of 302(c)(5)).

184 *See* STATEMENT OF GENE UPSHAW, *supra* note 4, at 3 (requesting removal of the joint administration provision). *See also supra* notes 45–48 and accompanying text (discussing the existing-fund criteria that the funds be held in trust for the sole benefit of the employee, that the contribution structure be memorialized in a written agreement, that the parties be equally represented in the administration of the fund with deadlock resolution provisions, and that the fund be subject to an annual audit to ensure compliance with good faith management requirements).

185 An amended, section 302(c)(5) would likely appear as follows if Congress acquiesced to the NFLPA request:

> The provisions of this section shall not be applicable . . .
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> . . .
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> (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, *and such agreement provides that an impartial umpire will be chosen by the board members to decide any disputes resulting in deadlock among the board members on issues of administration of the fund* ~~and employees and employers are equally represented in the~~

ability to approve a greater number of legitimate disability claims, considering only this singular outcome and the textually minimal nature of the change clouds any potential impact on nearly every employee welfare benefit plan subject to section 302(c)(5).[186] As such, an evaluation of the strengths and weaknesses of this argument cannot exist in a vacuum; it must also consider the wider impact the change would have on union laborers in positions less advantageous than those of NFL players.[187] Part III.B.1 evaluates the potential positive impacts to the Bell/Rozelle Plan as a result of legislative change.[188] Part III.B.2 evaluates the argument that the removal of the joint administration provision will improve the retirement/disability system for organized labor in general.[189] In contrast, Part III.B.3 evaluates the argument that removing the joint administration provision will harm the system.[190]

> ~~administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute~~, or in event of their failure to agree *on an umpire* within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of *the board* ~~either group~~, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities[] . . .

Text to be deleted from section 302(c)(5) is indicated by strikethrough, while textual changes necessary to grammatically clarify and retain the other safeguards are indicated by italics.

[186] *Cf.* Fogdall, *supra* note 36, at 219 (discussing that although the modern growth of privately held pension funds that are not subject to section 302(c)(5) control has substantially outpaced the growth of section 302(c)(5) funds, the investments held in section 302(c)(5) funds are still substantial and worthy of serious consideration).

[187] *See supra* Part II.C.3 (discussing the longevity of section 302(c)(5) and the NFLPA's status as only one of a multitude of unions governed by it).

[188] *See* discussion *infra* Part III.B.1 (discussing the impact a change in 302(c)(5) would have on the NFLPA's administration of the Bell/Rozelle Plan).

[189] *See* discussion *infra* Part III.B.2 (discussing the positive impacts of removing the joint administration provision and vesting sole control of plans in the hands of labor unions).

[190] *See* discussion *infra* Part III.B.3 (discussing the negative impacts of removing the joint administration provision).

1. Would the NFLPA's Requested Change Really Work?

Before the wider impact of the change is discussed, it is prudent to ask whether the requested change would actually give the NFLPA the result it seeks.[191] The NFLPA, in its furtive argument in favor of the change, has offered cloaked and circumstantial evidence that a conflict of interest could no longer impact a board decision if the board was composed of only union-appointees.[192] While the proposed result is not untenable, both congressional and judicial findings over the last sixty years indicate that the reasoning suffers from a potentially fatal assumption.[193] Congress explicitly stated its concern that the natural power-seeking instinct of labor unions rendered them fundamentally ill-equipped to administer welfare benefit plans.[194] Even unions that appeared wholly dedicated to operating legitimate funds for the sole benefit of their members were only one corrupt leader removed from potential extortion and abuse.[195] Thus, in Congress's view, unions are inherently flawed with respect to their ability to successfully act as plan fiduciaries, and the joint administration provision was seen as a viable solution.[196] Additionally, the holding of *Associated Contractors of Essex County, Inc.*[197] reasserted the notion that not only is the joint administration provision vital to the protection scheme, but the sheer volume of legislative history authenticates Congress's careful consideration of the provision.[198] In contravention of congressional

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191 Without some possibility that the change will allow the NFLPA to approve more legitimate claims at the proper level than the current board, there would be no evidentiary compulsion for Congress to entertain the idea of legislative action. *But cf.* STATEMENT OF GENE UPSHAW, *supra* note 3 (claiming that the change will help, but offering no evidence to Congress to support the claim).

192 *See supra* notes 164–67 and accompanying text (discussing the argument that the NFL appointees act covertly as agents for the NFL, in conflict with their fiduciary duties to the beneficiaries of the Bell/Rozelle Plan).

193 *See supra* notes 37–38 and accompanying text (discussing Congress's finding of a dire need to prevent abuse of welfare funds by fund fiduciaries). *See also supra* notes 69–70 and accompanying text (discussing the importance of the joint administration requirement to Congress's protective scheme).

194 *See supra* notes 41–42 (discussing Congressional understanding that allowing even apparently honest unions to have sole control over administration of funds is a dangerous idea considering the natural union motivation to seek power through forceful manipulation of its members' interest in financial security for retirement).

195 *See supra* notes 41–42 and accompanying text.

196 *See supra* note 37.

197 Associated Contractors of Essex County, Inc. v. Laborers Int'l Union of N. America, 559 F.2d 222 (3d. Cir. 1977).

198 *See supra* note 70 (discussing the *Associated Contractors* opinion indicating that the joint administration was a carefully considered preventive measure and was not the result of a rogue legislator or an over-protective Congress).

misgivings about a union's ability to act as a sole fiduciary, the NFLPA apparently believes that it is not susceptible to these abusive predispositions.[199] However, NFLPA policy preventing retirees from voting on important matters that may impact the selection of union-appointed plan fiduciaries is evidence that the NFLPA, like so many other unions, suffers from the same fatal flaws recognized by Congress several generations ago.[200]

Putting the potential benefit, or lack thereof, to the NFLPA aside, Congress would be remiss if it proceeded with a redaction of the joint administration provision absent careful consideration of the potential impact the change would have on members of labor unions generally. On the one hand, wiping the legislative slate of what has been called a restrictive, superfluous, and temporary provision may create a wider range of opportunities for unions to serve the unique needs of their members.[201] On the other hand, removal of such a long-standing and carefully targeted provision may invite the type of rampant abuse capable of ruining the financial well-being of a hefty portion of America's union-workers.[202]

2. Removing 302(c)(5) will Improve the Pension/Disability System

Although the congressional debates and findings surrounding the passage of section 302(c)(5) focused heavily on prevention of the kind of power-mongering exhibited in the United Mine Workers incident, later examination has revealed that this specific incident may have been used by the bill's proponents to wag the dog and create false hysteria against union power.[203] If this is truly the case, opponents of section 302(c)(5)'s

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[199] *See* discussion *supra* Part II.C.3 (discussing the NFLPA's belief that, because its members are the ones being hurt, it will naturally feel compelled to come to their aid). *See also* O'Keefe, *supra* note 6, at 1; Fogdall, *supra* note 36, at 227 (discussing the nature of the union as inherently protective of its own members, and motivated by threat of overthrow to comply with its members' wishes).

[200] *See supra* note 146 (discussing the structure of member voting rights in the NFLPA). *See also* discussion *supra* Part II.A.2 (discussing the nature of labor unions as being predisposed to usurp control of pension funds to the eventual detriment of the beneficiaries).

[201] *See generally* Fogdall, *supra* note 36 (discussing the need to legislatively redact all of section 302 in order to improve the disability/pension system in organized labor).

[202] *See supra* note 40 (discussing the abuse of pension funds as a very real fear, and the long-term need to prevent this type of abuse).

[203] *See* Fogdall, *supra* note 36, at 223 (discussing the United Mine Workers strike and indicating that although Congress saw this event as indicative of a real problem of union-abuse, the actual details of the fund sought and agreed to by union head John Lewis did include a joint administration requirement, along with the other safeguards Congress enacted in 302(c)(5)). In other words, the notion that section 302(c)(5) was the result of a

restrictions may have a valid contention that the provision is nothing more than a superfluous overreaction.[204] Opponents of section 302(c)(5) argue that the joint administration requirement falsely assumes that employers contributing to union welfare funds will desire to have partial control over that fund.[205] Because employers are more concerned with running their businesses than with the management of union benefit funds, employees will receive better representation of their interests if unions are given sole administrative control.[206] Thus, repeal of the joint administration requirement may result in better investments and benefit access for beneficiaries, and less of a burden on employers.[207]

Human nature dictates that it is unrealistic to assume that people will behave selfishly at every turn, and that a blanket prohibition on all instances of a certain behavior is the only way to counteract this negative side effect of fallibility.[208] Though born of a serious concern for the security of plan beneficiaries, the prohibition of joint administration not only assumes the worst from union trustees, but also purports to address the abuse tied to one specific union.[209] The unrealistic assumption that all union controlled plans will be abused unfairly penalizes those unions that have not breached their fiduciary obligations to the beneficiaries.[210] Yet again, a repeal of the joint administration provision may serve to increase the probability that the party truly interested in meeting the needs of the beneficiaries—the union—has the freedom to administer the plans.[211]

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tourniquet necessary to stop the bleeding and regain control of an extremist union head is not an accurate representation of the circumstances surrounding passage of the legislation. *Id*. *See also supra* note 38 (discussing the United Mine Workers strike and its outcome).

204 *See* Fogdall, *supra* note 36, at 223.

205 *See id*. at 224. Opponents of section 302(c)(5) contend that employers, for the most part, see the act of making these contributions as a show of good faith in bargaining with employees, but do not have any interest in managing the funds, principally because they view the union heads as better protectors of the union members' investment interests. *Id*.

206 *See id*. at 227 (discussing the relationship of union members to union heads as unique in that the members elect the holders of positions of power in unions, and this power is accompanied by a constant reminder of full accountability to the rank-and-file members of the union).

207 *See id*. As an aside, there may be related contractual issues with the joint administration provision in that an employer's power to bargain away his right to control the administration of the fund is taken away. *See id*. at 225.

208 *See* Note, *supra* note 37, at 746–47 (discussing the broad assumptions made by section 302(c)(5)).

209 *See supra* note 38 (discussing the United Mine Workers strike and union head John Lewis' actions). *See also* Fogdall, *supra* note 36, at 222–23.

210 *See* Fogdall, *supra* note 36, at 227 (discussing the over-inclusiveness of the joint-administration provision).

211 *See id*. at 227–28.

Finally, it has been argued that the joint administration requirement has been outdated and superfluous in its effort to ensure the union manages the fund for the benefit of its members.[212] The *Amax Coal* holding in which ERISA strictly codified the fiduciary obligations of trustees of section 302(c)(5) plans makes the strongest case that section 302(c)(5) has outlived its temporary status as a "stopgap" measure to prevent abuse.[213] If fund administrators are governed by ERISA's strict fiduciary standards, then the unnecessary section 302(c)(5) restrictions, including the joint administration provision, unfairly burden both union heads and employers and prevent them from utilizing potentially successful solo administration arrangements.[214]

3. Removing 302(c)(5) Will Harm the Pension/Disability System

Congress's most-cited reason for enacting the safeguards of section 302(c)(5), the prevention of union abuse of employer contributed funds, was not the result of illogical fear of an unsubstantiated outcome.[215] The fear of a union-dominated economy, in which the extremist views of a relatively small group of powerful union heads retained power over the economic pulse of the Nation was quite real.[216] As such, section 302(c)(5) of the LMRA was passed as a preemptive measure designed to prevent this domination from extending to employer contributions.[217] Modern critics argue that section 302(c)(5) has outlived its intended lifespan and is no longer necessary to achieve this goal.[218] Supporters of the provision argue, however, that the longevity of the provision, coupled with its extensive safeguards preventing abuse by both unions *and contributing*

[212] Schwab & Thomas, *supra* note 71, at 1077–78 (discussing ERISA and its governance of trustees of section 302(c)(5) plans).

[213] *See supra* notes 65–66 and accompanying text. The *Amax Coal* holding essentially states that the continued existence of section 302(c)(5) creates a double layer of protection that is superfluous and potentially stifling to the effective management of welfare funds. *Id. See also* Note, *supra* note 37, at 732 (discussing the temporary stopgap status of section 302(c)(5)).

[214] *See* Fogdall, *supra* note 36, at 233.

[215] *See supra* note 38 (discussing the United Mine Workers strike as the most serious example of the very real threats of strong-arm abuse by unions, and Congressional understanding of the need to prevent such abuse).

[216] *See* MILLIS & BROWN, *supra* note 27, at 312 (discussing the chilling economic impact that a labor front characterized by rampant strikes and uncontrolled union activism would have on the most important people in the manufacturing process —the end consumer).

[217] *See supra* note 38 and accompanying text.

[218] *See* discussion *supra* Part II.B.2 (discussing section 302(c)(5) as an outdated, flawed, and overly-preventive measure).

employers, make it an invaluable cornerstone in the foundation protecting the most important asset of the American labor front—the laborers.[219]

The legal system should be cautioned not to overvalue the modern applicability of an old statute simply because it has remained in the code unaltered. That said, the argument that sixty years have passed without amendment to section 302(c)(5) is of little value absent a showing that the law remains relevant to today's labor market.[220] The sweeping evolution of labor unions and industry over the past sixty years amid the dearth of amendments to 302(c)(5) provides proponents of section 302(c)(5) with a powerful justification for the argument that the statute remains a necessary safeguard against abuse of welfare funds.[221]

Perhaps an even stronger justification for the position that a repeal of the joint administration provision of section 302(c)(5) would undermine congressional intent is the contention that proponents of a repeal do not acknowledge one significant aspect of the provision—employer abuse. As much as Congress was concerned that union heads would abuse employer contributions to welfare funds, so too was Congress apprehensive of powerful employers using fund contributions to bribe union officials to ignore abhorrent labor practices.[222] Though the landscape of industry in America has changed momentously over the past sixty years, employers still retain significant power over their workers.[223] In the absence of the 302(c)(5) joint administration requirement, no check would exist to prevent employers from contributing to union welfare funds contingent on the union accepting less-exacting work standards for its members.[224] Thus, a repeal of section 302(c)(5) may open the floodgates to abuse not just by the unions, but also by employers, all to the detriment of the individuals the provision was intended to protect.[225]

Although the arguments for repeal of section 302(c)(5) and for maintaining the section as codified each make a valiant and persuasive effort in the face of semi-salient points, neither is effective for solving the

219 *See supra* discussion Part II.A.2.

220 *Cf.* Wallace, *supra* note 71, at 303 (stating that it has been fifty-eight years since the passage of the LMRA, yet section 302 has remained largely unchanged).

221 *See supra* note 73 and accompanying text (discussing the longevity of 302(c)(5) amid a changing labor landscape). This argument, though viable, does rely on the somewhat shaky reasoning that because there has been no blatant need to repeal or amend 302(c)(5), the provision is just as necessary and applicable today as when it was written.

222 *See supra* note 37 (discussing the concern for abuse on both sides of the bargaining table).

223 *See supra* discussion Part II.A.2.

224 *See supra* notes 38–40 and accompanying text (discussing Congress's concern for union and employer abuse of fund contributions).

225 *See supra* notes 38–40 and accompanying text. *See also* Note, *supra* note 37, at 744–46.

real problem at issue in this Note: the plight of once powerful men who are now unable to function without constant assistance and care.[226] As such, a legislative alteration of section 302(c)(5) that allows employees who are deferring their own compensation to the fund to opt for greater union control of those funds is the most viable solution to the problem.[227] A change in the joint administration provision that allows the employees to vest control of the funds in their chosen representatives when a plan is structured like the Bell/Rozelle Plan will provide the security from extortion that was the source of the original section 302(c)(5), and also the prevention of the employer conflict of interest that is central to the NFLPA's concerns.[228]

IV. CONTRIBUTION

While Congress and the NFLPA evaluate the merits of potential solutions to the claim approval problems, the retirees who are suffering plunge deeper into an uncontrollable vortex of mounting medical bills and living expenses. Clearly, the time to act is now. Unfortunately, the solution proposed by the NFLPA—complete redaction of the joint administration provision—carries with it too much potential harm to the organized labor system as a whole to be a viable option.[229] Instead, a unique solution that is narrowly focused to meet the NFLPA's goal of gaining the control necessary to approve more claims while maintaining the integrity of section 302's protections is appropriate. Section IV.A presents an amendment to section 302.[230] Section IV.B then explains the features of the amendment and the positive changes it offers for unions situated similarly to the NFLPA.[231]

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226 *See supra* Parts III.B.1, III.B.2 (discussing the arguments for and against repeal of Section 302(c)(5)). *See also supra* Part II.C.2 (discussing the plights of many disabled former players who have been denied disability benefits sufficient to meet their financial needs).

227 *See* discussion *infra* Part IV (discussing a proposed change to the joint administration requirement that would allow employees who are deferring their own compensation (like the NFL players) to opt for more union control of the funds).

228 *See* discussion *infra* Part IV (discussing a proposed change to section 302(c)(5) to meet the concerns of both Congress and the NFLPA).

229 *See supra* Part III.B.3 (discussing the nature of section 302(c)(5) as a necessary check on both union and employer abuse of benefit funds to the detriment of employees).

230 *See infra* Part IV.A (presenting a proposed amendment to section 302 that will allow unions such as the NFLPA to retain greater control over the management of welfare funds at the discretion of the union members).

231 *See infra* Part IV.B (discussing the two significant components of the proposed amendment: member elections of plan representatives and seat allotment based on the source of plan funding).

A. Proposed Amendment to Section 302

This Note proposes an amendment to section 302 that creates an exception to the joint administration provision when a retirement/disability plan is substantially funded by collectively negotiated deferments of compensation by employees. The amendment will allow the union-member employees and retirees, by vote, to designate a number of fund administrators proportionate to the percentage of plan funds contributed through compensation deferment. Such an amendment will allow both retired and active NFL players, whose deferment of portions of their salaries fund the Bell/Rozelle Plan, to choose by vote the members of the plan administrative board. The following amendment to Section 302(c)(5) will result in better representation of the beneficiaries' interests.

> The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, *t*hat (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event

> of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities. *If a trust fund established for the sole and exclusive benefit of employees, their families, and dependents is funded, in part or in total, by payments made from the employer to the fund at the direction of the employees, and the source of such payments is direct deferment of the employees' negotiated compensation, the employees shall have the right to elect, by majority vote, a number of fund administrators proportionate to the percentage of total fund contributions traceable to employee compensation deferments, provided that the employer shall retain the right to appoint a minimum of one administrator to the fund board, regardless of the percentage of fund contributions traceable to employee compensation deferments. For purposes of this exception, the term "employees" shall include active employees and retired employees who still qualify as beneficiaries of the fund to which the exception is applied.*[232]

B. Commentary

The proposed amendment contains two significant components designed to allow NFL players and retirees (and employees in other industries whose plans are structured similarly) greater flexibility in choosing their representatives, and to ensure that the representation is fair and for the benefit of the fund beneficiaries. The first component is the creation of a voting system whereby all fund beneficiaries, not only active players, are given the opportunity to choose plan administrators.

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[232] 29 U.S.C. § 186(c)(5). The normal font represents the language of the statute as currently codified. The text appearing in italics represents the proposed amendments the author of this Note adds to the statute.

The second component is the allotment of administrator seats to match the actual source of plan funding, acknowledging the tendency that, despite ERISA's strict fiduciary obligations, a constituent relationship does exist between appointees and the appointing party.[233]

First, the creation of a right for employees and retirees who are beneficiaries of the plan to vote for plan administrators addresses the original Congressional concerns that union bosses will abuse fund assets.[234] Though the NFLPA has argued that the joint administration provision ties its hands with respect to claim approval, the union is not without blame for denying retirees the right to vote in elections that impact the selection of the NFLPA's appointees to the Bell/Rozelle Plan board.[235] Thus, it appears that the NFLPA's restrictions on voting rights have the potential to entice those currently eligible to vote—the active players whose salaries are deferred—to vote for administrators who will seek to approve lower benefit levels and stretch the salary deferment contributions further. The creation of a vote to elect the plan administrators and the extension of this right to retired players will create a system in which the interests of the majority of beneficiaries are met through the election of administrators who will evaluate disability claims fairly, and on the actual merits of the claim. Furthermore, a voting system that includes retirees will create a natural extension of the Supreme Court's interpretation of section 302(c)(5) as including retirees under its protections.[236] If section 302(c)(5) protects the assets of retirees, then allowing retirees to vote on the administrators charged with protecting the assets is long overdue.

Second, the allotment of plan administrator seats to match the percentage of employer payments to the fund that are traceable to employee compensation deferments addresses several concerns on both sides of the issue. Allowing employees to vote for a number of seats equal to the percentage of actual compensation deferments addresses the recurring allegations by disabled retirees that the NFL-appointed administrators are denying full benefits in an effort to reduce the total

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233 *See* discussion *supra* Part II.B.1 (discussing the Supreme Court's holding in *Amax Coal*, specifically that ERISA clarified the existence of a solely fiduciary relationship between the beneficiaries of a plan and its administrators, and the absence of an agency-type relationship to the appointing party).

234 *See supra* Part II.A.2 (discussing widespread fears of abuse by union bosses, especially the United Mine Workers incident).

235 *See* discussion *supra* Part II.C.3 (discussing the right to elect retired players to be the NFLPA representatives on the Bell/Rozelle Plan board as granted solely to active player-members of the union).

236 *See* discussion *supra* Part II.B.1 (discussing the *Allied Chemical* holding and its extension of section 302(c)(5) protection to retirees who were active employees when a covered plan was in effect).

payments made by the fund, thus decreasing the league-minimum salary likely to be requested by the players when the CBA must be renegotiated.[237] Despite the NFLPA's lack of an overt assertion of a conflict of interest, the implementation of a seat-allotment system will forestall the possibility that this conflict will actually surface. Additionally, the proposed seat allotment system will bridge the gap between an overbroad equal administration requirement and sole reliance on ERISA's penal scheme for ensuring fiduciary loyalty.[238] Next, an allotment system based on deferments recognizes the significant changes in the retirement system over the generations that have passed since the LMRA was enacted. The past several decades have seen a shift from employer-funded retirement to a system funded by compensation deferments in both the private non-unionized sector, and to a lesser extent, the organized labor industries. As such, an update to the LMRA that provides more flexibility to the employees as the source of the funding is both timely and necessary to maintain the integrity of the funds and to protect assets that are arguably more valuable based on their source.[239] Finally, the requirement that an employer retain the right to appoint a minimum of one administrator to the plan board, regardless of the percentage of funds traceable to compensation deferments, accounts for plans that require some level of compensation deferment but also provides an employer match to a portion of those deferments. Thus, Congress's original desire to insulate employer contributions from union abuse is preserved, even if the employer match is minimal.

V. CONCLUSION

The amendment that this Note proposes to section 302(c)(5) would likely prevent the unfortunate and unnecessary predicaments of both Bill and Wally, the hypothetical characters introduced in Part I.[240] Under the proposed amendment, the board that reviewed Bill's disability claim would consist of representatives chosen by a vote of Bill and his player

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[237] *See supra* Part II.C.2 (discussing litigation against the Bell/Rozelle Plan by former players alleging abuse of discretion and a conflict of interest in denying claims).

[238] *See supra* notes 171–74 and accompanying text (discussing the conflict between the strict application of the joint administration provision, as required by *Amax Coal*, and the redundancy of the provision following the passage of ERISA's penalties for breach of fiduciary duty).

[239] Because compensation deferments reduce the level of income available for living expenses and other savings during a worker's active employment years, the protection of these deferments from abuse and mismanagement may be even more vital than the protection of those assets contributed solely out of the coffers of the employer.

[240] *See supra* Part I (presenting fictional scenarios illustrating the positive and negative aspects of section 302(c)(5)'s protections).

contemporaries. The requirements to demonstrate total disability would remain the same, but a true fiduciary concern for ensuring the fair and proper use of the funds would prevail to ensure that Bill received the full benefits to which he was entitled. The Bell/Rozelle Plan would no longer fail disabled retirees in need, like Bill, at the hands of board members perpetuating interests contrary to the beneficiaries. Likewise, Wally could retire, secure in the knowledge that the pension checks he was promised so many years ago would continue to arrive in his mailbox each month. The proposed amendment to section 302(c)(5) would retain the right for Wally's employer to be represented on the plan board, based on the employer's direct contributions on Wally's behalf. Thus, the union boss's fraudulent and abusive investments would likely have been stifled at the first sign of trouble, preserving for Wally the opportunity to enjoy his well-deserved retirement.

In the halls of Congress more than sixty years ago, the elected representatives of American workers came together to pass legislation designed to protect the retirement and disability assets of those workers from employer and union corruption. The amendment this Note proposes to the LMRA retains the integrity of Congress's original intent and contemporaneously updates the law to reflect the changing needs of American workers. Congress is in position, and must now pounce on the fumble and return possession to those whom it originally intended to protect.

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