



Retired Football Players Association
"United by the retired players, for the retired players"

Proposals for Meaningful Changes to the
NFL Disability System
Under the
Bert Bell/Pete Rozelle NFL Player Retirement Plan

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I. Introduction.

RFPA is an organization of retired professional football players and businessmen who have come together to assist retired NFL players who have been forgotten by their union and other alumni associations. Our mission is to

- Provide financial assistance to retired players in dire need;
- Provide medical and psychological assistance not covered through insurance and/or disability, especially health issues and impairments related to their days playing football ;
- Provide placement and support assistance to those players who have substance abuse dependencies;
- Provide counseling assistance during the transition from football into the private sector, to include career counseling, job placement and transitional and family counseling;
- Build brand for the retired players and their businesses; and to
- Better utilize the business network of retired professional football players.

We take this opportunity to present what we feel are meaningful, substantive and needed changes to the disability benefits programs offered to former NFL players under the Bell/Rozelle Plan.

While mindful of the requirements and restrictions of various federal laws, particularly those of the Employee Retirement Income Security Act of 1974 (“ERISA”) which govern the NFLPA Plan, we feel that the disability benefits which should be available to former professional football players, as well as the administrative process which adjudicates these claims, be responsive to the unique needs that playing in the National Football League creates.

Hall of Fame player and coach, Mike Ditka has repeatedly stated that “football is not a contact sport – it is a collision sport.” The average career of an NFL player may be a little longer than three years - which is the number of credited seasons a player needs to be vested for most disability and retirement benefits.

While professional football players are generally aware of the chances of serious injury and disablement, many retired players were unaware of the long-term effects of playing on Astroturf, nor the problems which can arise from Traumatic Brain Injury/Concussions. The recently released Congressional Research Service (“CRS”) report *“Former NFL Players: Disabilities, Benefits and Related Issues”* has discussed many of these concerns in detail, but has not proposed specific changes to the NFL’s disability system.

Our ability to present a more comprehensive plan could have been made easier had the NFLPA and NFL kept complete medical records on (a) career ending injuries; (b) specific numbers and injury identifications from playing on Astro-Turf; and (c) a

historical and statistical analysis on degenerative conditions of injured joints for the last 30 years. The proposals which follow, with regard to the substance and procedure in disability claims, are positive steps towards making the process of qualifying for disability fair, rational and expedient for the NFL player, as well as the NFL and the Plan administrators.

II. The Need for Changes to the NFLPA's Bell/Rozelle Plan's disability system.

In the past several years, the media has focused attention on the plight of a good number of severely disabled former NFL players who have been denied the benefits they sought from the Plan, or who were terminated from their benefits with little or no understanding why. Attention was focused on former football greats left in wheel chairs; some suffering from dementia and others, homeless.

While certain former players rallied to assist their retired player brothers in dire need, such as *Fourth and Goal* and *Gridiron Greats*, the need for substantial changes benefiting retired and disabled players became obvious.

On June 26, 2007, the House Judiciary Subcommittee on Commercial and Administrative Law held a *Hearing on the National Football League's System for Compensating Retired Players: An Uneven Playing Field?* which was followed in September by the United States Senate Committee on Commerce, Science and Transportation's hearing "*Oversight of the NFL Retirement System*".

At both of these hearings, former NFL players detailed the problems they had encountered seeking disability benefits from the Bell/Rozelle Plan. Subsequently, at the request of the House Committee on the Judiciary, the Congressional Research Service was engaged to prepare a report on many of the issues raised.

In releasing the CRS report, House Judiciary Chairman John Conyers indicated that the report revealed serious health concerns that were not being addressed by the NFL and NFLPA, and that further Judiciary Committee hearings would be held, and possible legislative remedies may be needed.

While the CRS provided a volume of helpful data, and discussed many issues facing former football players, they did not suggest any specific substantive changes. To date, neither has Congress.

The NFLPA and NFL have announced a series of various improvements to the disability plan in the past year, and have implemented some of them, but RFPA is convinced that additional major changes are needed to better meet the needs of the disabled NFL player.

Toward that end, we submit the following proposals:

III. Substantive Changes to the Bell/Rozelle Plan.

A. Revise the definition of total and permanent disability.

Under the Plan disability is defined as becoming “...*totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit, but expressly excluding any disability suffered while in the military service of any country. A Player will not be considered to be able to engage in any occupation or employment for remuneration or profit within the meaning of this Section 5.2 merely because such person is employed by the League or an Employer, manages personal or family investments, is employed by or associated with a charitable organization, or is employed out of benevolence.*” (Plan Sec. 5.2)

This standard is too vague. Does it mean full-time work? Does it mean part-time work? Does it mean the inability to work at minimum wage, or at a livable wage?

The late Hall of Famer Mike Webster’s claim for the particular disability benefits he sought from the Plan were denied in part because of work activity which included two auditions for a television network analyst’s job – which he failed due to his dementia, as well as other jobs he either did not actually perform, or was not paid for.

We propose:

1. That the definition of disability eliminate the phrase “...*totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit...*” and replace it with “a player will be considered totally disabled when impairments from League football activity are the major contributing factor to the player’s inability to sustain full-time competitive work activity at a “living wage”, which is defined as at least 75% of the benefit paid for “inactive” disability ($\$40,000 \times .75\% = \$30,000$) Hiring practices, or the player’s inability to find or obtain suitable competitive work activity will not be considered, although there must be a substantial number of any such jobs the player is deemed capable of performing in both the regional and national economies.”

(or, more simply).....

“...a player will be considered totally disabled when the impairments reasonably deemed to be the result of league football activity are the major contributing factor(s) in the players’ inability to sustain full-time competitive work activity.”

2. That the requirements in Sections 5.1(a) and (c) for “Active football” and “football degenerative” benefits, respectively, that require that the total disability result from, or arise from League football activities be changed to requiring that League football activities be “the major contributing factor” to the player’s total disability.

This change should eliminate the denial of claims where a former player has other medical problems which cannot definitely be linked to football, but may in fact be related, such as diabetes, obesity, heart disease, arthritis, and emotional or cognitive problems.

3. The word and requirement “permanent” should be removed from “total and permanent” disability as misleading, and unduly restrictive. Instead, we propose that total disability is one which has lasted, or can be expected to last for 12 continuous months.

When a former player is granted “T&P” disability under the Plan, they are, in fact subject to periodic review to determine whether the disability continues. (Plan Sec. 5.3) Some former players may undergo surgery, therapy or other treatment modalities which may restore their ability to work. Additionally, a former player might receive further education or training which will allow him to return to the work force, despite his severe medical impairments.

Using the misnomer “permanent” disability may serve as a discouragement to a former player, or a barrier to a favorable opinion from a treating or examining physician, and thus should be removed.

B. Require a showing of substantial improvement or the demonstrated ability to engage in meaningful gainful employment for the termination of total disability benefits.

One of the Plan improvements which were recently adopted was extending the period of disability review to five years in most cases. We applaud that change, so that a former player does not live in fear of having his benefits ceased after a short period of time. However, we propose that upon a medical review for continued eligibility, (as opposed to the successful return to work) that a showing of “substantial improvement”- from the time disability was awarded – be required. This important safeguard should prevent a former player’s benefits being ceased after a one-time examination by a physician who might be of a differing opinion than those of the physicians used to grant the claim.

C. Remove the 15 year limitation for entitlement to “football degenerative” benefits.

Under current Plan rules, a player seeking “football degenerative” benefits must demonstrate that he became totally disabled within 15 years of his last credited season in the NFL. The CRS addressed this issue, and indicated that it appeared to be an arbitrary benchmark. It pointed out that this limit will be applicable at various chronological ages for different players. For example, the youngest age a vested retired player could be is 23. He would have only until age 38 to qualify. On the other hand, a player who retires at age 35, would have until age 50 to qualify. (CRS, pp 81-86)

As the very name of this benefit implies, disability may result from medical conditions which degenerate over time. The rate of that degeneration may be based upon numerous factors –player position, body size, time in the League, injury history, etc..

We propose that players be eligible for football degenerative benefits at least until the full Plan retirement age of 55, as long as they can demonstrate that the late effects of their League injuries and activities are the major contributing factor to their total disability.

D. Restore entitlement to retroactive disability benefits.

The Plan was very recently changed to eliminate all but two months of retroactive benefits for T&P Disability, except in cases where an application is delayed due to mental incapacity. Prior to this change, for which no rationale was offered, for claims filed after November 1, 1998, up to 42 months of retroactive benefits were available to disabled former players. (Plan Sec. 5.7)

For players seeking “football degenerative” benefits, the very name implies that the disability may arise over a period of time. As it must be football related, an acute medical incident such as a stroke, heart attack, or accident may not be qualifying. Rather, this benefit contemplates that a player’s football injuries, over the passage of years, may degenerate to the point of being totally disabling.

Typically, these strong, proud men may struggle to work, while at the same time try to deny the severity of their impairment. All the characteristics which allowed them to be a professional football player – enduring tremendous pain and “toughing it out” serve to help them deny that they are actually “totally disabled.” As a result, it is very common for a former player to delay applying for disability benefits past the time they actually become disabled.

Players seeking “inactive” disability benefits might be eligible as the result of a traumatic accident or illness, with a sudden onset; but many of them may also delay applying for disability benefits due to the same stubborn denial of the reality that they can no longer work.

Accordingly, we recommend reinstatement of up to 42 months of retroactive disability benefits where the former player otherwise meets the criteria for total disability.

E. Allow payment of Line of Duty benefits for an indefinite period of time.

Under the Plan, these benefits are paid when a player establishes that he has a “substantial disablement” according to certain percentages of disability using the AMA’s Guides. If both a line of duty benefit and a total and permanent disability benefit are otherwise payable during a month, only the larger of the two benefits is paid (Plan Sec.6.2)

Regardless, under current Plan guidelines, the line of duty eligibility continues for the duration of the disablement, but not longer than 7 ½ years. (Plan Sec. 6.1)

A former player who is working, and thus not “totally disabled”, may receive the line of duty benefits.

To qualify for these benefits, a former player has to have a very serious impairment, which in many cases may be life long. We recommend that there be no time limit to the duration of eligibility for these benefits, but that they remain subject to the potential offset of a higher disability benefit, and cessation if the “substantial disablement” improves.

F. Make the "Alliance window" for disability applications permanent.

That is, eliminate the Plan provision which prevents a former player from applying for and receiving disability benefits after he has begun receiving his pension/retirement benefits. (Plan Sec. 5.1) Contrary to assertions by NFLPA Union Chief Gene Upshaw, federal law does not preclude payment of disability benefits after an individual has received retirement benefits.

As is evident in the need for the current "alliance window" which is open from April 1, 2008 through July 31, 2008, for various reasons, including expedience of access to funds, a player may choose to draw his pension rather than taking the time and effort of going through the disability process. This should not be held against them, and the Plan should accommodate the players' best interests.

G. Eliminate the "Reservation of Discretion" clause from the Plan.

Plan section 8.9 provides full discretion to the DICC and Retirement Board in making disability determinations under the Plan. Under ERISA law, where they have made such a reservation of discretion, the federal courts are bound to uphold the Plan's decisions if there is virtually any evidence to support them. The Court is not allowed to overturn a Plan's decision, even if the majority of the evidence (i.e. a preponderance) would justify it.

This creates an extremely difficult burden for a former player to have the Plan's decision overturned, and has resulted in all but two of the Plan's final decisions being upheld by the Federal Courts. This hurdle is so difficult to overcome, that several states have moved to ban the sale of insurance policies which contain this provision.

Eliminating this provision from the Plan does not mean that players will be able to succeed every time they challenge a denial of their claim in the federal courts. Rather, it gives the Court the ability to fully scrutinize the merits of the claim, and overturn the Plan's decision where it is not supported by the preponderance of evidence.

Removal of this clause, as well as implementation of the other suggestions herein will change the operation of the Plan so that the deck is not stacked against the former players, and there is full transparency and accountability in the actions of the DICC and Full Retirement Board.

IV. Procedural Changes.

With or without changes to the Plan, substantial changes to the administrative process of adjudicating disability benefit claims could significantly improve a player's chance of success. We recommend that the adjudication of claims be more consistent with common disability adjudication practices from both the governmental and private sectors. Moreover, full compliance with the spirit and intent of ERISA law will be a significant benefit to disability claimants.

The system of disability adjudication under the Bell/Rozelle Plan has evolved into a gauntlet of medical examinations; denial of claims in spite of the favorable opinions of one or more of the Plan's own expert physicians; and the former players' inability to properly perfect his disability claim. To remedy this situation, we propose the following changes:

A. Make "neutral" physician examinations a rarity.

The Plan contains a very common provision seen in private disability policies, as well as governmental disability plans such as Social Security, indicating that a former player ... "may" ... be required to undergo one or more examinations by a physician of the Plan's choosing. In the insurance industry, this examination is called an Independent Medical Examination. Social Security calls them a Consultative Examination. The Plan calls them Neutral Physician exams; and when a claim is deadlocked at the Retirement Board level, a binding medical examination is called a Medical Advisory Physician ("MAP") exam.

The clear intent and purpose of such examinations is to provide the adjudicator with crucial information not available from the claimant's own medical records; or in some cases, to help resolve a conflict in those records. Such exams are also needed when the disability claimant does not have his own medical sources.

The Bell/Rozelle Plan has instead made these examinations mandatory regardless of the amount and quality of the player's own medical records. The player's claim then hinges upon these one-time examinations which usually do not solicit or elicit all of the information necessary to make a proper disability determination.

Many former players, including Brent Boyd and Kurt Marsh, who testified before Congress, told of obtaining favorable opinions from two of the Plan's neutral physicians, only to have their claim denied by the opinion of the MAP.

Doug Eil, partner in the Groom Law Group, and counsel to the Plan, has confused the issue, both in his testimony to Congress, and in his brief to the United States Supreme Court in the *Nord v. Black and Decker* case. As recited in the CRS, Mr. Eil indicated that the neutral physician examination was required at the initial application level, when the Plan does not indicate that this exam is a mandatory requirement. He testified:

"If a player is dissatisfied in any way with the decision of the (Initial Claims) Committee, he has the right to appeal to the full Retirement Board. Players who appeal are sent to a different second Neutral Physician, as required by federal law. ..." (CRS-122)

Federal law does not require any neutral exams, let alone two. This is a complete distortion of ERISA claims regulations which provide that the "health care professional consulted on appeal" be different from, and not the subordinate of, the health care professional who was consulted in connection with the adverse determination that is the subject of the appeal. 29 CFR 2560.503-1 (h) (3) (iii) and (h) (4)

This regulation clearly presupposes that the medical opinion of the neutral physician at the initial level was unfavorable to the claim, when in practice; the DICC regularly denies claims in spite of a fully favorable opinion of this expert physician.

The clear intent of the regulation is to give disability claimants another independent medical evaluation (and it does not need to be from an examining physician) so that they might have a fair chance of succeeding with their claim. The Plan's practice of sending players for a second or third examination is a distortion of ERISA requirements, and actually presents another opportunity for the Plan to obtain evidence to deny the claim.

We strongly recommend that Neutral Physician Examinations be used only where there is a legitimate need for them, and that they not be used as a matter of routine.

B. Hire experienced adjudicators to process disability claims.

While the individuals sitting on the Disability Claims Committee and the Full Retirement Board have many years experience processing these claims, it is not known whether they have any specific education, training or certification in disability adjudication, as is required by insurance companies in the private sector, as well as governmental bodies such as the Veterans' Administration and the Social Security Administration.

We must presume that they do not possess such training, and as a result, have resorted to the compulsory use of Neutral and MAP physicians to make the medical evaluations for them.

The same members of the DICC and Full Retirement Board may continue to make the disability decisions, but they should employ skilled adjudicators to evaluate the claims and make recommendations to them. If this practice were in play, the need for Neutral and MAP exams should be minimized.

C. Acknowledge the vocational factors of disability.

Under current Plan procedure, Neutral and MAP physicians are asked to complete a form which asks whether "...the patient is totally disabled to the extent that he is substantially unable to engage in any occupation for remuneration or profit?" If the answer is "No", the physician is also asked ..." (I) n what type of employment can he engage?" THIS IS TOTALLY INAPPROPRIATE!

Most physicians are not trained to determine whether a person can engage in specific occupations, as that decision depends on factors beyond their expertise. Specifically, the determination of whether an individual is capable of working in competitive employment also depends upon vocational factors such as education and work skills.

While a physician may properly set forth a former player's work-related limitations – such as walking, lifting, carrying, etc., he is not qualified to say what jobs such an individual might perform.

This is where a skilled disability adjudicator comes into play. It is only after obtaining the needed information on a player's medical limitations, and fully assessing his education, training and experience; as well as a survey of various jobs in the local and national economy, that a proper decision can be made as to whether there actually are jobs which can be performed.

When a player's claim is denied, the DICC or Board usually says it is because he is "employable". That is not necessarily the case, and only an appropriately trained disability adjudicator can make that determination.

D. Adopt Social Security's "treating physician" rule.

While the U.S. Supreme Court has ruled that ERISA governed plans do not have to use the "treating physician" rule, it does not prohibit them from employing it in individual plans. We seek to have a Disability Plan that is responsive to the needs of the NFL Player with a process that is fair and transparent. The very nature of professional football, with most players having brief careers and experiencing a high incidence of injury, presents a completely unique set of circumstances from any other union or private group's insurance needs.

The Plan has recently begun accepting a player's award of Social Security disability as qualifying for T&P disability. As those Social Security awards may well be based upon the "treating physician" rule, we believe that the Plan should also adopt this rule.

We wish to emphasize that the "treating physician" rule does not mandate a favorable determination when a player's treating physician expresses an opinion that the player is "disabled". Rather, under Social Security rules, to be binding, the treating physician's opinion must be well supported by the objective medical findings, and be consistent with the other evidence. In such cases, why wouldn't the Plan want to have a former football player's claim granted?

E. Solicit and obtain more detailed information from the player's treating and examining physicians.

Under present Plan procedure, a player is encouraged to submit any and all medical evidence he wants to have considered. However, it is doubtful that the DICC or Board ever solicits additional information from treating sources. In the private sector, as well as in Social Security, a main responsibility of their disability adjudicators is to obtain all available and necessary information from treating sources; and if not available, to seek same from additional medical examinations or evaluations.

The forms used by the Plan to obtain information from Neutral and MAP physicians are too vague and ambiguous to make a proper disability determination. Assuming that the standard of disability is the inability to work on a full time basis, it would be necessary to solicit opinions on the players' ability to walk, sit, stand, lift, carry, etc. over the course of an eight hour day, and a 40 hour work week (or a similar schedule). The Plan does not do this.

It is also crucial to the determination of whether a player can actually work and hold a meaningful job to ascertain whether there are other limitations which would interfere with the ability to hold a job:

- Does the player need frequent rest periods? If so, for how long and how frequently?
- Can it reasonably be expected that the player will need to have the freedom to lie down during the work day?
- Does he need to be able to elevate his feet?
- Does he have limitations from fractures and arthritis in his hands and fingers which would limit fingering and feeling?
- Does he take medications which would interfere with his cognitive abilities? (Pain medications and muscle relaxers.)
- Does he have problems sleeping at night as a result of pain and/or sleep apnea which would tend to make him sleepy and tired during the day?
- Is his condition subject to exacerbations which would limit his ability to work from day to day or week to week?
- Is his condition subject to environmental limitations? (e.g. Arthritis and cold, wet environs)

A meaningful evaluation of whether an individual is able to work can only be made after such inquiry, coupled with a proper vocational evaluation.

F. The use of a Medical Advisory Physician ("MAP") should be rare. When employed, he should have an advisory role, not an examining physician role.

Under the plan, a MAP is employed when the Full Retirement Board is deadlocked on a medical issue. Section 11.4 (b) sets forth his duties:

"A MAP has authority to decide only those medical issues submitted by the Retirement Board under Section 8.3(a). In making a determination, a MAP will review all material submitted to the Plan and may arrange for any additional consultation, referral or other specialized medical services the MAP deems necessary. In addition, a MAP may require an applicant to submit to such physical or other examinations as the MAP deems reasonable and necessary in making a determination. ..."

The MAP's very title indicates that his role is that of an ADVISING physician, not that of an examining physician. Further, his duties clearly indicate that it is he who decides whether further examinations are necessary, not the Retirement Board. However, the Plan has distorted this provision, and sends the player to this MAP specifically for an examination.

This practice has enabled the Plan to deny the claims of former players such as Brent Boyd and Kurt Marsh after they had received two favorable opinions from the Plan's own highly skilled and carefully chosen Neutral Physicians.

G. Members of the DICC and Retirement Board must justify their denial decision in writing.

(1) In general.

A common scenario for a player's denial at the DICC level is that one member of the two person committee "votes" against the claim. In such cases of a deadlocked vote, the claim is deemed denied. (Plan Sec. 8.6)

Such denials are communicated to the players without any explicit recitation of the evidence considered, nor a reasoned determination of how or why the claim fell short. This is incredibly frustrating to players, especially those who submitted favorable evidence from their own physicians, and/or obtained a favorable opinion from one or more of the Plan's examining physicians.

The same is true when the Retirement Board is deadlocked, necessitating submitting the claim to a tie-breaking MAP.

At both levels, those voting against the claim are able to do so with little more than a "thumbs up/thumbs down" vote. The Player has no way of determining if the DICC or Board has considered all of the evidence submitted. More importantly, they have no idea how that evidence has been evaluated.

All of the members of the DICC and Full Retirement Board are bound by their fiduciary duty, specifically set forth in the Plan to discharge their duties

"...solely and exclusively in the interest of the Players and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims. ..." (Plan Sec. 8.8)

Basic ERISA law requires that they not act in an arbitrary or capricious manner when discharging these duties. However, not having to explain or justify their decisions leads to just that.

(2) The decision of the DICC.

ERISA claims procedure requires, and the Plan rules require, *inter alia*, that the initial denial determination be communicated to the player, in a manner to be understood, the specific reason(s) for the denial as well as a description of additional information necessary for the claimant to perfect his claim, and an explanation of why such material is necessary. (29 CFR 2560-503-1(g))

In our experience, the DICC miserably fails to meet this responsibility.

Without any recitation of the evidence considered, or an explanation of how it was evaluated, the player may receive no notice other than that the DICC was "deadlocked." In some cases, a cursory and conclusory opinion may be included such as "The evidence was conflicting." or "The evidence was not persuasive." etc.

Rather than explain where or why the claim fell short, nor describe the additional material or information needed to perfect the claim, players are advised only to submit any and all additional medical reports or information that they wish to have considered on appeal.

If the Plan were to properly and adequately follow ERISA claim procedure, a denial from the DICC would give at least a brief recitation of what evidence was evaluated. That way the player can easily ascertain whether any evidence he may have submitted has, in fact, been received and associated with his claims file, and fully considered.

If the Plan were to properly and adequately follow ERISA claim procedure, such written determination would also specify what information would be needed to be submitted to perfect the claim. This is not done, and the player is left in the dark. For example, the denial decision might state that the claim was denied because the favorable opinions were not supported by recent x-rays, CAT scans and MRIs. Upon being given such proper notification, the player can then obtain the missing evidence and submit it to support and fully justify the favorable opinions.

In theory at least, being able to perfect the claim in this matter should lead to a favorable decision, or at least the opportunity to know what is specifically required to obtain same.

Contrary to the clear intent of ERISA regulations, the Plan instead leaves the player to wonder how his claim fell short, and subjects his claim to another "roll of the dice" in the form of additional Neutral Physician examination(s).

(3) Determinations of the Full Retirement Board.

The Board must also be required to explain and justify their votes.

Many players who have chronicled their unhappy experiences with the Board speak of the six-member panel voting 3 to 3 along "party" lines. (Three members are appointed by the NFL Management Council and three by the NFLPA.) Even the NFLPA's *White Paper* issued in 2007 makes reference to such split votes.

Something is completely amiss if, in fact, voting along "party" lines is a common occurrence. The fiduciary responsibility of loyalty, as well as the duty of care, of all members of the DICC and Board is not to the entity which appointed them, but rather, to the player! (Plan Sec. 8.8)

Requiring all Board members to justify their votes in writing is the only safeguard available to ensure that they are not acting arbitrarily, in bad faith, or acting in violation of their duty of care owed to the player. So as not to be unduly cumbersome, these votes could be explained orally and a record of same kept as part of the players' claim file.

(Their deliberations do not need to be recorded in such a manner, only their votes after such deliberations.)

H. Discharge the Groom Law Group as Counsel to the Plan.

The Groom Law Group, one of the nation's preeminent employment law firms, is the author of the Plan and its deficient procedures, and is the architect of the entire disability debacle.

When Congresswoman Linda Sanchez, chair of the House Subcommittee on Commercial and Administrative Law asked former player Brent Boyd subsequent to her committee's hearing on the NFL's disability system, to propose measures to reform the disability process, his number one response was:

FIRE GROOM LAW – THERE CAN AND WILL BE NO TRUST UNTIL GROOM IS REPLACED. GROOM LAW IS A SYMBOL OF YEARS OF TOO MANY UNFAIR DECISIONS, QUESTIONABLE TACTICS, DOCTOR SHOPPING, NEEDLESS SUFFERING, NEEDLESS HOMELESSNESS, NEEDLESS DEATH, NEEDLESS SUICIDES – GROOM LAW MUST GO BEFORE ANY HEALING BEGINS! (emphasis per original)

In a situation completely unique to disability adjudication, Groom attorneys, as counsel to the Plan, attend and participate in all of the meetings of the DICC and Retirement Board. In legal theory, if not actual practice, this also creates a fiduciary responsibility for the Groom Group of loyalty and care owed to the players seeking disability benefits under the Plan.

However, when the claim is denied at the Full Board level, and a player chooses to appeal his claim to the United States District Courts, it is the Groom Law Group which represents the Plan against the player. Even if not an ethically impermissible conflict of interest, former players who feel wronged by their union and its' Plan, certainly are under the impression that there is a conflict.

The widely held perception that the Groom Group is their "enemy" is heightened by the firm's activities, including:

- Submitting *amicus* briefs to the U.S. Supreme Court, on behalf of the players' union, taking a position against requiring the use of Social Security's "treating physician rule" in ERISA governed plans. They were paid by the players' union over \$147,000 for two similar briefs on this issue, which if adopted, would have made it easier for some former players to succeed in their disability claims. Additionally, this work, paid for by the NFLPA, was of benefit to many other Groom clients who provide or administer disability claims.
- The vigorous appeal of the Mike Webster case to the 4th Circuit Court of Appeals, resulting in millions of dollars of attorneys fees, paid out of the former players' union funds. In affirming the District Court's award of benefits to the Webster estate, the 4th Circuit noted that the Board had denied the benefits Webster sought in spite of unanimous favorable medical opinions from the Plan's own expert physicians.

- The misrepresentation to the U.S. Supreme Court and Congress that ERISA law requires the Plan to send players for multiple neutral physician examinations. This distortion of the clear intent of ERISA claim procedure is a violation of the duty owed to the players seeking benefits under the plan.

If the Plan were to employ trained disability adjudicators to assist the DICC and Full Retirement Board in making their decisions, and the other recommendations in this paper are adopted, there should be no need for any lawyers to be involved in the disability determination process at the initial and appeal level.

Not only would such trained disability adjudicators help ensure a more thorough and realistic evaluation of disability claims, but certainly they would be much less expensive than having the attorneys from preeminent law firms participating in the adjudication process.

V. Discussion of Proposals for Legislative action presented by Eugene Upshaw, Executive Director of the NFLPA.

The CRS discusses several proposals submitted to Congress by Upshaw, without advocating for or against such changes. The RFLPA submits the following responses to his proposals:

A. Establish Federal Standards for Worker's Compensation.

The CRS notes that Workers' Compensations laws are governed by the various states. It would be difficult, if not impossible, to have an exception carved out for football players, as many other employers who conduct interstate commerce are also subject to the variations among the states in which their employees work and might incur an injury.

Mr. Upshaw's comments seemed to indicate that federalization of workers' compensation benefits for injured players would be important to help provide lifetime medical care for the work-related injury.

We fully agree with the CRS conclusion that additional, detailed information is needed in order to assess this proposal. However, we wish to emphasize that this issue really does not have anything to do with the problems players face in obtaining disability benefits from the NFLPA's Plan.

B. Eliminate the Requirement for the Disability Initial Claims Committee (DICC).

While elimination of the DICC may reduce the time required to administratively process a disability claim, this proposal flies in the face of the important protections the Department of Labor instituted when it revised ERISA claim procedure in 2000. (See, Federal Register, Vol. 65, No 225/Tuesday, November 21, 2000, pp.70246-70271)

The requirement of at least one level of administrative appeal is an important protection – when ERISA claim procedures are properly followed – which allows a claimant to perfect his claim in an informal, non-adversarial manner.

As discussed above, proper administrative procedures are not followed in the adjudication of players' disability claims, and rather than providing them the information needed to perfect the claim, the Plan merely makes them jump through more hoops.

The improper adjudication of disability claims under the Plan has been compared to several ridiculous football analogies: Touchdowns are taken away for unknown reasons; the other side chooses the referees, and they have few, if any, rules to guide them; the goal line is moved when it suits the other team's fancy; and appealing the denial of the DICC is little more orderly than putting up a "Hail Mary" pass in a desperate attempt to score a game winning touchdown.

RFPA strongly recommends that this proposal be rejected.

C. Permit the NFLPA to Manage the Plan Without the Participation of the NFL.

While this proposal may well lead to the grant of more claims, it would require an amendment, if not repeal of the Taft-Hartley Act. The implications of this could be far-reaching, and at this time, unknown.

The RFPA does not believe that "an Act of Congress" is needed for a proper evaluation of disability claims under the Plan. Rather, the existing laws if properly followed; and if claim procedures are processed in accordance with our suggestions, are more than adequate to give players a full and fair consideration of their disability claims.

In short, Mr. Upshaw's proposals are unnecessary, perhaps even unreasonable; and serve only to deflect blame from the responsible parties who have made adjudication of NFL disability claims a total fiasco.

VI. Conclusion.

The RFPA is proud to present these proposals to reform the Plan's disability process. We will be willing to provide any further information, as well as participate in discussions with other interested parties to help ensure that our disabled brothers obtain the benefits they deserve in a reasonable, fair and expedient manner.

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