Same Injury, Different Coverage: How Privatized Insurance Policies Affect Injured Elite and Non-Elite Professional Athletes

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SAME INJURY; DIFFERENT COVERAGE: HOW PRIVATIZED INSURANCE POLICIES AFFECT INJURED ELITE AND NON-ELITE PROFESSIONAL ATHLETES

I. INTRODUCTION

On April 1, 1999, former New Jersey Net Jayson Williams charged down the court like he did every night.1 Williams, a recent NBA (National Basketball Association) All-Star, played that game against the Atlanta Hawks2 with his notorious intensity.3 With one minute left to play,4 Williams collided with teammate Stephon Marbury5 and squirmed in anguish on the court.


In January 2003, Williams had settled a wrongful death lawsuit filed by Christofi’s family. He agreed to pay $2.75 million, The (Newark) Star-Ledger reported.

In his nine seasons with the Philadelphia 76ers and New Jersey Nets, the 6-foot-10, 245-pound Williams was recognized for his work on the boards. In the 1997-98 season, when he made his only All-Star team, his 13.6 rebounds per game ranked second in the NBA.

But just as Williams’ career had begun to blossom, it ended. A little more than two months after signing an $86-million, six-year contract extension with the Nets, he suffered a broken leg and injured his knee during a collision with teammate Stephon Marbury on April 1, 1999. He would never play again in the NBA. He announced his retirement in 2000, finishing with career averages of 7.3 points and 7.5 rebounds.

5. See NBA.com Bio: Stephon Marbury Bio, http://www.nba.com/playerfile/stephon_marbury/index.html (last visited Oct. 18, 2005) (listing Marbury’s career statistics and professional accomplishments). Marbury has played for the Minnesota Timberwolves (1996-1999), New Jersey Nets (1999-2001), Phoenix Suns (2001-2004), and New York Knicks (2004-present). See id. He was a “two-time NBA All-Star [2001, ’03],” and “[a]long with Oscar Robertson, is the only player in NBA history with career averages of 20 points (20.5) and 8.0 assists (8.2) and Robertson had 25.7 ppg, 9.5 apg.” Id. He was “[n]amed NBA Rookie of the Month for Janu-

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Unfortunately, the collision broke Williams’s right leg and ruptured his knee. He worked feverishly with trainers and doctors to rehabilitate and come back to the NBA. Nevertheless, on June 28, 2000, after fourteen months and one further injury, Jayson Williams officially retired from the NBA.

off the court, Williams made people laugh. A regular on the radio and television talk-show circuit, he released his autobiography Loose Balls in 2000 and it became a New York Times Bestseller.

“'When I'm retired, I want people to say, 'That's a good man,'” Williams wrote. “'Even the ones who say, 'Isn't that the guy who used to be so wild, who used to be drinking and fighting so much, who was always getting in trouble?''”

On June 28, 2000 - Williams formally announces his retirement after 10 injury-plagued seasons.

“This has been a hard choice for me,” Williams said in a written statement. “I loved playing basketball, I loved being a Net, and I loved the fans in New Jersey. But I know from the pain in my knee and what my physicians have told me that my injuries won’t allow me to return.”

In addition to leaving a hole in the Nets starting lineup, Williams took a hunk out of the team’s pocketbook: a four year, $59.6 million salary the Nets were required to pay.

After missing much of the regular season recovering from leg surgery, Williams breaks a toe on his left foot during his first full team practice.

“The doctors told me I’ll be out three months with this, so I figure I’ll be walking around in three weeks,” Williams told the New York Post as he prepared for toe surgery. “I love the game. I want to play again. I will play again.”

Jayson Williams is telling friends he plans to make a comeback with the Dallas Mavericks. Maybe Mark Cuban will be his benefactor. It’s been four years since Williams announced his retirement 14 months after breaking his leg April 1, 1999.”
After the knee injury ended his NBA career, Williams's compensation took center court. Prior to the injury, Williams had signed a six-year $86 million contract with the New Jersey Nets. As an elite professional athlete suffering a career-ending injury, what were Williams's options? Could he sue Stephon Marbury, the other player involved in the collision? Could he rely on Workers' Compensation Statutes? Could he solely depend on the NBA's Collective Bargaining Agreement's ("CBA") disability insurance provisions? Could he just rely on the insurance policy the Nets purchased on his guaranteed contract? What if Williams had been a first year player earning the NBA minimum? Would he have had the same options as a non-elite or inexperienced player?

Considering the likelihood of injury for a professional athlete, it is important to consider the available options upon injury.

11. See Fallen NBA Star Jayson Williams Makes Debut with Idaho of CBA, ¶ 4 (Jan. 13, 2005), http://www.allsports.com/cgi-bin/showstory.cgi?story_id=52581 (discussing how Williams is now attempting to come back to semi-professional basketball in Continental Basketball Association). "The 36-year-old Williams had not played since suffering a serious knee injury while with the New Jersey Nets during the lockout-shortened 1998-99 season. He averaged 7.3 points and 7.5 rebounds in nine seasons with the Nets and Philadelphia 76ers, making the All-Star team in 1998."

12. See Rovell, supra note 7, ¶ 4 (reporting value of Williams's contract).

13. For a discussion and analysis of compensation options available to Williams if Williams were non-elite and inexperienced athlete, see infra notes 158-200 and accompanying text.


17. See Redlingshafer, supra note 15, at 124 (describing disability insurance as very expensive and inferring elite professional athletes are more likely and able to insure relative to inexperienced and non-elite professional athletes).


19. For a discussion of the discrepancy in insurance options between elite and non-elite, inexperienced professional athletes, see infra notes 142-53, 189-200, and accompanying text.

and how these options affect athletes of different earning capacities. Fortunately for Jayson Williams, the New Jersey Nets had insured his $86 million contract. The insurance carrier paid the New Jersey Nets enabling the Nets to pay the remainder of Williams's contract. Like the Nets team owners, professional athletes and commentators talk about the significant likelihood of injury while participating in sports. A random sampling of sports news for the weekend of August 2 to August 4, 2003, revealed injuries that ranged from the expected to the bizarre and from the unfortunate to the tragic. During a preseason scrimmage, Seattle Seahawks free safety Damien Robinson separated his shoulder when he made a low drive to break up a pass. Arizona Cardinals tackle Leonard Davis broke his thumb during practice while engaged in a fistfight with teammates. Kansas City Chiefs receiver Dameane Douglas injured his knee and would be unable to practice for six weeks after Minnesota Vikings cornerback Rushen Jones threw him to the ground during a joint practice. For the risk averse, the oft-quoted words of Judge Cardozo provide apt advice: "the timorous may stay at home." Id. at 133-34 (footnotes omitted).

21. For a discussion examining different options through available statutory and common law scheme, see infra notes 31-88 and accompanying text.

22. See Heyman, supra note 1, at B18 (mentioning Williams's insurance). "Williams is telling folks the insurance on his $86 million contract expires in the coming weeks, so he wouldn't have to repay the insurance company . . . ." Id.; see also Bob Considine, Jayson Williams Attempts Comeback with the CBA, USA TODAY.COM, ¶ 11 (Jan. 10, 2005), http://www.usatoday.com/sports/basketball/cba/2005-01-10jwilliams-cba_x.htm?csp=34 (discussing details of Williams’s insurance issues and their potential implications).

An insurance company – the BWD Group – paid most of what Williams had remaining on his 6-year, $86 million contract after he retired in 2000. That payout was believed to have provisions that prohibited him from playing again without financial penalty. Joseph Hayden, an attorney for Williams, did not return a call on Monday. Nets president Rod Thorn, who took over for Nash in 2000, said he was unsure of the insurance implications for Williams in an NBA comeback. But a source close to Williams said that those legal concerns were a "non-issue." Considine, supra ¶¶ 11-12.

23. See Rovell, supra note 7, ¶ 8 (discussing different insurance groups believed to be involved with Williams's contract). Speculated insurance companies are BWD Group and ASU International. See id. (announcing different insurance companies involved in Nets contract with Williams).

24. See id. ¶ 6 (foreshadowing and speculating parties' current concerns). [N]ets general manager Rod Thorn told USA Today that he was unsure of the insurance implications of Williams' comeback. Nets executives did not return a call seeking comment . . . .

Executives with the insurance companies believed to be involved with Williams' policy, BWD Group and ASU International, declined comment.

Williams' former agent and attorney Sal DiFazio, who negotiated Williams' contract with the Nets, said that Williams will owe nothing if he makes it back to the NBA. DiFazio said one of the insurance companies involved believed that Williams' injury was not career-ending. After their doctor said he believed Williams was healthy and a doctor chosen by Williams' representation said the former center was badly injured, the case
athletes and entertainers have taken similar precautionary measures.25

This Comment examines options available to professional athletes when injury threatens their careers including Negligence Claims,26 Workers’ Compensation Statutes,27 and Collective and Individual negotiated contract terms.28 After evaluating these options, this Comment discusses whether private disability insurance is a professional athlete’s best choice.29 Further, this Comment explores the limited options available to non-elite and inexperienced professional athletes who cannot afford or attract privatized insurance.30

II. BACKGROUND

A. Professional Athletes’ Negligence Claims

When injured, the injured person can usually sue the person who caused the injury.31 This option, however, may be unrealistic for injured professional athletes.32 Besides prevailing over tort

went to arbitration in the fall of last year. DiFazio said Williams prevailed and the insurance company’s window to appeal has already expired. “They had their bite of the apple,” said DiFazio, who resigned as an NBA agent in 2000. “And I don’t think they get a second bite.” . . 

Insurance industry insiders said they would be surprised if Williams could make a full recovery and not have to make any payments.

Id. ¶ 7-10, 14.


26. For further discussion on negligence suits in the sports arena, see infra notes 31-63.

27. For further discussion on workers’ compensation statutes, see infra notes 64-79; for specific discussion on Pennsylvania’s Workers’ Compensation Statute and corresponding case law, see infra notes 80-116.

28. For further discussion on professional sports unions and their collective bargaining agreements, see infra notes 122-42.

29. For further discussion examining professional athletes’ best options when severely injured, see infra notes 142-53 and accompanying text.

30. For further discussion analyzing and comparing non-elite professional athletes’ options, see infra notes 158-200.


32. See Darryll M. Halcomb Lewis, An Analysis of Brown v. National Football League, 9 VILL. SPORTS & ENT. L.J. 263, 265 (2002) (discussing application of tort law to professional sports and effects of different tort doctrines); Richardson, supra note 20, at 133-34 (summarizing and analyzing sports related injuries and high frequency of injuries in professional sports); Rosenthal, supra note 14, at 2647-54 (describing courts’ approaches to sports related injuries and policy considerations for each approach).
law's complexities in the sports arena, a professional athlete would also have to overcome unique social stigmas. Courts have generally been unsympathetic to athletes, on a professional or amateur level, who suffer injuries while participating in sports. The following cases demonstrate the most prevalent tort doctrines applied to sports injury cases.

33. For further discussion describing application of tort law in professional sports and effects on individual players, see infra notes 158-66 and accompanying text.

34. See Rosenthal, supra note 14, at 2631-32 (alluding that suing in sports setting carries social stigma).

Sports participants often suffer physical injuries, and some may look to the civil torts system to recover for their harms. Many may not, however, because in the sports arena players are encouraged to "toughen up," be "macho," and forego their right to sue. Thus, a disconnect exists between the legal system of tort liability and the sports world.

Id. at 2692 (footnotes omitted); see also Memorable Quotes from A League of Their Own, 38, http://us.imdb.com/title/tt0104694/quotes (last visited July 26, 2005) (parodying need to remain stoic while playing sports especially on professional level). Jimmy Dugan, manager of the All-American Girls Baseball Team Rockford Peaches, has just scolded Evelyn Gardner, Rockford Peach outfielder, for making a fielding error. She begins to cry.

JIMMY DUGAN [in agitated voice]: Are you crying? Are you crying? ARE YOU CRYING? There's no crying, there's no crying in baseball. Rogers Hornsby was my manager, and he called me a talking pile of [garbage]. And that was when my parents drove all the way down from Michigan to see me play the game. And did I cry? NO. NO. And do you know why?

EVELYN GARDNER [sobbing]: No, no, no.

JIMMY DUGAN: Because there's no crying in baseball.

Memorable Quotes from A League of Their Own, supra, ¶ 38.

35. See Rosenthal, supra note 14, at 2647 (noting courts recognize three different theories of recovery in sports injury cases: intent, recklessness, and negligence). Public policy considerations lead to courts requiring a more intense standard for voluntary sports participants. See id. at 2661-62 (discussing public policy issues in sports). "Courts consider broad policy concerns when determining the appropriate standard in sports injury cases. Many courts stress the importance of maintaining vigorous participation and avoiding a flood of litigation. Courts and commentators also have stated the importance of other public policy concerns that should be addressed." Id. at 2662 (footnotes omitted). Rosenthal further examines the public policy discussion among courts and commentators:

Courts and commentators have mentioned the importance of considering various public policy considerations when determining the appropriate standard, including economic consequences, the participant's purpose of playing, the experience level and age of the participants, the impact of role models on younger players, and the importance of maintaining competition.

Several commentators have asserted that the economic circumstances of a participant is a significant factor that may affect the standard that is used. Such financial considerations include the participant's earning of a salary or insurance coverage, as well as the financial impact that a potential injury may have on the participant.

Id. at 2699-60 (footnotes omitted).

36. For further discussion of main sports injuries cases and ability to recover under tort law, see infra notes 37-63 and accompanying text.
i. Recklessness Standard

In Hackbart v. Cincinnati Bengals, Inc., Denver Bronco Defensive Back Dale Hackbart sued Running Back Charles "Booby" Clark and the Cincinnati Bengals for injuries resulting from Clark's hit. Hackbart argued Clark's hit was reckless, and alternatively, negligent. Despite evidence of Clark's illegal hit, Hackbart still lost the case. In dismissing the charges, Federal District Court Judge Richard Matsch rejected Hackbart's arguments of recklessness and negligence because both theories relied on "determining what a reasonable professional football player in Booby Clark's posi-

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37. 601 F.2d 516 (10th Cir. 1979).
39. See Hackbart, 601 F.2d at 519 (discussing Clark's overall role with Cincinnati Bengals and particular position at time of incident). Clark was the Bengals' offensive back and "just before the injury he had run a pass pattern to the right side of the Denver Broncos' end zone." Id.
40. See id. at 520 (summarizing Hackbart's theory of relief); Richardson, supra note 20, at 139-40 (presenting relevant background information about Hackbart's case).
41. See Richardson, supra note 20, at 139 ("Dale Hackbart sued both Booby Clark and the Cincinnati Bengals seeking compensation for the damages caused by Clark's blow; his primary theory of recovery was Clark's alleged recklessness, although negligence was asserted as an alternative basis for his claim.").
42. See id. at 139-40 (paraphrasing federal district court's rationale). "The federal district court entered judgment for defendants, finding that the judiciary could not be expected to control the violence in professional football." Id; see also Hackbart, 601 F.2d at 519 (reporting details leading to Hackbart's injury).

Clark was an offensive back and just before the injury he had run a pass pattern to the right side of the Denver Broncos' end zone. The injury flowed indirectly from this play. The pass was intercepted by Billy Thompson, a Denver free safety, who returned it to mid-field. The subject injury occurred as an aftermath of the pass play.

As a consequence of the interception, the roles of Hackbart and Clark suddenly changed. Hackbart, who had been defending, instantaneously became an offensive player. Clark, on the other hand, became a defensive player. Acting as an offensive player, Hackbart attempted to block Clark by throwing his body in front of him. He thereafter remained on the ground. He turned, and with one knee on the ground, watched the play following the interception.

The trial court's finding was that Charles Clark, "acting out of anger and frustration, but without a specific intent to injure * * * stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head and neck with sufficient force to cause both players to fall forward to the ground." Both players, without complaining to the officials or to one another, returned to their respective sidelines since the ball had changed hands and the offensive and defensive teams of each had been substituted. Clark testified at trial that his frustration was brought about by the fact that his team was losing the game.

Hackbart, 601 F.2d at 519.
tion would be expected to do." After considering Hackbart's brute size and experience compared to Clark's, Clark's feeling of desperation at the time of hit, and the nature of professional football in general, Judge Matsch decided Clark's actions were reasonable given the circumstances.

On appeal, the Tenth Circuit Court of Appeals Judge William E. Doyle reversed, deciding Hackbart deserved "a trial on the merits to determine whether Clark recklessly disregarded his safety when the fateful blow was struck." Even though he won the appeal,

43. Richardson, supra note 20, at 142 (analyzing Judge Matsch's approach to Hackbart's proposed liability theories). "It is wholly incongruous to talk about a professional football player's duty of care for the safety of opposing players when he has been trained and motivated to be heedless of injury to himself." Id. (citing Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352, 356 (D. Colo. 1977), rev'd, 601 F.2d 516 (10th Cir. 1979)).

44. See id. at 140 (differentiating size and experience between Hackbart and Clark).

The opinion emphasizes Hackbart's size (six feet three inches tall and 210 pounds) and his experience as a seasoned veteran (thirty-five years old with twenty-one years of experience in organized football, thirteen as a professional). Although his opinion did not mention it, Judge Matsch admitted into evidence incidents designed to show that Hackbart was a dirty player. In contrast, the opinion stresses Clark's youth and inexperience; he was a twenty-three-year-old rookie playing in his first regular season game. His size (six feet one and three-quarter inches tall and 240 pounds) likewise was mentioned.

Id. (footnotes omitted).

45. See id. at 141 (characterizing football as inherently violent and part of game's atmosphere). "Players are urged by their coaches to play with reckless abandonment of self-protective instincts and with controlled rage." Id.

46. See id. (describing rationale and application of law).

The trial court's opinion described the commercial context of the game as a necessary interpretive backdrop for plaintiff's claim. The ability to control the teams, players, and the terms and conditions of employment via the NFL constitution and bylaws as well as via the collective bargaining agreement between the League and the Players Association were all part of the trial court's initial observations. Judge Matsch then focused upon the game itself. He saw the most obvious characteristic of the game as the violent physical collisions between the bodies of players in contest for territory. Violence on the field is orchestrated carefully. Players are urged by their coaches to play with reckless abandonment of self-protective instincts with controlled rage.

Id. (footnotes omitted).

48. Richardson, supra note 20, at 143. Richardson compares the two decisions as follows:

Circuit Court Judge Doyle's opinion is markedly different from that of Judge Matsch. The characteristics of the parties were not discussed. The description of the violent incident was perfunctory. The discussion of the professional football industry came in a few short, conclusory
Hackbart still had to surpass a semi-heightened standard of liability.49 Although Judge Doyle reversed Judge Matsch, Matsch’s thoughts regarding the similarity between negligence and reckless behavior on the football field lurk on the sidelines and remain today.50 Amidst the huddle of uncertainty, in both professional and amateur contact sports, Hackbart establishes: “(1) negligence cannot form the basis for a tort claim by an injured player against another participant who caused the injury, but (2) either recklessness or intentional wrongdoing can form the basis of such a claim.”51 Courts today, however, remain torn between Matsch’s simple negligence approach and Doyle’s recklessness and intent approach.52

paragraphs that recited the NFL rule prohibiting players from striking the head of another with the forearm and referred to the customs of the game. The reference to custom is unclear. Judge Doyle asserted that football’s general customs do not approve the intentional punching or striking of others. Of course, the intentional striking of another—blocking, tackling and running over a tackler—is the very essence of this game of violent collisions. Judge Doyle stated that the general custom prohibiting the striking of a player from behind was supported by the witness testimony. Judge Matsch had found the testimony unconvincing in light of the response to the blow by Hackbart during the game and by those who viewed it in the game films. Judge Doyle disagreed with Judge Matsch’s notion that the NFL had abandoned all reason and argued that the cited rule was intended to establish reasonable safety boundaries.

Id. at 143-44 (footnotes omitted).

49. See id. at 144 (reporting appeal’s effect now requires proof of recklessness or intent).

50. See id. (pondering Judge Matsch’s concerns). “But, is Judge Doyle correct that recklessness is a workable standard, or is Judge Matsch’s view that negligence and reckless behavior on the football field are virtually indistinguishable more accurate?” Id.

51. Id. at 145.

52. See id. at 144-47 (describing different jurisdictions’ interpretations of Hackbart). Richardson comments that in Lestina v. West Bend Mutual Insurance Co., 501 N.W.2d 28, 33 (Wis. 1993), “the [Wisconsin] court carefully considered the post-Hackbart judicial trend toward adopting a recklessness standard. It rejected that standard in favor of negligence because the negligence standard can subsume all the factors and considerations presented by . . . contact sports and is sufficiently flexible to permit . . . vigorous competition . . . .” Id. at 145 (internal quotations omitted) (alteration in original). See also Turcotte v. Fell, 502 N.E.2d 964, 969 (N.Y. 1986) (“[A] professional athlete is more aware of the dangers of the activity, and presumably more willing to accept them in exchange for salary, than is an amateur.”); Crawn v. Campo, 643 A.2d 600, 601 (N.J. 1994) (upholding and enforcing requirement of recklessness to prove liability of tortfeasors in sports).

“New Jersey is averse to tort immunities. It strongly endorses a standard of care based on ordinary negligence and tolerates immunities only in exceptional situations for important public policy reasons.” Richardson, supra note 20, at 149.
ii. Assumption of Risk Doctrine

In *Knight v. Jewett*, Plaintiff Kendra Knight sued Defendant Michael Jewett for permanently injuring her finger during a touch football game. Before being injured, Knight asked Jewett "not to play so rough" and warned if he continued she would stop playing. Knight's injury required multiple surgeries, but all surgeries failed to restore the movement in her finger. The California Supreme Court decided against Knight concluding "that with the adoption of comparative fault, it is necessary to distinguish between the different types of assumption of the risk." The court further decided that depending on the activity's inherent danger, a participant could implicitly assume the activity's risks. "Thus, a participant is not in breach of a legal duty by engaging in merely negligent behavior because primary assumption of risk operates to lower the duty of care that participants owe to each other from ordinary negligence to recklessness."
iii. Different Jurisdictions

There is a discrepancy as to which standard applies to sports injury cases even among states within the same circuit.⁶⁰ Within the Third Circuit, New Jersey requires recklessness.⁶¹ But just across the Benjamin Franklin Bridge, Pennsylvania applies the assumption of risk doctrine.⁶² Regardless of the applicable torts doctrine, a professional athlete’s negligence suit may fall on deaf ears given the available alternatives.⁶³

B. Workers’ Compensation Statutes

After examining negligence case law in the realm of sports-related injuries, it is equally important to evaluate the current statutory recourse for injured professional athletes.⁶⁴ Analyzing both the available legal and statutory options helps determine the necessity behind proactive action and protection.⁶⁵ Workers’ Compensation Statutes (“WCS”) provide the necessary statutory recourse for

In cases involving “primary assumption of risk” — where, by virtue of the nature of the activity and the parties’ relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury – the doctrine continues to operate as a complete bar to the plaintiff’s recovery. In cases involving “secondary assumption of risk” – where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant’s breach of duty – the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties.

Id.

60. For a discussion of New Jersey’s and Pennsylvania’s approaches, see infra notes 61-62 and accompanying text.

61. See Crawn v. Campo, 643 A.2d 600, 601 (N.J. 1994) (upholding and enforcing recklessness requirement against sport tortfeasors). “New Jersey is averse to tort immunities. It strongly endorses a standard of care based on ordinary negligence and tolerates immunities only in exceptional situations for important public policy reasons.” Richardson, supra note 20, at 149.


63. See Redlingshafer, supra note 15, at 100 (generalizing society’s lack of sympathy for injured professional athletes given their perceived lucrative salaries). For an analysis of the recklessness standard and the assumption of risk doctrine as applied to facts surrounding Jayson Williams’s injury, see infra notes 158-66 and accompanying text.

64. For a further discussion on Workers’ Compensation Statutes as more of a remedy for non-professional athletes, see infra notes 67-79.

65. For a further discussion and analysis on Sports Unions’ negotiations for disability insurance premiums and individual professional athletes’ ability to negotiate for privatized disability insurance options in team contracts, see infra notes 121-42.
injured employees. Generally, legislatures enacted these laws to protect employees and to "obligate employers to pay for employee injuries, regardless of fault, by contracting with private insurance carriers or paying premiums to state workers' compensation funds." States enact their own WCS, but most classify the benefits under four categories: temporary disability benefits, permanent disability benefits, medical benefits, and death benefits.

For professional athletes, WCS present a bit of a curveball. Generally, states have chosen one of five approaches when confronted with professional athletes and WCS: statutory exclusion method, functional exclusion method, exclusion through case-law method, election method, and set-off method. Currently, about sixteen states exclude professional athletes in some way. Some

66. For a definition of Workers' Compensation Statutes, see infra note 67 and accompanying text.

67. Rachel Schaffer, Comment, Grabbing Them by the Balls: Legislatures, Courts, and Team Owners Bar Non-Elite Professional Athletes from Workers' Compensation, 8 Am. U. J. GENDER SOC. POLY & L. 625, 636 (2000) (referencing ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1, at 1-1 (1997)). "Generally, to obtain workers' compensation benefits, individuals must be 'employees' instead of 'independent contractors,' and their injuries must be work-related." Id. at 637 (footnote omitted).

68. See id. at 638 (describing different categories states consider when enacting WCS). Schaffer describes the four different categories as follows:

Temporary disability benefits are for short-term injuries that prevent an employee from working but anticipate an employee's return to work after full recovery. ... Usually, the temporary benefit provides for two-thirds of an injured worker's regular earnings.

Permanent disability benefits cover permanent partial disabilities and permanent total disabilities. Permanent disability benefit schemes compensate permanent physical impairment, limitation, or loss of earning capacity for injured employees. ... There are inherent differences between temporary disability benefits and permanent disability benefits, however; whereas permanent disability benefits indemnify against future loss of bodily functions and wage earning capacity, temporary disability benefits only compensate current income loss.

Medical benefits pay for all medical expenses related to an employee's injury. Usually, medical benefits are unlimited because they assist in recovery. Death benefits ... provide for fatal injuries or diseases. Death benefits usually cover burial and survival costs.

Id. at 638-39 (footnotes omitted).

69. See id. at 639 ("State workers' compensation statutes apply to professional athletes in a different manner than other employees.").

70. See id. (listing different states’ approaches to professional athletes and workers’ compensation statutes from most to least restrictive).

71. See id. at 639-42 (listing states and summarizing their approaches). These states are Florida, Massachusetts, Wyoming, Alabama, Rhode Island, Washington, Iowa, Louisiana, Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, Vermont, and West Virginia. See id.

72. See Schaffer, supra note 67, at 640-41 (explaining statutory exclusion of professional athletes ranges from complete exclusion to exclusion conditioned
states include professional athletes, "but functionally exclude them from such benefits." 73 Other states do not explicitly mention professional athletes in their WCS,74 but their courts have interpreted this silence as exclusion.75 Other states employ the election method,76 which grants team owners the option to participate, instead of requiring their participation, as they do of other employers.77 Under the set-off method, "workers' compensation benefits are subtracted from any benefits paid under contract and team owners receive a credit to avoid doubly compensating professional athletes." 78 This method still poses problems for professional athletes who are permanently injured.79

upon injuries obtained in successive seasons). Florida, Massachusetts, and Wyoming exclude professional athletes from WCS completely. See id. Rhode Island and Washington only exclude certain professional athletes: Rhode Island excludes professional hockey players, and Washington excludes horse race jockeys. See id. at 641. Alabama, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, Vermont, and West Virginia all exclude professional athletes who have injured themselves in two successive seasons including "off-season or preseason." Id.

73. Id. at 642. "Iowa, for example, does not allow professional athletes to fully recover their lost salary for permanent disabilities." Id. "Similarly, Louisiana's workers' compensation provision covers professional athletes but creates a set-off scheme of workers' compensation benefits." Id.

74. See id. at 643 (explaining Missouri and Maryland do not explicitly mention professional athletes in their WCS).

75. See id. at 642-43 (discussing supporting case law in both jurisdictions). In Palmer v. Kansas City Chiefs Football Club, a Missouri court rejected a claim for workers' compensation benefits by a football player. The court concluded that the deliberate collision of bodies did not constitute an "injury" under Missouri's definition of workers' compensation, and that Palmer's injury was "not an unexpected occupational event." Therefore, Palmer could not receive workers' compensation benefits for his injuries. Similarly, a Maryland court in Rowe v. Baltimore Colts held that an occupation such as football, which requires physical contact, cannot give rise to "accidental injur[ies]" under the Maryland Workmen's Compensation Law. Id. at 643 (alteration in original) (footnotes omitted).

76. See id. at 644 (exemplifying Illinois and Minnesota as such states). Minnesota is a bit more progressive, in the sense that "both the professional athletes and the employers decide jointly whether to forgo workers' compensation benefits and instead opt for players' contracts." Id.

77. See Schaffer, supra note 67, at 644. ("For example, in Illinois, an employer has a choice of whether to participate in the state's workers' compensation program. If team owners choose not to participate in the state's workers' compensation programs, professional athletes must rely on their contracts for benefits.").

78. Id. at 645 (footnote omitted).

79. See id. at 645-46 (determining professional athletes with permanent injuries cannot sufficiently rely on set-off method WCS).

In such situations, professional athletes need workers' compensation benefits because they are not being compensated for any period during their employment, but are being compensated prospectively for the period after their employment terminates. Professional athletes who are perma-
Among the five types of WCS, the set-off method is the most inclusive of professional athletes. One has a better understanding of a statute's limits, however, by analyzing its language and relevant case law. Pennsylvania's Workers' Compensation Statute ("PAWC") is best described as a set-off method statute. By employing a broad definition of "employer," "employee" and "employer's liability," the statute includes professional athletes who are permanently injured, therefore, need both workers' compensation benefits and their remaining contractual benefits in order to compensate for their future physical and therefore occupational disabilities.

Id.

80. For a discussion of the different categories of WCS, see supra notes 69-79.

81. For an analysis of Pennsylvania's Workers' Compensation Statute, and its case law, see infra notes 82-116 and accompanying text.


84. 77 Pa. Cons. Stat. Ann. § 22 (West 2005). The Pennsylvania Legislature has defined employee as follows:

The term 'employe,' [sic] as used in this act is declared to be synonymous with servant, and includes –

All natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer. . . . . .

Id.

85. Id. § 51.

The employer shall be liable for the negligence of all employees [sic], while acting within the scope of their employment, including engineers, chauffeurs, miners, mine-foremen, fire- bosses, mine superintendents, plumbers, officers of vessels, and all other employees [sic] licensed by the Commonwealth or other governmental authority, if the employer be allowed by law the right of free selection of such employees [sic] from the class of persons thus licensed; and such employees [sic] shall be the agents and representatives of their employers and their employers shall be responsible for the acts and neglects of such employees [sic], as in the case of other agents and employees [sic] of their employers; and, notwithstanding-
athletes. PAWC, however, requires numerous after-tax reductions that significantly limit the professional athlete’s ultimate compensation.

86. For further discussion of Pennsylvania’s inclusion of professional athletes through statutory language and case law, see infra notes 89-116.


a) The eligibility of professional athletes for compensation under this act shall be limited as provided in this section.

b) The term “professional athlete,” as used in this section, shall mean a natural person employed as a professional athlete by a franchise of the National Football League, the National Basketball Association, the National Hockey League, the National League of Professional Baseball Clubs or the American League of Professional Baseball Clubs, under a contract for hire or a collective bargaining agreement, whose wages as defined in section 309 are more than eight times the Statewide average weekly wage.

c) In the case of a professional athlete, any compensation payable under this act with respect to partial disability shall be reduced by the after-tax amount of any:

1) Wages payable by the employer during the period of disability under a contract for hire or collective bargaining agreement.

2) Payments under a self-insurance, wage continuation, disability insurance or similar plan funded by the employer.

3) Injury protection or other injury benefits payable by the employer under a contract for hire or collective bargaining agreement.

d) No reduction shall be made pursuant to clause (c) against any compensation payable under this act which becomes due and payable on a date after the expiration or termination of the professional athlete’s employment contract, except for any amounts paid by the employer pursuant to the contract.

e) In the case of a professional athlete, the term “wages of the injured employe” as used in section 306(b) for the purpose of computing compensation for partial disability shall mean two times the Statewide average weekly wage.

88. See Niles & West, supra note 82, at 11 (illustrating Section 565 and commenting on professional athlete’s actual compensation). According to the authors:

Workers’ compensation benefits are limited for professional athletes: Athletes whose careers end by injury can collect benefits up to $24,700 per year for ten years; The law covers all seven major league sports teams in Pennsylvania; The law does not affect players earning less than eight times the state’s average weekly wage ($198,000); Minor League professional athletes are not affected; Major leaguers making more than $198,000 would have their workers’ compensation benefits reduced, dollar-for-dollar, by [w]ages paid during period of disability, [p]ayments under self-insurance, wage continuation, disability insurance or similar plan funded by the employer, [i]njury protection or other injury benefits payable by the employer.
Case Law Solidifying Limited Compensation for Highly Paid Professional Athletes


In Bayless v. Philadelphia National League Club (Philadelphia Phillies), Bayless sued the Philadelphia Phillies for “personal injuries suffered while employed as a professional baseball pitcher [for] the Phillies minor league farm system.” Initially, Bayless sought compensation for his back injuries and mental illness. After remand from the Third Circuit Court of Appeals, Bayless only pursued his mental illness complaint. Bayless claimed while playing for the Phillies minor league team, he took back medication that led to his mental illness. Bayless wanted to sue the Phillies for negligence. PAWC, in combination with motions for summary judgment, became the Phillies’ best weapon against Bayless. The district court decided PAWC applied to Bayless’s suit. In attempting to avoid PAWC’s reach, Bayless argued the Pennsylvania Legislature did not intend for PAWC to include “high priced athletes.”

90. Id. at 627.
91. See id. (claiming Phillies had contractual duty to “provide him with good sound medical care”).
92. See id. (“As noted by the Court of Appeals, plaintiff has abandoned any claims based on the physical injury to his back.”).
93. See id. (“Plaintiff claims his mental illness was caused by the administration of drugs following complaints of severe back pain. At the time the drugs were administered, plaintiff was in defendant’s employ and under the care of a team trainer and physician supplied by defendant.” (citation omitted)).
94. See Bayless, 472 F. Supp. at 627. “Defendant had . . . a contractual duty to plaintiff to provide him with good sound medical care in the event Plaintiff’s skills were being impaired by injury, illness or disease and Defendant failed to provide such care.” Id. (alteration in original) (quoting plaintiff’s legal theory from plaintiff’s complaint). Plaintiff also complained defendant failed to “provide proper medical care in the administration of drugs,” and failed to “obtain plaintiff’s informed consent to medical treatment.” Id.
95. For further discussion of the district court’s decision to apply PAWC regardless of Bayless arguing PAWC lacked statutory intent to apply to highly paid professional athletes, see infra notes 96-101 and accompanying text.
96. See Bayless, 472 F. Supp. at 627-28 (describing PAWC’s general purpose).

The Workmen’s Compensation Act provides coverage for injuries and death resulting from accidents occurring in the course of employment for all employees of employers who have agreed to accept the provisions of the Act. The Pennsylvania Supreme Court has repeatedly held that there is a conclusive presumption that the parties to the employment agreement have accepted the Act, absent either party’s written notice of rejection of its provisions.

Id.

97. Id. at 631 (citing plaintiff’s brief).
Relying on statutory language, the district court rejected Bayless's argument. It concluded Bayless's only remedy was PAWC because he suffered an injury within the course of his employment.  

b. Lyons v. Workers' Compensation Appeal Board (Pittsburgh Steelers Sports, Inc.)

Because Bayless struck out arguing PAWC intended to exclude highly paid athletes, the next challenger would have to find another game plan. In Lyons v. Workers' Compensation Appeal Board (Pittsburgh Steelers), Plaintiff Mitchell W. Lyons dislocated his left knee, “tear[ing] the posterior cruciate ligament, the anterior cruciate ligament, medial collateral ligament and possible damage to the meniscus with possible other damage to the interior.” As a result, he could no longer run, and therefore, could not “return to his career as a professional football player.” He went before the Workers' Compensation Appeal Board ("W.C.A.B.") who applied

98. For further discussion of PAWC's statutory language, see supra notes 83-87 and accompanying text.


But the Act makes no such distinction. It applies to all employees regardless of their earnings. If professional athletes were excluded from coverage, then hundreds and possibly thousands of low as well as high priced athletes on Major and Minor League Teams would be deprived of the humanitarian benefits and protection the Act affords. Id.

100. See id. at 628 (describing PAWC's general effect to employee's common law rights and employment injuries).

By virtue of the Act, an employee's common law right to damages for injuries suffered in the course of his employment as a result of his employer's negligence is completely surrendered in exchange for the exclusive statutory right of the employee to compensation for all such injuries, and the employer's liability as a tortfeasor is abrogated. Id.

101. See id. (analyzing extensive application of PAWC and aftermath). "To come within the purview of the Act, there must be both an accident in the course of employment and an injury." Id. After examining Bayless's claim, the court decided he was "within the ambit of the Workmen's Compensation Act as interpreted by the Pennsylvania Supreme Court, in that he avers 1) the defendant-employer's assumption of a duty to provide proper medical care; 2) the failure to provide that care; and 3) resultant harm." Id. at 630.

102. For a summary detailing Bayless's argument and district court's response, see supra notes 96-101 and accompanying text.

103. For an examination of a recent case challenging PAWC, see infra notes 104-16 and accompanying text.


105. Id. at 858.

106. Id.
PAWC's limitations. Lyons appealed the W.C.A.B.'s decision, arguing PAWC violated the Equal Protection Clause. The Pennsylvania Commonwealth Court examined the relevant statutory language and conducted an equal protection analysis. It decided professional athletes were "neither a suspect class nor a sensitive classification, and [Section 565] implicates no fundamental or important right." Thus, under the rational basis test, PAWC did not violate the Equal Protection Clause. Further, the significant difference between Lyons's pre-injury salary and Lyons's post-injury salary via PAWC's use of statewide weekly average did not matter. Lyons further argued there was disparate treatment among professional athletes. Ultimately, the Pennsylvania

107. See id. For relevant statutory language, see supra notes 83-88.
108. See id. at 860 (summarizing plaintiff's legal argument before court).
109. For Section 565's exact statutory language, see supra note 87 and accompanying text.
110. See Lyons, 803 A.2d at 860 (outlining equal protection analysis).

The types of classification are: (1) classifications which implicate a "suspect" class or a fundamental right; (2) classifications implicating an "important" though not fundamental right or a "sensitive" classification; and (3) classifications which involve none of these. Should the statutory classification in question fall into the first category, the statute is strictly construed in light of a "compelling" governmental purpose; if the classification falls into the second category, a heightened standard of scrutiny is applied to an "important" governmental purpose; and if the statutory scheme falls into the third category, the statute is upheld if there is any rational basis for the classification.

The first step in an equal protection analysis is to determine which of three types of scrutiny the reviewing court should apply to the challenged classification: strict scrutiny, intermediate scrutiny or rational basis scrutiny. A classification satisfies rational basis scrutiny so long as the legislative distinction has some rational ground that relates to a legitimate state purpose. In conducting its analysis, "the reviewing court is free to hypothesize reasons that the legislature might have had for the classification," the reviewing court cannot question the soundness or wisdom of the legislative distinction if "any state of facts reasonably can be conceived to sustain that classification." A law will not be found to violate equal protection under rational basis scrutiny simply because the classifications drawn by the legislature are imperfect or result in some inequality.

111. Id.
112. See id. at 860-61 (explaining rational basis test and defining what satisfies rational basis test).

A classification satisfies rational basis scrutiny so long as the legislative distinction has some rational ground that relates to a legitimate state purpose. In conducting its analysis, "the reviewing court is free to hypothesize reasons that the legislature might have had for the classification," the reviewing court cannot question the soundness or wisdom of the legislative distinction if "any state of facts reasonably can be conceived to sustain that classification." A law will not be found to violate equal protection under rational basis scrutiny simply because the classifications drawn by the legislature are imperfect or result in some inequality.

Id. at 861 (citations omitted).
113. See id. at 859 (informing readers Lyons's actual weekly wage was $8,075.90).
114. See id. (declaring Lyons's compensation as $1,176, "two times the State-wide average weekly wage of $588").
115. See Lyons, 803 A.2d at 861 (summarizing Lyons's argument).

Lyons further contends that there is no logical reason to distinguish between professional athletes who receive eight times the Statewide average
Commonwealth Court still rejected Lyons's arguments under a rational basis analysis.116

C. Contract Negotiation: Abilities of Unions and Individuals to Negotiate for Future Contracts

The previous sections summarized what remedies the injured professional athlete can expect under common tort law117 and statutory provisions.118 This section discusses options athletes pursue collectively via Collective Bargaining Agreements.119 This section also discusses avenues athletes pursue individually in order to prepare for potential future injuries.120

i. Collective Bargaining Agreements: Their Protection and Limitations

Unions represent professional athletes in the four major professional sports: Major League Baseball ("MLB"), National Basket-
ball Association ("NBA"), National Football League ("NFL"), and National Hockey League ("NHL"). The Union officials negotiate with team owners and managers over the collective bargaining agreement ("CBA"), which governs all the union's members. The CBA's terms and conditions address compensation, benefits, and regulations relating to that particular sport. The following discussion focuses on the typical provisions covered in CBAs.

Generally, CBAs provide athletes with some type of remedy when injured. The extent of that protection, however, depends on: 1) the franchise sport, 2) "whether the player is a party to a standard or guaranteed contract," 3) the club's disability pension plans, and 4) the arbitration provisions interpreting these disability provisions. Under a standard, non-guaranteed player contract, the team gives an injured player one year's salary, but a team can also terminate the player's contract if the player cannot "exhibit sufficient skill or competitive ability to qualify or continue as a member of the Club's team." Unlike a standard contract, a guar-

121. For a description of unions' representation of professional athletes, see infra notes 122-32 and accompanying text.
122. See Herbert, supra note 16, at 246 (describing players' unions involvement in negotiating players' possible benefits in players' contracts with their teams).
123. See id. (defining CBA and its general purpose for professional athletes).
124. See id. ("The CBA provides an injured player with possible benefits under his contract, as well as possible benefits under his pension plan if the player has suffered a total and permanent disability.").
125. For an analysis of CBA disability provisions for injured athletes, see infra notes 179-86.
126. See Redlingshafer, supra note 15, at 106-15 (discussing disability and medical benefits in CBAs of NBA, MLB, NHL, and NFL with emphasis on NFL).
128. For a summary of disability provisions, see infra notes 130-32 and accompanying text.
129. For a discussion of arbitration provisions' role in interpreting professional athletes' disability pension plans, see infra notes 133-37 and accompanying text.
130. Herbert, supra note 16, at 247 (quoting Player's Contract, The Nat'l League of Professional Clubs, at para. 7(b) (2)). "However, if the player is unable to compete because he has been injured in the course and scope of his employment, he will receive his 'full salary for the period of disability not to exceed the remainder of the season.'" Id. (quoting Player's Contract, The Nat'l League of Professional Clubs, at Regulations, para. (2)). The NBA, NFL, and NHL have very similar, if not identical, provisions in their CBAs. See Redlingshafer, supra note 15, at 106-15 (discussing CBA disability provisions of all four sports franchises).
anteed contract usually runs for two to five years and awards compensation even if the player cannot demonstrate enough "skill or competitive ability to qualify or continue as a member of the [Club's] team."\(^{131}\) A guaranteed contract offers more protection, but still does not provide the ultimate security injured athletes seek for themselves and their families.\(^ {132}\)

Grievance procedures within the CBA also implicitly affect the injured athlete's recovery.\(^ {133}\) Typically, CBAs require arbitrators to resolve disputes based on contract interpretation.\(^ {134}\) If an athlete wants to challenge salary, medical benefits, salary received when injured, or any other CBA provision, the athlete must go through arbitration.\(^ {135}\) Although arbitration is limited in its remedial power,\(^ {136}\) courts have deferred many disputes between professional athletes and their teams to arbitration, claiming the disputes require contract interpretation.\(^ {137}\)

The CBA also protects athletes through disability benefits and pension plan options.\(^ {138}\) Devastating and career-ending injuries

\(^{131}\) Herbert, supra note 16, at 247 (quoting Player's Contract, The Nat'l League of Professional Clubs, at para. 7(b)(2)).

\(^{132}\) See id. at 248 ("Neither the standard nor the guaranteed player's contract provides compensation based on whether the player was negligently or intentionally injured by his employing team, trainer or physician."). For further discussion on disability, pension plan provisions, and arbitration provisions, see infra notes 138-42 and accompanying text.

\(^{133}\) See Herbert, supra note 16, at 248 (restating United States Supreme Court holding on applicable labor relations law). "The Supreme Court has held that § 301 of LMRA (Labor Management Relations Act) preempts state-law claims that are 'substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract.'" Id. (quoting Allis-Chambers Corp. v. Lueck, 471 U.S. 202, 220 (1985)).

\(^{134}\) See id. at 249 ("If a player has a claim against the team that requires interpretation of his contract, the CBA stipulates that the player's sole remedy is arbitration.").

\(^{135}\) See id. (voicing arbitration's significance in professional sports' CBAs).

\(^{136}\) See id. (explaining briefly arbitration's significant limitations).

The primary purpose of arbitration is to ensure uniform interpretation of the CBA. Since claims that are subject to mandatory arbitration are based on a breach of contract theory, such claims will only provide an injured player with contract damages. Arbitration will not compensate the negligently or intentionally injured athlete for damages that usually accompany a tort injury, such as: loss of earning capacity, disfigurement, physical impairment, medical care or physical pain and mental suffering. Id. (footnote omitted).

\(^{137}\) See id. at 250-51 (summarizing relevant case law demonstrating uncertainty regarding athletes' ability to sue for physical battery).

\(^{138}\) For a discussion detailing different provisions regarding disability and pension, see infra notes 139-42.
trigger these benefits, and subsequently, a pension committee "determines, under a clear and convincing evidence standard, if a player qualifies for disability benefits under the Plan." Typically, the disability provisions in pension plans provide some compensation for athletes' injuries. Because both the pension plan and disability provisions are part of the team's agreement with the union and all its members, all injured players receive the same compensation whether the injury resulted from their team or another athlete's negligence.

ii. Privatized Insurance Option: Status and Power Needed to Protect Yourself

In addition to the respective CBAs' standard insurance options, a professional athlete might still desire further protection

139. See Herbert, supra note 16, at 259 (articulating triggering instances for disability and pension plan benefits in MLB).

The disability benefits offered under the Pension Plan provide financial protection to all players who suffer a "total and permanent" disability that prevents them from performing any type of work for wage or profit. A total and permanent disability is one where it is "not likely that the player in question is likely to recover from his total disability."

Id. (footnotes omitted).

140. Id. If athletes want to appeal the pension committee’s decision, they can sue “pursuant to the Employee Retirement Income Security Act (ERISA), but only after the player has exhausted any administrative appeal available under his Pension Plan.” Id.; see Sweeney v. Bert Bell NFL Ret. Plan, 961 F. Supp. 1381, 1390 (S.D. Cal. 1997) (outlining conclusions of law and demonstrating athlete’s difficulty to successfully appeal pension committee’s decision not to award pension).


A NFL team is not required to expend continued medical care and treatment to an injured player beyond the duration of the injured player’s contract. A player’s contract is not renewed if he cannot pass the physical examination for the ensuing year(s). Of course, a player suffering a debilitating injury cannot successfully pass the team physical, and his salary expectations will be terminated along with the contract.

Lewis, supra note 32, at 266-67 (footnotes omitted).

142. See Herbert, supra note 16, at 259 (exploring athletes’ equal treatment through these provisions). Compensation is “not provided to an injured player based on whether the injury received was negligently or intentionally inflicted. Therefore, the Pension Plan does not compensate an injured player for the tortious conduct that resulted in his injury. All player injuries are equally compensated.” Id. (footnote omitted).

143. For overall information on the disability insurance options sports unions generally negotiate and receive, see supra notes 121-42 and accompanying text.
and can ultimately rely upon additional insurance. Professional athletes and entertainers can take matters into their own hands by purchasing disability or life insurance. For peace of mind, and potential increased marketability, some athletes and celebrities should consider spending additional money on insurance to ensure financial stability if injured. Similar to non-celebrity injured individuals searching for disability insurance, professional athletes and celebrities who desire additional coverage have to shop around for a willing insurance carrier. Unfortunately for some professional entertainers and professional non-elite athletes, the price of the additional insurance exceeds what they want to spend.

144. See infra notes 145-53 and accompanying text (explaining insurance options available to professional athletes that can either be executed individually or through respective teams).

145. See Hynes, supra note 25, at 332 (discussing insurance policies entertainers and celebrities obtain to protect themselves in anticipation of injuries). Casual perusal of the newspapers reveals stories of highly compensated athletes or entertainers who purchase disability or life insurance policies worth millions of dollars. For example, before the championship game in college football in January of 2003, the star running back for the University of Miami purchased a two and a half million dollar policy to protect himself against a career ending injury.

Id. (footnotes omitted).

146. See id. (citing Ken Rosenthal, Insurance Should Help Gonzalez Land Long-Term Deal, SPORTING NEWS, Nov. 26, 2001). Hynes explains the use of additional insurance to obtain increased marketability as follows: The most lucrative policies often name the employers of these celebrities as the beneficiaries. This is partly because these celebrities often have contracts that guarantee payment in the event of injury; these celebrities are already insured against these risks. But, of course, the insurance provided by the guarantee comes at a price; the celebrity would have been able to negotiate a higher salary if she did not receive the guarantee.

Id. (footnotes omitted).

147. See id. (mentioning how celebrities are purchasing disability and life insurance policies for protection).


149. See Redlingshafer, supra note 15, at 124 (avoiding discussion of purchasing disability insurance because "receiving coverage of this insurance is not necessarily the norm in mainstream athletics and notably for lower-paid, little experienced athletes, especially since many of these policies are extremely expensive").
Professional athletes with highly lucrative contracts usually do not have to seek an additional insurance carrier.\textsuperscript{150} If the professional athlete receives such a contract, the contract is probably guaranteed and the team would be responsible for the remainder of the contract.\textsuperscript{151} Because of this responsibility, teams often insure guaranteed contracts.\textsuperscript{152} In this situation, the team would purchase an insurance policy on the athlete's contract, and upon a career-ending injury, the policy would pay out the rest of the contract.\textsuperscript{153}

III. Analysis

A Tale of Two Jaysons: Analyzing Jayson Williams's Injury as Elite v. Non-elite & Inexperienced NBA Player

The following analysis examines the potential recovery for Jayson Williams, an elite NBA player, versus a hypothetical Jayson Williams, a non-elite NBA player with one year experience in the NBA.\textsuperscript{154} The analysis compares both elite and non-elite Jayson Williams under the different legal,\textsuperscript{155} statutory,\textsuperscript{156} and contractual\textsuperscript{157} settings.

\begin{itemize}
  \item \textsuperscript{150} For an explanation of why players signing high-paying guaranteed contracts do not have to self-insure their contracts, see \textit{infra} notes 151, 190-201, and accompanying text.
  \item \textsuperscript{151} For an explanation of guaranteed contracts, see \textit{supra} notes 130-32 and accompanying text.
  \item \textsuperscript{152} \textit{See} Rovell, \textit{supra} note 7, ¶ 5 ("NBA teams insure large, guaranteed player contracts in order to protect themselves against injury."); \textit{see also} NCAA, Catastrophic Injury Insurance Program (2003-04), 2, \url{http://www.ncaa.org/insurance/catpolicy03-04.pdf} (last visited July 10, 2005) (listing NCAA insurance benefits as: medical, dental, rehabilitation, custodial care expense, total and partial disability, adjustment expense, special expense, ancillary illness or injury, college education, vocational rehabilitation, assimilation, and death benefits).
  \item \textsuperscript{153} \textit{See}, e.g., Rovell, \textit{supra} note 7, ¶ 4-5 (recounting Jayson Williams's insurance policy with New Jersey Nets and how Nets cashed in on policy when Williams broke his right leg and "ruptured his knee").
  \item \textsuperscript{154} In the remainder of the analysis, elite Jayson Williams will refer to the actual Jayson Williams, while non-elite Jayson Williams will refer to the "hypothetical" Jayson Williams. Additionally, the fact pattern of elite Jayson Williams's injury will also apply to non-elite Jayson Williams.
  \item \textsuperscript{155} For background information on tort law in sports injury cases, see \textit{supra} notes 37-63 and accompanying text.
  \item \textsuperscript{156} For information on WCS and its distinct application to professional athletes, see \textit{supra} notes 64-79 and accompanying text.
  \item \textsuperscript{157} For background information regarding disability provisions on collective bargaining agreements between professional athletes and management, see \textit{supra} notes 121-42 and accompanying text.
\end{itemize}
A. Negligence Claims

Although suing is always an option in the United States, it is an unlikely game-winning strategy for the professional athlete in a semi-contact sport such as basketball.\(^{158}\) Under Hackbart's recklessness standard,\(^{159}\) elite and non-elite Williams would both have a difficult time winning unless they could prove Stephon Marbury's collision was intentional.\(^{160}\) Even if elite and non-elite Williams could prove Marbury's intent to collide with him and cause injury, to sue the Nets, both Williams need to prove the Net coaches and/or policy prompted Marbury to hurt fellow teammate Williams.\(^{161}\) Knight's assumption of risk doctrine\(^{162}\) also seems futile under Williams's fact pattern. Under this doctrine, both elite and non-elite Williams would have to prove the collision with Marbury was reckless and not part of professional basketball's assumed risk.\(^{163}\) Al-

\(^{158}\) For a discussion of societal views on participation of sports and how sports participants should handle injuries, see supra notes 34-63 and accompanying text. For an examination of courts' reluctance to interfere with professional sports injuries, see infra notes 158-65.

\(^{159}\) For more details and background information on the recklessness standard established in Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979), see supra notes 37-52 and accompanying text.

\(^{160}\) Compare supra notes 4-7 and accompanying text (inferring collision between Williams and Marbury was accidental and occurred during regulation of game), with Richardson, supra note 20, at 140-41 (emphasizing Clark's hit against Hackbart occurred after play ended and arose out of Clark's then frustration).


**PRIMA FACIE CASE**

A prima facie case in a respondeat superior action to recover from the employer for the intentional tort of an employee requires proof:

1. of the underlying tort committed by the employee;
2. that the tortfeasor was a bona fide employee of the defendant; and
3. that the tortfeasor was acting within the "scope of employment" when the tort was committed; or
4. that the tortfeasor was acting within the "scope of apparent authority"; or
5. that the employer authorized or ratified the tortious conduct

*Id.* (internal references omitted).

\(^{162}\) For a discussion of assumption of the risk doctrine, see supra notes 53-59 and accompanying text.

\(^{163}\) See Rosenthal, supra note 14, at 2650-51 (clarifying liability standard established by Knight Court).

[A] participant in an active sport breaches a legal duty of care to other participants – i.e., engages in conduct that properly may subject him or her to financial liability – only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.

*Id.* at 2651 (emphasis added) (quoting Knight v. Jewett, 834 P.2d 696, 711 (Cal. 1992)). Even under assumption of the risk doctrine, the injured professional ath-
though some courts are hearing more sports injury cases, the policy considerations would not apply to professional athletes. Additionally, the societal notion of keeping judiciary courts out of basketball courts and other sporting arenas may further prevent injured professional athletes from successfully recovering in negligence suits.

B. Workers' Compensation Statutes

Although New Jersey Workers' Compensation Statutes would apply to both Jayson Williams, it is interesting to analyze the potential compensation under Pennsylvania's Workers' Compensation Statute ("PAWC"). PAWC specifically includes professional
athletes, and recent case law is available. Section 565 of PAWC establishes specific disability pay-outs for all professional athletes. Specifically, Williams and any other Pennsylvania professional athlete would start with a disability benefit of $1,176 per week. From this $1,176, the CBA disability insurance provisions would be deducted along with any other self-insurance or employer insurance. So in the case of Jayson Williams, his $1,176 would be deducted significantly due to both the CBA and employer insurance on his contract. According to the *Lyons* court, it is insignificant how much an injured athlete made prior to injury relative to the PAWC pay-out. Thus, whether elite Williams would receive any workers' compensation is questionable because of the many deductions.

Non-elite and inexperienced Williams would probably receive some compensation from PAWC. Non-elite Williams does obtain a greater workers' compensation pay-out, but this amount is still

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168. For a discussion of the statute's inclusion of professional athletes, see *supra* notes 82-86.

169. For an analysis of the *Lyons* case and a professional athlete's equal protection challenge against Section 565, see *supra* notes 104-16 and accompanying text.

170. See 77 PA. CONS. STAT. ANN. § 565 (West 2005) (setting initial disability pay-out for professional athletes at two times statewide weekly average).

171. See id. § 565(e) (proclaiming disability pay-out prior to deductions as two times statewide weekly average); id. § 601 (paralleling current payment installment with pre-injury payment installment); *Lyons v. Workers' Comp. Appeal Bd. (Pittsburgh Steelers Sports, Inc.)*, 803 A.2d 857, 859 (Pa. Commw. Ct. 2002) (declaring statewide average weekly wage as $588).

172. For a discussion of CBA provisions to Jayson Williams's situation as elite and non-elite professional athlete, see *infra* notes 179-86 and accompanying text.

173. See 77 PA. CONS. STAT. ANN. § 565(c) (West 2005) (outlining deductions made before professional athlete receives payment).

174. For a discussion of the CBA provisions applied to Williams, see *infra* notes 179-86 and accompanying text. For details about New Jersey Nets's insurance on Jayson Williams's contract, see *supra* notes 22-24 and accompanying text.

175. See *Lyons*, 803 A.2d at 862 (rationalizing legislature's decision to draft statute in manner that effectively prevents professional athletes from earning what they did pre-injury).

176. See 77 PA. CONS. STAT. ANN. § 565(c) (West 2005) (requiring deduction of wages paid by employer and payments from self, disability, and employer funded insurance). If the Nets insured Williams's entire six-year $86 million contract, the insurance company would pay an estimated weekly amount of $275,641 which exceeds $1,176. Thus, Williams would not receive any compensation PAWC.

177. See Exhibit C: Minimum Annual Salary Scale, *supra* note 18 (establishing non-elite player with one year in NBA earned $350,000 in 1999). Such a player would most likely not have insurance so the self-insurance deduction would not apply. 'See 77 PA. CONS. STAT. ANN. § 565(c) (requiring deduction of self-insurance from workers' compensation). The individual NBA disability CBA provision would probably not completely offset the $1,176 so a non-elite Williams would actually receive workers' compensation. See *Article IV: Benefits*, at 34, http://www.nbpa.
significantly less than his pre-injury salary. Thus, even though he is receiving more workers’ compensation, non-elite Williams would have to rely on other methods to attain financial security in the event of a career-ending injury.

C. Contractual Applications

i. CBA Implications

The NBA’s CBA establishes players’ contract regulations that teams must follow. Elite and non-elite players’ contracts have the same basic coverage regarding disability provisions. Although the CBA establishes basic minimums, the team and the player individually negotiate the contract’s specific terms. Additionally, the


178. See Exhibit C: Minimum Annual Salary Scale, supra note 18 (listing $350,000 as minimum salary for professional basketball player with one year of service in NBA during 1998-99 season). For non-elite Williams, the career ending injury decreases income significantly from $350,000 to $61,152 ($1,176 multiplied by 52 weeks), pre-statutory deductions.

179. For an examination of CBA provisions and self-insurance and employer insurance options for injured professional athletes, see infra notes 180-200 and accompanying text. See Niles & West, supra note 82, at 30 (commenting that exclusion of professional athletes from workers’ compensation statutes will probably draw minimal sympathy). “In the end, as long as professional athletes continue to earn astronomical wages, the public will be hesitant to hear their cries of unfair treatment.” Id. at 30.

180. See Redlingshafer, supra note 15, at 106 (informing readers on different provisions in NBA’s CBA regarding disability, life, medical, and dental insurance).

181. See Article IV: Benefits, supra note 177, at 34 (narrating benefits provisions guaranteed by CBA to NBA players).

Except as set forth below, effective with the date of this Agreement, and continuing for the duration thereof, the NBA shall provide the following benefits to NBA players and, in the case of Section (a) below, former NBA players: (a) (1) Subject to the provisions of Section (a)(3) below, League-wide pension benefits in accordance with the terms of the National Basketball Association Players’ Pension Plan, as restated effective February 2, 1996, as amended by the First and Second Amendments thereto (the “Plan”). In accordance with the collective bargaining agreement made as of September 18, 1995, the Plan has been amended so that the “Normal Retirement Pension” payable to a player under the Plan is the maximum monthly amount permitted by the applicable benefit limitations under the Internal Revenue Code of 1986, as amended (the “Code”) to be paid to the player at his “Normal Retirement Date” under the Plan (the “Maximum Monthly Benefit”).

(c) Disability insurance benefits, as set forth in the Standard Security Life Insurance Co. of New York, Policy No. SSL524-16343.

Id.

application of these disability benefits and provisions differ between the elite and non-elite player. The guarantee of disability insurance is not the same amount for elite and non-elite Williams. It is also possible the contracted disability insurance would not provide enough for the non-elite, inexperienced player. Further, when appealing or challenging the amount of disability or pension provided, all professional athletes, elite and non-elite, must go through the CBA grievance procedure that ultimately ends with arbitration, not trial. So if either elite or non-elite Williams wanted to challenge the disability insurance or pension, an arbitrator would ultimately hear and decide the case.

(showing standard uniform player contract language but leaving blank areas regarding salary, benefits, pension, and termination for negotiation between individual athlete and team).

183. For a discussion contrasting disability guarantee of player with lucrative contracts against less elite players, see infra notes 184-87 and accompanying text.

184. Compare Puma, supra note 3, ¶ 12 (deducing elite Williams's annual salary as $14.3 million ($86 million/6 years)), with Exhibit C: Minimum Annual Salary Scale, supra note 18 (implying non-elite Williams, as NBA player with one-year service in NBA, would earn $350,000 for 1998-99 season). Disability insurance would be worth more to the non-elite Williams than the elite Williams.

185. See, e.g., Redlingshafer, supra note 15, at 102-05 (recounting story of Greg Lotysz, 6'6", 310-lb offensive tackle, who seriously injured his knee during second day of team practice with New York Jets and could not qualify for disability provisions in NFL CBA).


(a) Any dispute (such dispute hereinafter being referred to as a "Grievance") involving the interpretation or application of, or compliance with, the provisions of this Agreement or the provisions of a Player Contract (except as provided in paragraph 9 of a Uniform Player Contract), including a dispute concerning the validity of a Player Contract, shall be resolved exclusively by the Grievance Arbitrator in accordance with the procedures set forth in this Article; provided, however, that disputes arising under Articles VII, VIII, X, XI, XII, XIII, XIV, XV, XVI, XXXVII, XXXIX, and XL shall (except as otherwise specifically provided by Article VII, Section 3(d)(5) above) be determined by the System Arbitrator provided for in Article XXXII.

Id. For further discussion on the court's approach to arbitration being the final word on interpreting collective bargaining agreement, see supra notes 133-37 and accompanying text.

187. For a discussion of arbitration and its finality regarding CBA provisions, specifically disability and pension payment, see supra note 186 and accompanying text.
ii. Privatized Insurance Application

In comparison to all the other protective options available to professional athletes when injured, 188 privatized insurance 189 is arguably the best option because it seems the most certain. Although all professional athletes face similar risks of injuries, 190 the availability of this extra insurance is not similar. 191 An athlete's bargaining power, propensity to injury, marketability, value to the team, and whether the contract is guaranteed or standard all help team owners decide whether to purchase insurance for the player's contract. 192

Fortunately for elite Jayson Williams, the ball tipped in his favor when the New Jersey Nets insured his six-year, $86 million contract. 193 Williams signed the contract after selection to the 1998 All-Star Game and amidst elevation to a hometown favorite. 194 The following year, he used his rising status to sign a lucrative and guaranteed contract. 195 Because the New Jersey Nets were aware of his

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188. For a summary of legal, statutory, and contractual remedies for elite and non-elite injured professional athletes, see supra notes 158-87 and accompanying text.

189. In this sentence and in the section's title, the term “privatized insurance” means both self-insurance bought by the player and insurance on the player's contract paid by the employer. In the rest of the analysis, the two are distinguished. For an analysis of privatized insurance options for professional athletes, see infra notes 190-201.

190. See, e.g., Richardson, supra note 20, at 134 (reporting 2002 statistics of sporting injuries according to each sport).

Basketball was played by over 36 million people in 2002; 2,783,000 participants were injured (7.6%). Soccer was played by 17,641,000 players in 2002, 1,063,000 of whom were injured (9.3%). 602,000 of the 10,402,000 people who played baseball in 2002 were injured (5.8%). The injury rate was highest in the two contact sports where violent collisions are an inherent part of the game: 15.9% of ice hockey players (415,000 of the 2,612,000 participants in 2002) and 18.8% of football players (1,083,000 of the 5,783,000 who played in 2002) were injured.

Id. (footnotes omitted).

191. For an examination of the economic and bargaining disparity between elite and non-elite professional athlete, see infra notes 192-200 and accompanying text.

192. For a discussion of the New Jersey Nets' consideration of these factors when purchasing insurance policy for Williams's contract, see infra notes 194-200 and accompanying text.

193. See Rovell, supra note 7, ¶¶ 4-5 (explaining advantage to Jayson Williams when New Jersey Nets purchased insurance policy).

194. See generally On the Court, supra note 4 (follow “1998-99” hyperlink) (providing timeline of Williams's troubles on and off court).

195. See Rovell, supra note 7, ¶ 4 (reporting year and amount of Williams's contract as six years, $86-million dollars).
propensity for injury, they gave him the elite contract and purchased the insurance policy to protect themselves.

A non-elite and inexperienced Williams would lack the necessary bargaining power to protect himself in a similar manner. Theoretically, a non-elite Williams could still insure himself, but with his minimum salary, it seems to be an unrealistic option. It is likely that if a non-elite and inexperienced Williams suffered the same ruptured knee, his dreams of playing professionally and enjoying financial security would also have ruptured.

**IV. IMPACT**

Jayson Williams's comeback attempt could deter both private insurance carriers and teams from insuring guaranteed contracts. Nonetheless, the use of privatized insurance worked well

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196. See On the Court, supra note 4 (follow “1998-99” hyperlink) (recounting Williams’s constant battles with injuries which began in college and continued through his professional career).

197. See Rovell, supra note 7, ¶ 5 (“NBA teams insure large, guaranteed player contracts in order to protect themselves against injury.”).

198. See Redlingshafer, supra note 15, at 100-01 (commenting how inexperienced athletes do not receive astronomical wages nor sufficient protection if injured, but society still believes they receive both). Redlingshafer discusses the actual perception and reality of all injured professional athletes; the reality is that non-elite professional athletes do not have the bargaining power to obtain an insured contract and must rely on changes to the current system.

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

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

Id.

199. For a listing of insurance companies that will insure professional athletes, see supra note 148.

200. See Redlingshafer, supra note 15, at 124 (rationalizing elimination of self-insurance discussion from article by noting such insurance policies' extreme price and many athletes' inability to pay for them).

201. See, e.g., id. at 102-05 (discussing story of Greg Lotysz whose dreams of playing professional sports were cut short when he suffered injury during second day of practice of his second season with New York Jets).

202. See Rovell, supra note 7, ¶ 6 (speculating insurance companies would go after New Jersey Nets because Williams now desires comeback to professional basketball).
Williams benefited via the privatized insurance because of his status and individual negotiating. Considering not every professional athlete has such bargaining power, some changes could protect athletes who work just as hard but do not receive the spotlight or the guaranteed contracts. The inexperienced and non-elite professional athletes would be the target groups for proposed changes to the current legal, statutory, or contractual schemes. Unlike their elite colleagues with lucrative and guaranteed contracts, these inexperienced and non-elite athletes are inadequately supported financially upon severe injury. Currently, amidst the legal, statutory, and contractual limitations, self-insurance or employer’s insurance on the contract would be the savior at

“If I’m the Nets, I’m thinking, ‘Whoa, now that we’re done paying him, he has his skills back?’” said Jim Padilla, an independent sports insurance broker. “And if I’m the insurance company that paid the Nets so that they could pay Jayson, I’m thinking that the money was paid to the Nets believing that his injury was career-ending, so they’re going to want to recoup some of that.”

Id. See id. ¶ 6-15 (summarizing Williams’s injury and continued income thereafter).

For a discussion scrutinizing Williams’s individual bargaining power and external factors which prompted team’s insuring of contract, see supra notes 193-200 and accompanying text.

See Redlingshafer, supra note 15, at 125-32 (examining and opining changes that should be made to financially protect inexperienced and non-elite professional athletes); Herbert, supra note 16, at 275-76 (proposing remedies such as amending WCS and prohibiting teams from providing medical care); Schaffer, supra note 67, at 650-54 (recommending all legislatures should include professional athletes in WCS and eliminate set-off WCS).

See Redlingshafer, supra note 15, at 125-32 (recommending athletes be allowed to sue team physicians for medical malpractice and legislatures should include professional athletes in WCS).

See id. at 102-05 (exemplifying predicament by retelling story of Greg Lotysz, who suffered injury early in his second season with New York Jets, and comparing Lotysz’s struggle with those of Jacksonville Jaguars Offensive Lineman Jeff Novak).

Greg [Lotysz] claims his knee has only gotten worse, and he continues his fight not only for his family, but for a lot of guys who’ve played pro sports. Despite the dedication, Greg’s struggle was not needed for other former athletes who have had their careers ended because of faulty medical treatment. On August 6, 2002, a former offensive lineman for the Jacksonville Jaguars, Jeff Novak, accepted a settlement in his medical malpractice lawsuit against a former team doctor. Novak received $2 million in the settlement, after a judge threw out his $5.35 million judgment. He had suffered a bone bruise in 1998, and in a story eerily similar to Greg’s, claimed infections that stemmed from the improper treatment of the bruise ended his career.

Id. at 104-05 (footnotes and quotations omitted).
the buzzer. For some, such as Jayson Williams, it has been. But for the non-elite inexperienced professional athletes, it usually comes up just short.

Diana P. Cortes

208. Contra Rovell, supra note 7, ¶ 6 (speculating about Williams's future legal problems regarding his insurance policy and his current attempt to return to professional basketball).

209. See, e.g., Redlingshafer, supra note 15, at 102-05 (retelling Greg Lotysz story and how severe injury prematurely ended his career). "Due to the limited service Greg served in the NFL, he is not eligible for most of the benefits provided through the union and the collective bargaining agreement, but is eligible for Workers' Compensation, reimbursement of medical and rehabilitation expenses, and disability." Id. at 103.