

# DISCARDED WITHOUT DISABILITY: IS THE NFL WRONGFULLY DENYING DISABILITY BENEFITS TO FORMER PLAYERS?

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“Delay, Deny, and hope we die.”-Brent Boyd <sup>1</sup>

# INTRODUCTION

Last month, ten retired professional football players brought suit against the National Football League’s (hereafter “NFL”) disability benefits plan, its board of trustees, and Commissioner Roger Goodell in federal court.<sup>2</sup> In the complaint (hereafter “the Complaint”), the players accuse the NFL of wrongfully denying disability benefits, denying “statutorily mandated full and fair review of benefits denials, violations of plan terms or governing regulations, and breaches of fiduciary duty.”<sup>3</sup> The retired athletes brought their case under the Employee Retirement Income Security Act of 1974 and are seeking the removal of the NFL Disability Board’s members based on their repeated violations of fiduciary duty to the former players.<sup>4</sup>

<sup>1</sup> Mike Freeman, *Opinion: On NFL Disability, Some Players Say ‘Delay, Deny and Hope We Die’ Remains True*, USA TODAY (Apr. 9, 2021, 3:01 PM), <https://www.usatoday.com/story/sports/columnist/mike-freeman/2021/04/09/nfl-disability-delay-deny-and-hope-we-die-remains-true/7156511002/>.

<sup>2</sup> Will Hobson, *Former NFL Players Sue Over Disability Claims, Accuse Plan of “Disturbing” Denials*, THE WASH. POST (Feb. 9, 2023), [https://www.washingtonpost.com/sports/2023/02/09/nfl-disability-plan-lawsuit/?hpid=hp\\_sports%3Anfl-disability-plan-lawsuit%3Ahomepage%2Fstory&hpid=hp\\_sports%3Anfl-disability-plan-lawsuit%3Ahomepage%2Fstory](https://www.washingtonpost.com/sports/2023/02/09/nfl-disability-plan-lawsuit/?hpid=hp_sports%3Anfl-disability-plan-lawsuit%3Ahomepage%2Fstory&hpid=hp_sports%3Anfl-disability-plan-lawsuit%3Ahomepage%2Fstory)

<sup>3</sup> *Alford et al v. The NFL Player Disability & Survivor Benefit Plan et al*, 1:23-CV-00358, at \*2 (D. Md. Feb. 9, 2023).

The accusations against the NFL plan are disturbing. The players allege that the NFL has been violating the Employee Retirement Income Security Act of 1974 (hereafter “ERISA”) by using the opinions of biased, NFL-paid physicians to determine whether a former player qualifies for benefits under the NFL Benefit Plans.<sup>5</sup> These NFL-paid physicians find that former players do not qualify for disability more often than not. The NFL leans almost entirely on these biased opinions when players appeal their denied disability claims instead of fairly reviewing all evidence as required by federal law.<sup>6</sup>

The high rates of denial are concerning because disability benefits are crucial for professional athletes. The high speed and full-contact nature of football itself leads to a high probability of life-altering injuries.<sup>7</sup> For example, a study conducted by the American Heart Association found that former NFL players were almost six times more likely to have atrial fibrillation than men of a similar age group who did not play professional football.<sup>8</sup>

Moreover, in the 2022 pre- and regular season alone, there were 213 reported concussions.<sup>9</sup> People may view concussions as a standard football injury, but the long-term effects can be substantial. In 2019, the Football Players Health Study at Harvard University found that former players who suffered concussion symptoms during their NFL careers were significantly more likely to report cognitive impairment, depression, and anxiety after retirement.<sup>10</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at \*15.

<sup>6</sup> Hobson, *supra* note 2.

<sup>7</sup> *Sports Medicine*, UNIV. OF ROCHESTER ORTHOPAEDICS & PHYSICAL PERFORMANCE, <https://www.urmc.rochester.edu/orthopaedics/sports-medicine/football-injuries.cfm> (last visited Mar. 4, 2023).

<sup>8</sup> *Former NFL Players May Face Higher Risk of Irregular Heartbeat*, J. OF THE AM. HEART ASS'N REP. (July 24, 2019), <https://www.heart.org/en/news/2019/07/24/former-nfl-players-may-face-higher-risk-of-irregular-heartbeat>.

<sup>9</sup> *Injury Data Since 2015*, THE NAT'L FOOTBALL LEAGUE (Feb. 3, 2023), <https://www.nfl.com/playerhealthandsafety/health-and-wellness/injury-data/injury-data>.

<sup>10</sup> *Results: Concussion, Playing Experience, and Long-Term Health*, THE FOOTBALL PLAYERS HEALTH STUDY AT HARV. UNIV. (Sept. 5, 2019), <https://footballplayershealth.harvard.edu/about/news/results-concussion-playing-experience-and-long-term-health/>.

The results of the former players' lawsuit against the NFL have major implications for current NFL players as well. Miami Dolphins quarterback Tua Tagovailoa suffered three major blows to the head, two of which resulted in confirmed concussions, in the 2022 season.<sup>11</sup> In January, Buffalo Bills safety Damar Hamlin suffered a life-threatening cardiac arrest after tackling an opposing player.<sup>12</sup> The pending lawsuit could determine what amount of disability payments, if any, these men will get after retirement.

This Article examines the current lawsuit alleging that the NFL is unlawfully denying disability benefits to former players. First, this Article examines the federal law that the League is allegedly violating. This Article then proposes ways in which the NFL can reform its system so that it is no longer violating federal law. Lastly, this Article discusses some of the other reasons why the NFL should reform its current system of evaluating disability claims.

## I. THE NATIONAL FOOTBALL LEAGUE MAY BE VIOLATING FEDERAL LAW

### *What the Federal Law Requires*

In the 2023 Complaint, the ten former professional football players accuse the NFL Player Disability & Survivor Benefit Plan, the NFL Player Disability & Neurocognitive Benefit Plan, the Plan's Administrator and fiduciary, the Disability Board and its members, and Board Chairman and NFL Commissioner Roger Goodell of violating ERISA.<sup>13</sup> The alleged violations include "flagrant disregard of the full-and-fair review requirement, biased claims administration, a disturbing pattern of illogical and inconsistent interpretations to the detriment of participants, and other unscrupulous result-oriented decisions."<sup>14</sup>

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<sup>11</sup> Jonathan Jones, *NFL-NFLPA Conclude Tua Tagovailoa's Concussion Suffered on Christmas Was Handled Properly*, CBS SPORTS (Dec. 31, 2022, 1:20 PM), <https://www.cbssports.com/nfl/news/nfl-nflpa-conclude-tua-tagovailoas-concussion-suffered-on-christmas-was-handled-properly/>.

<sup>12</sup> Victor Mather, *What to Know About Damar Hamlin's Injury*, THE N.Y. TIMES (Feb. 6, 2023), <https://www.nytimes.com/article/damar-hamlin-injury-update.html>.

<sup>13</sup> Alford et al v. The NFL Player Disability & Survivor Benefit Plan et al, 1:23-CV-00358, at \*2 (D. Md. Feb. 9, 2023).

<sup>14</sup> *Id.* at \*6.

To understand the claims against the NFL, it is necessary to understand what ERISA requires. The act is codified at 29 U.S.C. §§ 1001 et seq. Congress passed the Act in response to the growth in the size, scope, and number of employee benefits in the late 1970s.<sup>15</sup> The goal of ERISA is as follows:

[T]o protect...the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.<sup>16</sup>

ERISA protects the interests of retirement and welfare benefit plan beneficiaries by establishing minimum standards that the plan administrators must follow.<sup>17</sup> The law requires plan sponsors to provide plan information to participants.<sup>18</sup> It also establishes enforcement provisions to ensure that protection of plan funds, and that qualifying participants receive their benefits.<sup>19</sup>

ERISA's goal is to protect retirement savings from mismanagement and abuse.<sup>20</sup> As a result, it requires those in charge of employee benefit plans to always act in the best interests of plan participants.<sup>21</sup> ERISA also requires transparency and accountability on the part of plan administrators.<sup>22</sup>

To ensure this transparency and accountability, ERISA imposes certain fiduciary duties on the administrators of qualified retirement and/or disability plans.<sup>23</sup> These fiduciary duties have three components: the duty of loyalty, the “prudent person” fiduciary obligation, and the duty to act for the exclusive purpose of providing benefits to plan beneficiaries.<sup>24</sup>

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<sup>15</sup> 29 U.S.C. § 1001(a) (1982).

<sup>16</sup> 29 U.S.C. § 1001(b) (1982).

<sup>17</sup> *ERISA*, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/topic/health-plans/erisa>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 29 U.S.C. § 1104(a) (1982), *amended by* PL 117-328 (Dec. 29, 2022).

<sup>24</sup> *Krohn v. Huron Memorial Hosp.*, 173 F.3d 542 (Ct. App. Mich. 1999).

The duty of loyalty refers to the duty of the fiduciary to act solely for the benefit of the plan participants and beneficiaries.<sup>25</sup> The “prudent person” obligation refers to a fiduciary’s obligation to comply “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 a like character and with like aims.”<sup>26</sup> All of the fiduciary duties required by ERISA are intended to ensure that those in charge of employee benefit plans always act in the best interest of plan participants.<sup>27</sup>

Furthermore, the statute establishes causes of action for plan participants and their beneficiaries to recover wrongfully denied benefits.<sup>28</sup> Employee benefit plan participants may also sue employers and plan administrators for a breach of one of the fiduciary duties described above.<sup>29</sup> Failure to uphold one of these duties can result in personal liability of a fiduciary and possible removal from their position as a fiduciary for failure to uphold one of these duties.<sup>30</sup>

## B. HOW THE FEDERAL LAW IS BEING VIOLATED BY THE NFL

### *I. Lack of Neutral Physicians*

The Complaint outlines the disability claims process. First, after a player applies for disability benefits, his “case” is assigned to a benefits coordinator in the Benefits Office’s disability group.<sup>31</sup> Next, the Plan’s Disability Initial Claims Committee decides the Player’s claim for disability.<sup>32</sup> The terms of the Disability Plan require the Committee to review all facts and available information before making a decision.<sup>33</sup>

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<sup>25</sup> *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2<sup>nd</sup> Cir. 1982).

<sup>26</sup> *Id.* (quoting 29 U.S.C. § 1104(a)(1)(B) (1982)).

<sup>27</sup> *ERISA*, U.S. DEPT OF LABOR, <https://www.dol.gov/general/topic/health-plans/erisa>.

<sup>28</sup> *ERISA*, CORNELL LAW SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/erisa>.

<sup>29</sup> *Id.*

<sup>30</sup> 29 U.S.C. § 1109 (1982).

<sup>31</sup> *Alford et al v. The NFL Player Disability & Survivor Benefit Plan et al*, 1:23-CV-00358, at \*12 (D. Md. Feb. 9, 2023).

<sup>32</sup> *Id.*

If the Committee decides to deny the player's claim, the player can appeal this decision to the Plan's Disability Board. The Board is one of the defendants named in the Complaint. The terms of the Plan and federal law require the Board to make a "full and fair review" of the Committee's denial.<sup>34</sup>

The Plan requires that the decisions of both the Committee and the Board be based on the opinions of neutral physicians.<sup>35</sup> The NFL and NFLPA define a "neutral physician" as "a [p]hysician selected by the Disability Plan and assigned to examine you and report on your condition."<sup>36</sup> These physicians are also supposed to be neutral because they are appointed jointly by the Retirement Board members, who were chosen by the Players Association and the NFL.<sup>37</sup>

It is apparent from these definitions that the NFL deems these physicians as neutral because of how they select them, not how the physicians' practice. Furthermore, objective medical evidence is not necessary for approving or denying a disability claim, so the Committee and Board may rely entirely on these opinions without any extraneous evidence or other support.<sup>38</sup>

The lack of procedures in place to ensure neutrality in these physicians' diagnoses is one major aspect of the Complaint. The Complaint first alleges that the defendants breached their fiduciary duty of loyalty to former players by "misrepresenting that all Board-hired physicians are 'neutral' when, in fact, most are biased."<sup>39</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at \*13; *see also* 29 U.S.C. § 1133(2) (1982) (stating that "every employee benefit plan shall...afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim").

<sup>35</sup> *Alford*, 1:23-CV-00358 at \*14.

<sup>36</sup> *NFL Player Disability & Neurocognitive Benefit Plan Summary of Material Modifications*, NFL PLAYER BENEFITS, <https://nflpaweb.blob.core.windows.net/website/Departments/Benefits/DisabilitySPD-21.pdf>.

<sup>37</sup> *Oversight of the National Football League (NFL) Retirement System: Hearing Before the Committee on Commerce, Science, and Transportation*, 110<sup>TH</sup> CONG. (2007), <https://www.govinfo.gov/content/pkg/CHRG-110shrg76327/html/CHRG-110shrg76327.htm>.

<sup>38</sup> *Id.* at \*21.

<sup>39</sup> *Id.* at \*63.

These neutral physicians are financially rewarded for finding that retirees are not disabled. This inevitably leads to bias. The Complaint alleges that “financially-incentivized doctors were given additional cases if they denied more claims, with the goal of limiting payments to the players for whom the plan was designed.”<sup>40</sup> Because objective medical evidence is not required to support an opinion and there are no other procedures in place to ensure neutrality, such financial incentivization would be entirely possible.

There is also statistical evidence that supports the Complaint’s allegation that the physicians are financially incentivized to find that players are not disabled. From March 2019 to April 2020, physicians paid \$210,000 or more only diagnosed 4.5% of players they examined as totally and permanently disabled.<sup>41</sup> Physicians paid \$54,000 to \$60,000, in contrast, found total and permanent disability in 30% of the players they examined.<sup>42</sup> These numbers suggest that the less a physician diagnoses former players as disabled, the more the League pays him/her.

Additionally, 58% of NFL-hired physicians did not diagnose any former players as totally and permanently disabled from 2015 – 2020.<sup>43</sup> Furthermore, of the thousands of NFL retirees who have filed for disability benefits, only 37% have received the top level of disability compensation of \$265,000.<sup>44</sup>

Given the volume of applicants and the high rates of injury in the NFL, the low number of successful applicants for disability benefits is highly suspect. The Complaint alleges that these statistics indicate a correlation between the physicians’ salaries

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<sup>40</sup> Frank Pingue, *Ten Former Players Sue NFL’s Benefits Plan Over ‘Unscrupulous Tactics’*, THOMSON REUTERS (Feb. 9, 2023), <https://www.reuters.com/article/usa-nfl-disability-idCAKBN2UJ1I5>.

<sup>41</sup> Ben Morse, *10 Former NFL Players Sue League’s Disability Program, Alleging Board ‘Engaged in Repeated and Substantial Derelictions of Their Responsibilities’*, CNN (Feb. 9, 2023), <https://www.cnn.com/2023/02/09/sport/nfl-lawsuit-disability-claims-spt-intl/index.html>.

<sup>42</sup> *Id.*

<sup>43</sup> *Alford et al v. The NFL Player Disability & Survivor Benefit Plan et al*, 1:23-CV-00358, at \*69 (D. Md. Feb. 9, 2023).

<sup>44</sup> Jabari Young, *Damar Hamlin’s Story Shines A Light On Pro Football’s ‘Cruel’ Record On Disability Payments*, FORBES (Jan. 14, 2023), <https://www.forbes.com/sites/jabariyoung/2023/01/14/damar-hamlins-story-shines-a-light-on-pro-footballs-cruel-record-on-disability-payments/?sh=4e7378285eb2>.

and how often they diagnose players as totally and permanently disabled.<sup>45</sup>

Furthermore, some players reported that their experiences with these physicians indicated extremely biased behavior. Former Dallas Cowboys player Daryl Johnston stated during the Oversight of the NFL Retirement System hearing that the physicians he met while filing for disability under the Plan had no interest in actually examining his physical health.<sup>46</sup>

According to Johnston's testimony, the first physician he saw while trying to get benefits showed interest only in whether he was capable of holding another job. He did not review any of Johnston's medical records, nor did he consult with his trainer or previous surgeon.<sup>47</sup>

After Johnston appealed the first denial of his claim, another designated National Football League Players Association ("NFLPA") physician examined him. Johnston testified that his "claim was denied as [he] walked into the office."<sup>48</sup> The physician did not bother to examine or interview Johnston before denying his claim.<sup>49</sup>

The Complaint further alleges that there are no procedures in place within the Plan to ensure that NFL-compensated physicians remain neutral.<sup>50</sup> There are also no requirements within the Plan for preservation or monitoring of these physicians' findings.<sup>51</sup> As a result, if a physician is making decisions based on their salary rather than objective medical evidence, there are no records to prove it.

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<sup>45</sup> *Alford*, 1:23-CV-00358, at \*65-69.

<sup>46</sup> *Oversight of the NFL Retirement System*, U.S. SENATE COMM. ON COM., SCI., & TRANSP. (Sept. 18, 2007, 10:00 AM), <https://www.commerce.senate.gov/2007/9/oversight-of-the-nfl-retirement-system> (sharing the testimony of Fox News broadcaster and former Dallas Cowboys player, Daryl Johnston).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Alford*, 1:23-CV-00358 at \*14.

<sup>51</sup> *Id.* at \*15.



## II. OTHER CRITICISMS OF THE PLAN

The Complaint accuses the defendants of wrongfully denying benefits and abusing their discretion by unreasonably considering injuries individually rather than cumulatively. The former players also accuse the defendants of relying solely on the opinions of biased doctors in order to rarely award full disability benefits.<sup>52</sup>

The lawsuit further alleges that the defendants violated their duty of loyalty as fiduciaries to the Plan.<sup>53</sup> The former players argue that the defendants “acted as an adversary of participants rather than as a fiduciary” by knowingly and wrongfully denying disability benefits.<sup>54</sup> They did this by increasing the salaries of and thereby incentivizing NFL-paid physicians to not find diagnosed players as totally and permanently disabled.

Former players have criticized the NFL Disability Plan in the past for its complicated nature and drawn-out claims process. Some allege that the complicated nature is intentional, with the goal of discouraging former players to the point that they give up on seeking disability benefits. This allegation, combined with the NFL’s practice of rewarding physicians who do not make disability diagnoses, indicates that the NFL Disability Plan is intentionally and fraudulently avoiding fulfilling its obligations to retired players.

Former Minnesota Vikings offensive lineman Brent Boyd sought disability payments due to symptoms caused by multiple concussions during his six-year NFL career.<sup>55</sup> His experience with the disability claims process was so confusing and defeating that he summed up the disability program with an iconic phrase: “Delay, deny and hope we die.”<sup>56</sup>

The Texas district court judge who ordered that the NFL pay former running back Mike Cloud \$3.3 million in disability benefits slammed the retirement fund, stating that its denials of disability were “part of a larger strategy engineered to ensure that former

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<sup>52</sup> *Id.* at \*73.

<sup>53</sup> *Id.* at \*75.

<sup>54</sup> *Id.*

<sup>55</sup> Freeman, *supra* note 1.

<sup>56</sup> *Id.* (citing a statement made by a former Minnesota Vikings offensive lineman during a Congressional appearance in 2007 examining the impact of football and concussions).

NFL players suffering from the devastating effects of severe head trauma are not awarded.”<sup>57</sup> If true, then the NFL Disability Board has certainly violated the fiduciary duties required by federal law.<sup>58</sup>

The Complaint also argues that the defendants breached their fiduciary duties by misrepresenting to players that all physicians involved in disability claims decisions are neutral.<sup>59</sup> If these allegations are true, then the NFL is in direct violation of ERISA Section 502(a)(3).

The NFL has faced accusations of wrongfully denying benefits for almost 20 years. Mike Webster, a former NFL center, played for the League from 1974 to 1988.<sup>60</sup> In 2004, his estate won the first ever judgment against the plan in 2005 for wrongfully denying disability benefits.<sup>61</sup> The federal court hearing the Webster suit found that the NFL Retirement Board had “ignored the findings of every medical expert who had examined Webster, including its own expert.” The court also held that the Board’s decision to deny Webster disability benefits indicated “culpable conduct, if not bad faith.”<sup>62</sup>

Numerous other former players have brought lawsuits since Webster’s. Charles Dimry, a former NFL cornerback, brought one of these actions.<sup>63</sup> Dimry challenged the decision of the NFL Player Retirement Board to deny him total and permanent disability.<sup>64</sup>

He claimed that this decision violated ERISA, and the California federal judge presiding over the case agreed with him.<sup>65</sup> The judge found that the Board’s reason for the denial, a lack of objective medical evidence, was “illogical and implausible.”<sup>66</sup>

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<sup>57</sup> Young, *supra* note 44.

<sup>58</sup> 29 U.S.C. § 1104(a) (1982), *amended by* PL 117-328 (Dec. 29, 2022).

<sup>59</sup> Hobson, *supra* note 2.

<sup>60</sup> Brett Edwin LoVelle, “*Mortal (k)ombat in Cleats*”: An Examination of the Effectiveness of the National Football League’s Disability Plan and Its Impact on Retired Players, 36 PEPP. L. REV. 1101 (2009).

<sup>61</sup> Hobson, *supra* note 2.

<sup>62</sup> LoVelle, *supra* note 39, at 1127.

<sup>63</sup> Dimry v. Bert Bell/Pete Rozelle NFL Player Ret. Plan, 2022 WL 1786576 (N.D. Cal. 2022).

<sup>64</sup> *Id.* at \*1.

<sup>65</sup> Jacklyn Wille, *Retired NFL Cornerback Wins Disability Benefits from League Plan*, BLOOMBERG LAW (June 2, 2022, 8:00 AM), <https://news.bloomberglaw.com/employee-benefits/retired-nfl-cornerback-wins-disability-benefits-from-league-plan>.

<sup>66</sup> Dimry, 2022 WL 1786576 at \*3.

Dimry won his case, but it still took eight years following his application for him to get his benefits.<sup>67</sup> His attorney argued that this is the NFL's strategy: to fight and appeal cases for so long that players give up on their claims.<sup>68</sup>

Judges presiding over these lawsuits have also criticized the NFL Disability Plan. In 2017, after the NFL Plan cut off disability payments to retired defensive end Tyrone Keys, a federal judge ruled that the NFL Plan "cherry-picked" evidence to avoid its obligation to Keys.<sup>69</sup>

A year later in 2018, United States District Judge Kenneth Marra found that the Plan's decision to deny former offensive lineman, Darryl Ashmore, disability benefits because he failed to attend physical evaluations that the Plan itself cancelled "defied all reason and common sense."<sup>70</sup>

Time and time again, federal courts have found that the NFL Disability Plan was violating ERISA in denying disability benefits to former players. Former players are still suing the Plan in 2023, 19 years after Mike Webster's estate brought the first successful lawsuit against the plan. This indicates that the NFL is uninterested in reforming its system and a serious disregard for the well-being of its players.<sup>71</sup>

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<sup>67</sup> Will Hobson, *How the NFL Avoids Paying Disabled Players – With the Union's Help*, THE WASH. POST (Feb. 8, 2023, 2:33 PM), <https://www.washingtonpost.com/sports/2023/02/08/nfl-disability-players-union/>.

<sup>68</sup> Hobson, *supra* note 55 (quoting Charles Dimry's attorney, Terrence Coleman: "[The NFL's] strategy works. They fight and appeal and drag cases out for as long as possible, and many players just give up").

<sup>69</sup> *Id.*

<sup>70</sup> Cameron Miller, *Sports Law Development of the Week: Federal Judge Rules Former NFL Player Wrongly Denied Disability Benefits*, SPORTS LAWYERS ASS'N, <https://blog.sportslaw.org/posts/sports-law-development-of-the-week-federal-judge-rules-former-nfl-player-wrongly-denied-disability-benefits/> (last visited Mar. 8, 2023).

<sup>71</sup> See Hobson, *supra* note 2 (quoting Cy Smith, an attorney who has represented several former players in lawsuits against the NFL plan: "When a federal judge tells you multiple times you've broken the law, your response should be to change your ways and follow the law. Attacking the courts instead shows just how little the plan has learned...and how lightly they take their duties to NFL retirees.").

## II. HOW THE NFL CAN REDEEM ITSELF

*Hire Physicians That Are Actually Neutral*

The first step that the NFL should take towards correcting its biased and unlawful disability claims process is hiring neutral physicians. The NFL only refers to its hired physicians as neutral because of the selection process.

The NFL needs to take measures to ensure that these physicians are also neutral in their practice and examination of former players. The first step should be establishing uniform compensation for all NFL Disability Plan physicians. This is the best way to guarantee that there is no correlation between how much a physician makes and the rates at which he/she diagnoses retirees as disabled.

There should be no variation whatsoever in physicians' compensation. Even if one physician examines significantly more patients than others, the compensation should remain the same. This will prevent the NFL from paying a physician more for finding that retirees are not disabled, and then claiming that this additional compensation is based solely on the number of patients seen.

Additionally, rather than having pre-selected physicians on the payroll, NFL-compensated physicians could be designated on a case-by-case basis by a neutral committee consisting of equal numbers of medical experts selected by the NFL and NFLPA, along with a neutral, tie-breaking member.<sup>72</sup>

This reform would require the committee to consider the players' preference for the physician. This would allow players to personally schedule examinations with physicians close to their homes, making the process much easier and more efficient.<sup>73</sup> The

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<sup>72</sup> See Glenn Cohen, Holly Fernandez Lynch, & Christopher R. Deubert, *A Proposal to Address NFL Club Doctors' Conflicts of Interest and to Promote Player Trust*, NAT'L LIBR. OF MED. (Nov. 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5215412/> (explaining that a neutral committee could be responsible for selecting club doctors, thereby avoiding any threat of bias).

<sup>73</sup> See Hobson, *supra* note 55 (explaining that former offensive tackle Darryl Ashmore requested to be seen by doctors close to his south Florida home so that he could avoid air travel, which was "excruciating" due to his arthritis and herniated disks. The NFL Plan denied his requests and scheduled him to fly to Atlanta).

current system of flying former players across the country to see doctors under contract with the NFL plan is unnecessary and burdensome.<sup>74</sup> The Plan should only require such travel in cases where a player's requested doctor is not an expert in the relevant field.

Additionally, the reformed Plan should require the new committee to disclose its reasons for selecting a physician, and why it did or did not approve of a player's requested physician. Former players should also have access to all medical records, opinions, etc. used to reach the decision of a denial.

Next, the NFL and Disability Board should rewrite the terms of the Plan to ensure that the NFL and Disability Board take affirmative steps toward ensuring that all opinions given by physicians are free from bias and based on objective medical evidence. This could include subjecting physician compensation and rate of denials to periodic reviews or audits to ensure that physicians are not giving biased opinions.<sup>75</sup>

Lastly, the Plan currently provides no penalties "for inaccurate or inadequate decision-making by Plan-declared 'Neutral Physicians.'"<sup>76</sup> The reformed Plan would impose penalties on both the physicians and any committee members who conspire together to give biased opinions and denials. This will further incentivize physicians to make objective decisions.

### *New Claims Processes and Board Members*

Former players and their families have accused the NFL Disability Plan of wrongfully denying benefits many times in the last decade.<sup>77</sup> In the last fifteen years alone, eight players successfully sued the plan.<sup>78</sup> As a result, the players likely have a deep mistrust of the Board that no number of rewritten procedures can mitigate.

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<sup>74</sup> Hobson, *supra* note 55 (explaining that the disability process "usually starts with medical evaluations by doctors under contract with the NFL plan").

<sup>75</sup> See Cohen, Lynch, & Deubert, *supra* note 72.

<sup>76</sup> Alford et al v. The NFL Player Disability & Survivor Benefit Plan et al, 1:23-CV-00358, at \*15 (D. Md. Feb. 9, 2023).

<sup>77</sup> *Id.* at \*6-9 (listing twelve cases wherein the NFL Disability Board was sued for its denial of former players' disability claims).

<sup>78</sup> Hobson, *supra* note 55.

The first step the NFL should take in reforming its Disability Plan, therefore, is removing and replacing all current members of the Disability Board. The NFL should allow Commissioner Roger Goodell to remain chairman of the Board for the rest of his term, since he is a nonvoting member.<sup>79</sup>

The NFL will need to appoint new Board members after the current Board is swept. Currently, retirees lack representation on the Board.<sup>80</sup> Adding designated representatives for former players to the Board would remedy this issue. There are currently three NFL-appointed Board members and three appointed by the NFLPA.<sup>81</sup> Adding three representatives appointed by the former players would balance the Board and give players an equal voice in the claims process.

Promotion of transparency in the disability claims process is also imperative. Appointing representatives selected by former players to the Board is the first step.

Another step towards transparency is heightened disclosure requirements for the Initial Claims Committee and the Disability Board.<sup>82</sup> When the Committee and/or Board issues a denial, it does not automatically have to disclose what materials it used to reaching a decision.<sup>83</sup> This makes it harder for retirees to understand and push back against the decision.

Rewriting the Plan so that all decisions made by the Committee and Board come with an automatic disclosure requirement is the next step in reforming the disability claims process. This means that the Committee and Board must disclose to the retirees all materials it reviewed in deciding to deny a claim. Furthermore, the Disability Board needs to allow retirees and their attorneys to sit in on the appeals hearing wherein the Board decides the claim.<sup>84</sup>

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<sup>79</sup> Pingue, *supra* note 40.

<sup>80</sup> LoVellette, *supra* note 60, at 1150.

<sup>81</sup> *Id.* at 1153.

<sup>82</sup> *Id.*

<sup>83</sup> See *Alford et al v. The NFL Player Disability & Survivor Benefit Plan et al*, 1:23-CV-00358, at \*30 (D. Md. Feb. 9, 2023). (stating that after denying Willis McGahee's application for disability benefits in 2016, the Disability Committee did not identify the materials it had considered).

<sup>84</sup> LoVellette, *supra* note 60, at 1154.

The next step is rewriting the terms of the Plan to make the process more efficient and less of an obstacle course for players.<sup>85</sup> This means removing the restrictive language currently used in the Plan.<sup>86</sup> For example, the Plan's current phraseology gives the Board "full discretion" over the disposition of disability claims.<sup>87</sup>

This narrow language makes it nearly impossible to overturn a decision of the Disability Board in federal court.<sup>88</sup> It also makes it easy for the Board to deny claims without any justification. Removing language that gives the Board unilateral power over the claims process will help ensure that the Board decides claims in a fair manner.

### III. WHY THE NFL NEEDS TO CHANGE ITS SYSTEM

#### *A. Avoid Consequences of Violating Federal Law*

The actions of the NFL could result in a wide array of consequences for all of those involved in the disability claims process. These include punishments for violation of federal law and lawsuits against the board members individually.

ERISA's civil enforcement section, codified in 29 U.S.C. § 1132, gives all former players the right to bring a civil action against the NFL Disability Plan. The statute states that:

*A civil action may be brought –*

*(1) by a participant or beneficiary—*

*(A) for the relief provided for in subsection (c) of this section, or*

*(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.*

The statute further allows benefit plan participants to enjoin any act that violates ERISA or the terms of the plan, and obtain

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<sup>85</sup> See *Cloud v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, No. 3:20-CV-1277, 2022 WL 2237451, at 1 (N.D. Tex. Jul. 18, 2022) (describing the disability claims process as a "byzantine process" that players are forced to navigate, only to be denied later).

<sup>86</sup> LoVellette, *supra* note 60, at 1150.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

other appropriate equitable relief to redress a violation or enforce ERISA rules or the terms of the plan.<sup>89</sup>

The above statute gives all NFL retirees the statutory right to sue the NFL Disability Plan to recover denied disability claims. This, in turn, means that courts are unlikely to dismiss complaints like the one brought in 2023, as long as the procedural requirements are met.

The entitlement to relief granted in the ERISA statute, along with the numerous cases in which courts have criticized the NFL Disability Plan, encourage retired players to bring their claims for disability benefits. Even when these lawsuits are not successful, they still have consequences for the NFL.

These civil actions against the NFL Disability Plan and Board for the wrongful denial of benefits have major financial implications for the NFL. The NFL has already spent millions in attorneys' fees and settlements on these disputes, and it could be facing millions more if former players continue to bring these lawsuits.<sup>90</sup> Even when the NFL wins against former players, it still incurs attorney's fees. The only way that these expenses can be avoided entirely is if the NFL reforms its system so that former players get the benefits, they are entitled to through the claims process.

The outcome of the pending Complaint ~~specifically~~ could also have huge consequences for the NFL. The Complaint seeks class action status.<sup>91</sup> The "Class" the Complaint wants to represent is "[a]ll participants in the Plan who filed an application for one or

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<sup>89</sup> 29 U.S.C. § 1132(a)(3).

<sup>90</sup> See Doreen McCallister, *NFL To Demand Cowboys Owner Reimburse Legal Fees, Reports Say*, NPR (Feb. 27, 2018, 6:01 AM), <https://www.npr.org/sections/thetwo-way/2018/02/27/589050864/nfl-to-demand-cowboys-owner-reimburse-legal-fees-reports-say> (stating that the NFL was demanding Dallas Cowboys owner Jerry Jones reimburse the League for "money spent on a seven-figure legal bill" after a legal dispute between Jones and the NFL); see also Associated Press, *Judge Approves Fix to Stem Race Bias in NFL Concussion Deal*, NFL (Mar. 4, 2022, 7:03 PM), <https://www.nfl.com/news/judge-approves-fix-to-stem-race-bias-in-nfl-concussion-deal>; see also Tim Daniels, *Deflategate Legal Fees Reportedly Could Cost Nearly \$20 Million*, BLEACHER REP. (Mar. 2, 2016), <https://bleacherreport.com/articles/2621285-deflategate-legal-fees-reportedly-could-cost-nearly-20-million>; see also Hobson, *supra* note 55 (explaining that the Groom law firm made \$8.5 in revenue from defending the NFL plan).

<sup>91</sup> See *Alford et al v. The NFL Player Disability & Survivor Benefit Plan et al*, 1:23-CV-00358, at \*1 (D. Md. Feb. 9, 2023).



more categories of disability benefits under the Plan on or after August 1, 1970.”<sup>92</sup>

There are also three subclasses named in the Complaint. These are former players who applied for active football benefits and/or line-of-duty benefits on or after August 1, 1970.<sup>93</sup> The last subclass is former players who applied for neurocognitive disability benefits on or after April 1, 2012.<sup>94</sup>

The members of this Class and the other Subclasses named in the Complaint are numerous, estimated to be in the hundreds.<sup>95</sup> If the Complaint goes to trial and the court rules in favor of the players, the NFL could be looking at a massive payout.<sup>96</sup> The NFL may be able to settle the dispute, but this won’t prevent other large-scale class actions in the future. The best way for the NFL to protect itself against such suits is to hire neutral physicians and rewrite the terms of the Plan to align with ERISA.

Furthermore, a breach of the fiduciary duties required by ERISA will result in personal liability for the breaching fiduciary.<sup>97</sup> The fiduciary will be personally liable to pay back to the plan any losses resulting from the breach and give back to the plan any profits made by the use of plan assets.<sup>98</sup>

This means that, if found to have violated their fiduciary duties, the individual Board Members and other fiduciaries of the plan will have to pay for benefits out of their own pockets. The breaching fiduciary is also subject to any equitable or remedial relief deemed appropriate by the court, including removal.<sup>99</sup>

There could also be legal consequences for the NFL outside the boundaries of ERISA. For example, the 2023 Complaint brought by the ten former players accuses the Board fiduciaries of “bad faith contract misinterpretations.”<sup>100</sup>

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<sup>92</sup> *Id.* at 69.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 70.

<sup>96</sup> *Id.* at 82. The Complaint seeks a “judgment awarding Plaintiffs and Class members monetary relief sufficient to place them in the same position in which they would have been in if Defendants had granted and paid them the full number of benefits that they deserved, in accordance with the plain terms of the Plan.” *Id.*

<sup>97</sup> 29 U.S.C. § 1109(a).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See Alford*, 1:23-CV-00358, at \*3.

Every contract has an implied promise of good faith and fair dealing between the parties in its execution and performance.<sup>101</sup> Violation of the duty of good faith and fair dealing constitutes a breach of contract.<sup>102</sup>

As a result, if the District Court for the District of Maryland finds that the NFL Disability Plan, the Disability Board, and the other defendants named in the suit did engage in bad faith by denying the players disability benefits, then these defendants also impliedly committed a breach of contract. The remedies for breach of contract are damages, specific performance, and restitution.<sup>103</sup>

This means that a court could order the NFL to pay additional damages in addition to the full amount of disability payments sought by a former player who sues it. These additional damages would be punitive damages.<sup>104</sup> Courts only award punitive damages in breach of contract cases where fraud occurred, or when the breach rises to the level of an independent tort.<sup>105</sup>

Such cases are rare, but not impossible. If courts find that the NFL has committed fraud by paying physicians to find that players are not disabled, then this could potentially be fraudulent behavior that deserves an award of punitive damages.

### *B. The Sacrifices of the Players*

The systematic and erroneous denials of disability benefits by the NFL plan have real-life harms on former players. For instance, the NFL reported that regular-season concussions increased 18% in 2022.<sup>106</sup> A 2005 clinical study found that retired players who sustained three or more concussions in their NFL career were five times as likely to have a mild cognitive impairment (MCI) diagnosis compared to other NFL retirees who never suffered a concussion.<sup>107</sup>

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<sup>101</sup> 23 WILLISTON ON CONTRACTS, § 63:22, (4<sup>th</sup> ed., May 2022 update).

<sup>102</sup> *Id.*

<sup>103</sup> Chambliss, Bahner & Crawford v. Luther, 531 S.W.2d 108, 110 (1975) (citing CORBIN ON CONTRACTS, § 1102 (1964 ed.)).

<sup>104</sup> JEFFREY JACKSON ET AL., 7 ENCYCLOPEDIA OF MISSISSIPPI LAW, § 64:101 (2d ed., 2022 update).

<sup>105</sup> *Id.*

<sup>106</sup> Kevin Seifert, *NFL Says Regular-Season Concussions Increased 18% in 2022*, ESPN (Feb. 3, 2023), [https://www.espn.com/nfl/story/\\_/id/35582897/nfl-says-regular-season-concussions-increased-18-2022](https://www.espn.com/nfl/story/_/id/35582897/nfl-says-regular-season-concussions-increased-18-2022).

Doctors and researchers have also linked concussions to depression and early onset dementia.<sup>108</sup> Additionally, players who suffered multiple concussions during their NFL careers have been shown to suffer from “sharply deteriorated cognitive function and psychiatric symptoms such as paranoia, panic attacks, and major depression.”<sup>109</sup> Concussions have also been linked to chronic traumatic encephalopathy (CTE).<sup>110</sup>

CTE is a degenerative brain disease that can lead to cognitive, behavioral, mood and motor changes, including memory loss, impulsive behavior, aggression, substance abuse, and suicidal thoughts.<sup>111</sup> The effects of this disease are life-altering and require long-term care.

The high-impact nature of football can also cause non-neurological harm to players. Some of the other most common ailments affecting professional football players are ACL tears, arthritis, heart conditions, musculoskeletal injuries, pain, and inflammation.<sup>112</sup>

Left untreated, these mental and physical conditions have devastating effects on NFL retirees. One example of the tragic impact of denied disability claims is Former Pittsburgh Steeler and Kansas City Chief Mike Webster.

Webster was the first football player diagnosed with CTE.<sup>113</sup> In an interview, Webster’s wife said that he started exhibiting lethargy and memory loss, along with a new explosive temper.<sup>114</sup>

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<sup>107</sup> Kevin M. Guskiewicz et al., *Association Between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players*, 57 NEUROSURGERY 719, 722 (2005).

<sup>108</sup> Joseph M. Hanna, *Concussions May Prove to Be a Major Headache for the NFL Players’ Class Action Suit Places a Bounty on the League*, 84 N.Y. STATE BAR J. 10, 11 (2012).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Chronic Traumatic Encephalopathy*, THE MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/chronic-traumatic-encephalopathy/symptoms-causes/syc-20370921> (last visited Mar. 8, 2023).

<sup>112</sup> *Football and the Brain: Lifestyle Impacts Health*, HARV. MED. SCH. (2017), <https://hms.harvard.edu/news-events/publications-archive/brain/football-brain-lifestyle-impacts-health>.

<sup>113</sup> Pam Webster, *The Frontline Interviews: Mike Webster’s Legacy*, PBS, <https://www.pbs.org/wgbh/pages/frontline/oral-history/league-of-denial/mike-webster-s-legacy/> (last visited Apr. 5, 2024).

<sup>114</sup> *Id.*

He also started showing physical symptoms, such as extreme arthritis in his hands and loss of teeth.<sup>115</sup>

Webster also started experiencing financial difficulties. In the final years of his life, Webster even experienced homelessness.<sup>116</sup> His wife had to take on a waitressing job to support the family, and many of the checks he gave her to provide for their children would bounce for lack of funds.<sup>117</sup>

Webster applied for disability benefits from the NFL, but he and his family met much resistance from the NFL.<sup>118</sup> In 2005, a court awarded Webster's family disability benefits of between \$1.5 and \$2 million dollars after a seven-year battle.<sup>119</sup>

Unfortunately, Webster passed away three years before receiving his benefits award.<sup>120</sup> Webster likely would have been able to get the help he needed and had a higher quality of life during his last years if he had received his benefits while he was still alive.

Mike Webster's tragic story serves as a warning to current players who may need disability benefits later. For example, Miami Dolphins quarterback Tua Tagovailoa has suffered repeated concussions, one of which marked one of the major health scares of the 2022 season.<sup>121</sup>

These repeated blows to the head, along with any future injuries, could lead to the long-term health effects described above. As a result, Tagovailoa may need disability payments from the NFL after he retires.

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<sup>115</sup> *Id.*

<sup>116</sup> Damon Hack, *Former Steeler's Family Wins Disability Ruling*, THE N.Y. TIMES (Dec. 14, 2006), <https://www.nytimes.com/2006/12/14/sports/football/former-steelers-family-wins-disability-ruling.html?searchResultPosition=1>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (quoting Garrett Webster, son of Mike Webster, saying "[i]t seemed like we battled every – the NFL, even the players' union, which should be the first ones to support our case").

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*, see also Adam Augustyn, *Mike Webster American Football Player*, ENCYCLOPEDIA BRITANNICA (Mar. 14, 2023), <https://www.britannica.com/biography/Mike-Webster> (stating that Mike Webster's death was on September 24, 2002).

<sup>121</sup> Elizabeth Merrill & Marcel Louis-Jacques, *Why Dolphins QB Tua Tagovailoa Now Must Face Questions About Concussions and His Future*, ESPN (Jan. 11, 2023), [https://www.espn.com/nfl/story/\\_/id/35413187/why-dolphins-qb-tua-tagovailoa-now-face-questions-concussions-future](https://www.espn.com/nfl/story/_/id/35413187/why-dolphins-qb-tua-tagovailoa-now-face-questions-concussions-future) (reporting that "everything eerily stopped" while Tua laid on the ground after being "violently flung to the turf").

If there is no reformation of the Disability Plan, then the NFL leave him to deal with his health problems, and all resulting medical bills, alone. No retiree should suffer the same fate as Mike Webster when the NFL Disability Plan has billions in assets.<sup>122</sup>

Of course, the fact that football is a dangerous sport is no secret. Players are injured regularly due to the high-impact, high-speed, and brute force elements of the game.<sup>123</sup> The fact that professional players accept the risk of physical harm and injury within the general customs of the game every time they play is undisputed.<sup>124</sup>

Some may argue that the generous compensation paid to NFL players during their careers should be enough to provide them with medical care after retirement.<sup>125</sup> Yet this argument fails in multiple ways.

First, NFL careers are notoriously short, usually three and a half seasons.<sup>126</sup> If a player does not have the foresight to properly save and limit spending habits, or prepare for a second career, then he can find himself in financial distress quickly.<sup>127</sup> Medical bills only exacerbate this financial predicament.

Given the devastating injuries and long-term harms that can result from these short careers, a pension plan that provides financial security following retirement is necessary.<sup>128</sup> This is what the NFL promises players when they begin their careers, and they deserve to receive what they were promised by the League.

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<sup>122</sup> See *Alford et al v. The NFL Player Disability & Survivor Benefit Plan et al*, 1:23-CV-00358, at \*5 (D. Md. Feb. 9, 2023).

<sup>123</sup> UNIV. OF ROCH., *supra* note 7.

<sup>124</sup> *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520-521 (10<sup>th</sup> Cir. 1979).

<sup>125</sup> Charlotte Edmonds, *Here's How Much Money the Average NFL Player Makes in 2022*, NBC SPORTS (Jul. 29, 2022), <https://www.nbcsports.com/philadelphia/eagles/2022-nfl-salaries-how-average-players-pay-compares-stars> (reporting that the average NFL player salary in 2022 was \$2.7 million).

<sup>126</sup> LoVellette, *supra* note 60.

<sup>127</sup> Leigh Steinberg, *5 Reasons Why 80% Of Retired NFL Players Go Broke*, FORBES (Feb. 9, 2015, 3:51 PM), <https://www.forbes.com/sites/leighsteinberg/2015/02/09/5-reasons-why-80-of-retired-nfl-players-go-broke/?sh=7eb79cc978cc>.

<sup>128</sup> LoVellette, *supra* note 60.

## IV. CONCLUSION

This Article sought to achieve three main purposes. First, it examined current litigation from former players against the National Football League, alleging that the League is unlawfully denying disability benefits to former players. Next, this Article explained the federal law that the League is allegedly violating. This Article then proposed ways in which the National Football League could reform its system to no longer violate federal law. Lastly, this Article discussed some of the other reasons why the National Football League may want to reform its current system of evaluating disability claims.

It is clear from the amount of litigation brought against the NFL Disability Plan that it is broken, if not unlawful.<sup>129</sup> Courts have repeatedly found that the NFL plan was in violation of ERISA and arbitrarily denied benefits, but there has been no significant change. This is a sign that the League does not have any regard for federal law or the well-being of former players.

The National Football League is an organization worth billions of dollars, yet former players oftentimes do not get a dime from the organization in disability payments.<sup>130</sup> These men often have crippling, long-term injuries as a result of their football careers. They deserve the disability benefits promised to them by the NFL. To avoid further legal consequences and a negative image, the NFL needs to reform its disability plan and fairly compensate disabled players.

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<sup>129</sup> Hobson, *supra* note 55 (quoting U.S. District Judge Karen Gren Scholer: “[b]ased on the mountain of evidence set forth in this trial, it is clear to me that the [NFL disability] plan is broke[n] and it’s time to fix it”).

<sup>130</sup> Terence Moore, *NFL Revenue (\$18 Billion) Keeps Going Up, But Quality of Play (3-3 Teams) Keeps Getting Sacked*, FORBES (Oct. 18, 2022, 6:10 PM), <https://www.forbes.com/sites/terencemoore/2022/10/18/nfl-revenue-18-billion-keeps-going-up-but-quality-of-play-3-3-teams-keeps-getting-sacked/?sh=1d49a5f16816>.