Tackling the Issues: The History of the National Football League's 2011 Collective Bargaining Agreement and What it Means for the Future of the Sport

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INTRODUCTION

Sports are compelling, unpredictable, and have produced some of the most dramatic moments many of us have seen in our lifetimes. They fulfill the fantasies in our minds and make us feel as if we are part of something bigger. Sports give us a reason to have pride in our cities and states. For these reasons, they are easy to love. However, every few years professional sports leagues experience work stoppages, reminding fans that these organizations are in fact businesses concerned with profit margins and bottom lines. Although sports are popular for reasons other than collective bargaining and revenue sharing, when the dust settles on these issues and others, fans go back to being fans, no matter how greedy they perceive the players and the owners to be. Still, issues of collective bargaining and revenue sharing, among others, are of paramount importance because they have helped transform professional sports into the phenomenon they are today.

This article will examine the National Football League's 2011 collective bargaining agreement (the "CBA"). Part A of the article will discuss the history of collective bargaining in the NFL. Part B will discuss some of the major changes implemented by the 2011 CBA, including the establishment of the Rookie wage scale and the Legacy Benefit for retired players, as well as the adjustments made to revenue sharing, the salary cap, and team spending. Finally, Part C and Part D will use case studies to show how the 2011 CBA addressed the concerns of former players and examine potential gaps that remain between prior and current CBAs.

I. The History of Labor Relations in the National Football League

In 1935, Congress passed the National Labor Relations Act (the "Act").[1] The Act created the National Labor Relations Board ("NLRB"), which had the authority to determine, *inter alia*, who in the workplace is to be considered employees or employers.[2] In the early days of professional sports, owners

[1] Eva M. Panchyshyn, *Medical Resident Unionization: Collective Bargaining by Non-employees for Better Patient Care*, 9 ALB. L.J. SCI. & TECH. 111, 114-15 (1998).
[2] *Id.; see also*, 29 U.S.C. 153 (outlining the creation of the board and discussing the powers delegated to it).

insisted that players were not employees and thus were not protected under the Act.[3] However, the National Labor Relations Board decided otherwise, leading to many labor controversies between players and owners in professional sports leagues, including the National Football League (the "NFL").[4] In 1956, with the help of Creighton Miller, the General Manager for the Cleveland Browns, the National Football League Player's Association (the "NFLPA") was born.[5] Miller's background as an attorney and former college football player appealed to the players, who were just looking to have clean uniforms and greater assistance with expenses.[6] At first, the owners were entirely disinclined to negotiate with the NFLPA.[7] But in 1957, the Supreme Court decided *Radovich v. NFL*,[8] which held that baseball was the only sport exempt from anti-trust laws, meaning that the NFL was vulnerable to anti-trust actions for unfair labor practices.[9] The Court refused to extend the anti-trust exemption given to professional baseball to professional football because baseball has long relied on the exemption and Congress allowed the exemption to stand.[10] The holding in *Radovich* forced NFL Commissioner Bert Bell to listen to and address the concerns of the players. That same year, the NFLPA submitted their first proposal to Commissioner Bert Bell. The proposal included a minimum salary of $5,000, a uniform per diem pay for players, a rule requiring clubs to pay for players' equipment and, most importantly, a provision for the continued payment of salary to an injured player.[11] The League acquiesced and the first agreement was made.[12]

In the 1960s, the creation of the American Football League (the "AFL") led some players to try and use the NFL-AFL competition as leverage in collective bargaining. However, when the AFL and NFL merged in 1966, the balance of power shifted in favor of the owners because the NFLPA only represented players from 16 out of the 26 teams in the league.[13] The owners turned the NFLPA players and the unrepresented players against one another, and the result was that the NFLPA did not receive the best deal for the players when the first CBA was agreed to in 1968.[14] Conditions improved slightly when the players all joined together for the CBA of 1970 for increased benefits and player mobility, but the four-year deal still favored the owners in that, Pete Rozelle, the NFL Commissioner at that time, could award equal compensation to a team when it lost a player to another team.[15] After the 1970 CBA expired, the NFLPA attempted to resolve lingering problems through judicial means, a strategy, which was rather successful since the 1977 CBA, granted NFL players free agency for the first time.[16] Despite this victory,

[3] WILLIAM B. GOULD IV, BARGAINING WITH BASEBALL: LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL 9 (2011).
[4] *Id*.
[5] NFLPA History, WWW.NFLPLAYERS.COM, https://www.nflplayers.com/About-us/History/ (last visited Dec. 22, 2011).
[6] Richard Goldstein, *Creighton Miller, 79, Lawyer and Notre Dame Halfback*, THE NEW YORK TIMES, May 29, 2002.
[7] Adam B. Marks, *Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members By Not Fighting the Enactment of the Personal Conduct Policy*, 40 CONN. L. REV. 1581, 1587 (2008)
[8] Radovich v. NFL, 352 U.S. 445, 451 (1957) (*Radovich* came about when NFL players alleged that the owners conspired to monopolize and control professional football through actions such as prohibiting a player from signing with a new team without the consent of his prior team).
[9] *See* Marks, *supra* note 7
[10] *Radovich*, 352 U.S. at 451
[11] *See* NLFPA History, *supra* note 5.
[12] *Id*.
[13] *Id*.
[14] *Id*. (stating that the players represented by the NFLPA were forced to accept the terms of the agreement because the players on the 10 teams not represented by the NFLPA had already accepted the owners' terms).
[15] *Id*.
[16] *Id.*; *see also*, Mackey v. National Football League, 543 F.2d 606 (abolishing the Commissioner's authority to award a team equal compensation when it lost a player to another team).

provisions in the 1977 CBA forced teams to give up draft picks for signing another team's player, which had the effect of dissuading owners from pursuing free agents.[17] The 1982 CBA did not improve the situation, although the players did negotiate for a larger portion of the revenues.[18] The tensions between the players and owners came to a head when the 1982 CBA expired in 1987. The 1987 labor dispute that followed was arguably the most contentious in the history of the National Football League.

1. The 1987 Labor Dispute and Eventual Free Agency

On September 22, 1987, the NFL players went on strike.[19] The League, however, refused to cease operations, and instead hired replacement players to take the place of the professionals.[20] Fans reacted harshly, with attendance dropping by approximately 75%.[21] Unfortunately for the players, owners' profits actually increased during the strike due primarily to two factors.[22] First, with games available for television production, the revenue from the League's television contracts was still accruing.[23] Second, the low wages paid to the replacement players, when combined with the television revenue, ended up benefiting the owners.[24] The striking players, on the other hand, were losing money fast, which eventually forced them to acquiesce and end the strike.[25] While the short-term projection was that the owners achieved a crushing victory over the players, the long-term reality was that the players actually benefited from the labor crisis in that it opened the door for the players to use the judicial system.

The NFLPA disbanded after failing to achieve any of their goals through the union in 1987, which created the opportunity to sue the NFL in anti-trust, as the players no longer had a collective bargaining representative.[26] Between 1988 and 1992, the players sued the League numerous times, emerging victorious more often than not.[27] One of the most important holdings from these judicial actions came from *McNeil v. National Football League*. After hearing testimony for over two months from both parties, a Minnesota jury found that the rules regarding free agency imposed an unlawful restriction on a player's right to have teams bid for his services.[28] Now that the players had some leverage, the owners were willing to come back to the table, and the two sides eventually agreed to a new CBA in 1993.[29] The players were granted full free agency and agreed to a "hard salary cap" in exchange.[30] This CBA was renewed three times with very little confrontation in 1998, 2002, and 2006.[31] Finally, on March 11, 2011,

[17] *Id*.
[18] *Id*. (noting that the owners would still have to give players, draft picks, and/or cash as compensation for signing a new player).
[19] *Picket Lines and Replacement Players: The 1987 NFL Strike,* WWW.SCHMOOP.COM, http://www.shmoop.com/nfl-history/labor.html (last visited Dec. 23, 2011).
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Picket Lines and Replacement Players: The 1987 NFL Strike, supra* note 19 (discussing how the players failed to win true free agency as well as a guaranteed share in the revenues).
[26] *Id*.
[27] *Id*.
[28] *See*, McNeil v. National Football League, 790 F. Supp. 871 (D. Minn. 1992).
[29] *Id*.
[30] *Id.*; *see also* David Shapiro, *Salary Cap 101: The Basics,* WWW.PUCKPEOSPECTUS.COM, http://www.puckprospectus. com/article.php?articleid=200 (last visited Dec. 23, 2011) (defining a "hard cap" as an amount that a team can spend on players that cannot be exceeded for any reason).
[31] JOHN VROOMAN, THE FOOTBALL PLAYERS' LABOR Market 2 (2011).

the NFL owners locked out the players after the parties were unable to reach an agreement to replace the 2006 CBA.[32]

The main issues of contention surrounding the 2011 negotiations included revenue sharing, the salary cap, a Rookie wage scale, player safety and retired player benefits.[33] The owners wanted to rollback the salary cap by approximately 18%, which the players vehemently opposed as against their pecuniary interest.[34] The two parties also disagreed over how to share the $9 billion in revenue at stake.[35] Under the 2006 CBA, the owners took approximately $1 billion off the top to cover operating costs, payments to owners, and other miscellaneous expenses. 790 F. Supp. 871 (D. Minn. 1992).[36] The players then received 59.6% of the remaining $8 billion.[37] In the new agreement, the owners sought to take $2 billion off the top and leave the players the same percentage of a smaller revenue pool.[38] By taking more money up front, the owners essentially wanted the players to assume more of the financial risk.[39] The players, on the other hand, did not want to decrease their share because they thought this did not reflect the fact that they were putting their bodies at risk every week.[40] Interestingly, both sides agreed that rookie salaries were getting out of hand, but they disagreed on how to resolve this issue, as the players wanted to be careful not to harm their earning potential.[41] The parties were finally able to finalize a new deal on July 25, 2011; the 2011 CBA featured some major differences from the 2006 agreement.

II. The 2011 NFL CBA and the Some Major Differences from the 2006 AGREEMENT

1. The Rookie Compensation Clause

There were many provisions in the 2006 CBA concerning Rookie salaries, but these changed considerably after the new CBA was concluded on July 25, 2011. For example, under the 2006 CBA, a player who signed a Rookie Contract could not have their salary increased by more than 25% each year.[42] There was also a clause stating that a player was free to renegotiate his rookie deal the day after the Super Bowl in his second year.[43] However, Article XVII Section 4(j) specifically stated that "[n]othing in this Agreement is intended to or shall be construed to mean that any Rookie's Salary is predetermined by any Allocation or Formula Allotment."[44] The 2006 CBA did provide for a Rookie salary allocation for each team, however, that formula used to calculate that allocation was not to be disclosed to any team, player, or the public.[45]

[32] *Id*.
[33] Will Brinson, 2011 *NFL Lockout Issues*, WWW.CBSSPORTS.COM, http://www.cbssports.com/mcc/blogs/entry/22475988/29591032 (last visited Dec. 23, 2011).
[34] *Id*.
[35] *Id*.
[36] Adam Oestmann, *NFL Lockout for Dummies: The 2011 Labor Dispute Explained*, WWW.CHICAGONOW.COM, .http://www.chicagonow.com/chicago-bears-huddle/2011/03/nfl-lockout-for-dummies-the-2011-labor-dispute-explained/ (last visited Dec. 24, 2011).
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id* (explaining how this risk also relates to the discussion of retirement benefits).
[41] *Id*.
[42] NFL Collective Bargaining Agreement 2006-2012, art. XVII, § 4(e) [hereinafter CBA].
[43] NFL CBA 2006-2012 art. XVII § 4(i).
[44] NFL CBA 2006-2012 art. XVII § 4(j).
[45] NFL CBA 2006-2012 art. XVII § 4(k).

However, the limitations contained in the 2006 CBA had little effect in curbing the enormous salaries paid to Rookies drafted in the first round of the NFL Draft[46], resulting in contracts that many teams surely regretted.[47] For example, after releasing former overall number one draft choice Jamarcus Russell in 2011 (whom the Raiders signed for $61 million), Raiders owner Al Davis was quoted as saying, " . . . (JaMarcus Russell is) a good person, but he's got personal problems, and I decided that it was time that we were not going to fight it anymore . . . . Anytime you lose a first-round draft choice it hurts. But it's over." [48] When negotiations over for the new CBA began, both the players and the owners agreed that Rookie salaries needed to be restricted.[49] This would serve the two-prong purpose of saving owners from bad contracts and providing more money to be allocated towards veteran players in free agency and the benefits of retired players.[50] Therefore, the conflict between the owners and the NFLPA was more about where to set the ceiling on rookie wages. The owners wanted to spend no more than $840 million on rookie salaries, while the players were asking $884 million;[51] the parties settled on $874 million.[52]

Article 7 of the 2011 CBA, entitled "Rookie Compensation and Rookie Compensation Pool," sets forth a detailed system for paying rookies that is unprecedented in professional football.[53] Under the new agreement, rookie salaries were capped for the first time. Article 7, Section 2(a) states that the Total Rookie Compensation Pool for the 2011 NFL season shall be $874 million.[54] In other words, the total amount of every rookie's contract, not just the amount earnable in the first year, cannot exceed $874 million annually. The "Year-One" rookie compensation pool cannot exceed $159 million every year.[55] This means that the total salary earnable in each rookie's first year combined cannot be more than $159 million.[56] Additionally, Section 2(a) provides that these two numbers will increase or decrease with the change in the salary cap from year to year.[57] The new CBA also limits rookie contract lengths to four years - with a club option for a fifth in the player is drafted in the first round - and three years for undrafted rookies.[58] In the 2006 CBA, rookie contracts could keep a player on one team for up to six

[46] *See*, Kevin Bonsor, *How the NFL Draft Works*, WWW.ENTERTAINMENT.HOWSTUFFWORKS.COM, (explaining how each spring, NFL teams pick from a pool of college football players who desire to play professionally) (last visited July 3, 2012).
[47] *See*, *The Most Disastrous Rookie Contracts in NFL History,* WWW.FORBES.COM , (Sep. 9, 2011) (listing the rookie contracts of eight high-salaried players that ended up having sub-par careers) (last visited Dec. 26, 2011).
[48] S*ee*, *Al Davis Quotes from Raiders Press Conference*, WWW.SFGATE.COM (last visited July 3, 2012).
[49] Judy Batista, *NFL Labor Talks Bog Down over Rookie Wage*, WWW.NYTIMES.COM, http://www.nytimes.com/2011/07/11/sports/football/nfl-labor-talks-bog-down-over-limits-on-rookies-pay.html (last visited Dec. 27, 2011).
[50] *Id*.
[51] Mike Florio, *On rookie wage scale, league, players don't seem to be squabbling over much*, WWW.NBCSPORTS.COM, http://profootballtalk.nbcsports.com/2011/07/11/league-players-dont-seem-to-be-squabbling-over-much/ (last visited Dec. 27, 2011); *see also, Players, Owners Sign Deal to End NFL Lockout*, WWW.CNN.COM, http://edition.cnn.com/2011/SPORT /07/25/nfl.deal/index.html (last visited Dec. 27, 2011).
[52]
[53] NFL CBA 2011-2020, art. 7.
[54] NFL CBA 2011-2020, art. 7 § 2(a) (2011); *see also*, NFL CBA 2011-2020, art. 7 § 1(c) (using the example where a contract in which a player earns $1,000,000 in year one, 1,100,000 in year two, 1,200,000 in year three, and 1,300,000 in year four would count as $4,600,000 against the $874,000,000 allowed per year).
[55] NFL CBA 2011-2020, art. 7 § 2(a); *see also*, NFL CBA 2011-2020, art. 7 § 1(d).
[56] NFL CBA 2011-2020, art. 7 § 2(a).
[57] *Id*. (explaining that Rookie compensation can increase or decrease by the same number as the salary cap up to 5%, but then only half a percent for any increase or decrease greater than 5%. For example, if the salary cap increases by 9%, then the Rookie Compensation Pools will increase by 7%).
[58] NFL CBA 2011-2020, art. 7 § 3(a).

years if the player was drafted with the first sixteen picks.[59] Another difference is that drafted rookies now have to wait until the after the Super Bowl of their third year to attempt to renegotiate their contracts.[60]

One last notable change concerning rookie contracts in the 2011 CBA is the addition of the "Proven Performance Escalator." Article 7, Section 4 mandates that all players drafted in rounds three through seven of the NFL draft have a provision in their rookie contracts stating that the salary in their fourth year will increase if they are used for a certain percentage of the teams plays.[61] This formula is not easy to digest, but it basically conditions that if a player is used for a "cumulative average" of 35% of his teams offensive or defensive plays (depending on the player's position over the course of three seasons, or 35% of the team's offensive or defensive plays in any two if his previous three seasons, then he will be eligible for a salary increase in his fourth year.[62] The increase is based on the difference between the player's salary and the qualifying offer that the team can tender to the player after his fourth year.[63] In total, these new restrictions are estimated to save the NFL team owners tens of millions of dollars by cutting top rookie salaries by 50%.[64]

2. The Legacy Fund

Article 57, Section 1 of the 2011 CBA established a new fund for retired players called the Legacy Benefit.[65] The Legacy Benefit promises $620 million over the life of the ten-year CBA to players who retired prior to the 1993 season.[66] The goal is to improve the quality of life for those players that were vested in the 1992-93 Pete Rozelle/Bert Belle Retirement Plan.[67] The Legacy Benefit is taken separately from the pension payments.[68] The least a vested player can earn is $600 per month, which is the amount given to those that took their pensions early.[69] A vested player that takes his pension at the age of 55 will receive a monthly income of $124 multiplied by the number of seasons accrued during the player's career, provided that he played prior to 1974.[70] For those that played after 1974, the benefit pays $108 per month multiplied by the amount of seasons played.[71] This figure increases the longer the player waits to take his pension. As a result, some retirees will see increases of over $1,500 in their pension checks per month.[72] Other Benefits include an increase in pensions for the player's lifetime; not just for the life of the CBA.[73]

[59] NFL CBA 2006-2012, art. XVII, § 5.
[60] NFL CBA 2011-2020, art. 7 § 3(k).
[61] NFL CBA 2011-2020, art. 7 § 4(a)–(b).
[62] NFL CBA 2011-2020, art. 7 § 4(b).
[63] NFL CBA 2011-2020, art. 7 § 4(c) (using the example that a player that makes $850,000 and that can be tendered $1,400,000 million after his fourth year shall have his fourth year salary increased by $550,000 if he qualifies).
[64] Matt Hayes, *NFL Rookie Pay Scale Could Strengthen College* Game, WWW.SPORTINGNEWS.COM, http://aol.sportingnews.com/ncaa-football/story/2011-07-26/new-nfl-rookie-pay-scale-could-strengthen-college-game (last visited Dec. 27, 2011).
[65] NFL CBA 2011-2020, art. 57 § 1 (the Legacy Benefit is not actually set out in the CBA. The players and the owners had 14 days from the date the CBA was reached to agree to the terms).
[66] NFL CBA 2011-2020, art. 57 § 2.
[67] *Cornelius Bennett Details New Legacy* Benefit, WWW.PROPLAYERINSIDERS.COM, http://proplayerinsiders.com/cornelius-bennett-details-new-legacy-benefit/ (last visited Dec. 27, 2011); *see also*, Part D *infra.*
[68] *Id*.
[69] *Id*.
[70] *NFLPA/NFL Benefit Announcement*, WWW.DAVEPEAR.COM, http://davepear.com/blog/2011/11/nflpanfl-benefits-announcement/ (last visited Dec. 27, 2011).
[71] *Id*.
[72] *Id*.
[73] *Id*.

Although this might initially seem like a tremendous step forward for the retired players, there was no Legacy Benefit in any of the prior CBAs. Some still question whether all the needs of these players were met. Three separate lawsuits filed in 2011 reflect many retired players' dissatisfaction with the level of their involvement in the NFL's collective bargaining process. On September 14, 2011, almost two months after the new CBA was agreed to, a group of retired players filed a lawsuit against the NFLPA in the United States District Court of Minnesota.[74] The lawsuit alleges that the players did not have the right to agree to the terms of the retired players benefits and that a number of their concerns were ignored.[75] Although the benefits that the former players now receive are greatly improved, the lawsuit claims that there was an earlier proposal from the NFL that amounted to $1.5 billion in benefits for the retired players, $600 million less than the agreed-upon $900 in retiree benefit package.[76] The retirees believe that they could have negotiated a better deal had they been adequately represented during the bargaining sessions, or if they had negotiated their benefits separately from the NFLPA.[77] They requested that the new CBA be readjusted so as to address the concerns raised in the action.[78]

Another group of former players also filed a lawsuit in July 2011 claiming that the League concealed information about the dangers of concussions.[79] These claims centered around allegations that the NFL concealed information about the dangers of concussions.[80] In the lawsuit, these retired players stated that they have "or will in the future" be diagnosed with a brain injury or illness as a result of receiving a concussion on the field.[81] They accused the NFL of "turning a blind eye" to the proliferation of evidence showing that concussions and other brain injuries resulted in severe, long-term brain damage in football players.[82] The plaintiffs also accused NFL coaches of encouraging players to use their helmets as "offensive weapons" to "block, tackle, butt, spear, ram, and/or injure opposing players by hitting with their helmeted heads."[83] They asked the court to order the NFL to develop and fund a monitoring system for current and former players who have suffered a concussion on the field to study the connection between football head injuries and brain illnesses such as Alzheimer's disease and dementia.[84]

Lastly, in December, 23 retired players sued the NFL over the use of an anti-inflammatory drug, the widespread use of which put those with head injuries at an increased risk.[85] The lawsuit asserts that the League failed to warn the players that the drug, a blood thinner, had the effect of reducing the "feeling of injury", which in turn, made it more difficult for players to recognize concussions.[86] The plaintiffs are seeking specific performance by the NFL in the form of medical monitoring, as well as compensatory and

[74] *Retired Players Sue Brady, NFLPA*, WWW.FOXSPORTS.COM, http://msn.foxsports.com/nfl/story/Tom-Brady-Retired-players-sue-NFLPA-091311 (last visited Dec. 27, 2011).
[75] *Id*.
[76] Jeff Dixon, *Examining the Retired NFL Player's Class Action Law* suit, WWW.NFLALUMNIASSOCIATION.COM, http://nflalumniasssociation.wordpress.com/2011/09/26/examining-the-retired-nfl-player%E2%80%99s-class-action-lawsuit/ (last visited Dec. 27, 2011).
[77] *Id*.
[78] *Id*.
[79] *Report: Retired Players Sue NFL* Union, WWW.ESPN.COM, http://espn.go.com/nfl/story/_/id/6968557/report-nfl-retirees-file-lawsuit-players-union (last visited Dec. 27, 2011).
[80] *Id*.
[81] *NFL Disputes Retired Players Brain Injury Lawsuit*, WWW.SANDIEGOPERSONALINJURYLAW.COM, http://www.sandiegopersonalinjury-law.com/2011/11/nfl-disputes-retired-players-brain-injury-lawsuit.shtml (last visited Dec. 27, 2011).
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Retired Players Sue NFL Over* Painkiller, WWW.ESPN.COM, http://espn.go.com/nfl/story/_/id/7320805/new-lawsuit-retired-players-vs-nfl-focuses-painkiller (last visited Dec. 27, 2011).
[86] *ExPlayers Suing N.F.L. Over use of Painkiller*, WWW.NYTIMES.COM, http://www.nytimes.com/2011/12/06/sports/football/nfl-sued-by-ex-players-over-painkiller-toradol.html (last visited July 30, 2012).

punitive damages for both the players and their spouses.[87] It seems as though the thousands of players involved believe that the NFL should have foreseen the consequences of their antiquated safety regulations. As new and improved rules are promulgated to protect the athletes, the League is faced with the difficult task of ensuring safety while maintaining the integrity of the game. The outcome of these lawsuits will surely influence the League's direction.

3. Revenue Sharing, the Salary Cap, and Team Spending

Article XXIV, Section 10 (e)(i) of the 2006 CBA set forth the procedures for determining the amount of the salary cap, as well as the minimum salary each team must carry beginning with the 2008 season.[88] "The numbers were to be based on Projected Total Revenues and Projected Benefits for the relevant Capped Year, as provided in Subsections 10(b)-(c) above, utilizing the information contained in a Special Purpose Letter."[89] The "Special Purpose Letter" is a report that an independent accounting firm[90]creates based on the financial reporting of both the Clubs and the League.[91]

As for Revenue Sharing, Article XXIV, Section 11 established "incremental revenue sharing", a revenue sharing system whereby the higher revenue teams share a higher percentage of their revenues with the other Clubs.[92] The 15 teams earning the most revenue were supposed to end up sharing $850 to $900 million over the life of the old CBA.[93] Under the 2006 agreement, the players were supposed to receive about 59.6% of Total Revenue.[94] This worked out to about $150 million per team.[95]

A focal point of the 2010 negotiations was that owners wanted to increase their initial take for operating expenses.[96] This would decrease the size of the revenue pool to around $7 billion.[97] The players opposed this change and countered with a fifty-fifty split of the revenue.[98] Article 12, entitled "Revenue Sharing and Calculation of the Salary Cap," defines how the two parties settled their differences. Section 6(b) states that for the 2011 league year the amount allocated for player salaries, the Player Cost amount, would be $4,556,800,000, or $142,500,000 per team.[99] The Player Cost amount and the salary caps for the remainder of the CBA will be set by the "Special Purpose Letters" just as they were under the 2006 CBA.[100] Section 7(a) of Article 12 goes on to guarantee players no less than 47% of all revenues over the

[87] In re National Football Players' Concussion Injury Litig. (MDL No. 2323) (No. 2:12-md-02323-AB).
[88] NFL CBA 2006-2012, art. XXIV § 10(e)(i).
[89] Id.
[90] NFLCBA 2006-2012, art. XXIV § 10(b) (explaining that the firm used was agreed upon by both parties).
[91] Id.
[92] NFL CBA 2006-2012, art. XXIV § 11. See also, John Clayton, Owners Finally Come to an Agreement on Revenue Sharing, WWW.ESPN.COM, http://sports.espn.go.com/nfl/columns/story?columnist=clayton_john&id=2360296 (last visited Dec. 27, 2011);
[93] Id. (explaining that the top five revenue generating teams would share the most, the sixth through tenth teams the second most, and the eleventh through fifteenth the third most)
[94] Adam Oestmann, NFL Lockout for Dummies: The 2011 Labor Dispute Explained, WWW.CHICAGONOW.COM, http://www.chicagonow.com/chicago-bears-huddle/2011/03/nfl-lockout-for-dummies-the-2011-labor-dispute-explained/ (last visited Dec. 24, 2011).
[95] NFL Labor Issues: Looking at the CBA, Part 1,How Much is at Stake?, WWW.NINERSNATION.COM, http://www.ninersnation.com/2011/2/14/1992203/nfl-labor-issues-looking-at-the-cba-part-1-how-much-is-at-stake (last visited Dec. 27, 2011).
[96]Adam Oestmann, NFL Lockout for Dummies: The 2011 Labor Dispute Explained, WWW.CHICAGONOW.COM, http://www.chicagonow.com/chicago-bears-huddle/2011/03/nfl-lockout-for-dummies-the-2011-labor-dispute-explained/ (last visited Dec. 24, 2011).
[97] Id.
[98] Id.
[99] NFL CBA 2011-2020, art. 12 § 6(b).
[100] NFL CBA 2011-2020, art. 12 § 6(c).

life of the CBA.[101] The players share is calculated as the sum of 55% of the League Media Revenue, 45% of NFL Ventures/Postseason Revenue, 40% of Local Revenue, and, if applicable, a percentage of new business projects.[102] This means that the players' share can be as high as 48.5% towards the end of the newest CBA, which is set to expire in 2020.[103] However, there is also a "stadium credit" that comes out of the players' share, which could decrease the players' percentage in a given year to as little of 46%.[104] In the event that this occurs, the League must adjust the salary cap in such a way that the players will receive the 47% that they are promised.[105]

Lastly, in the 2006 CBA, teams were required to spend 84% of the Salary Cap in 2006.[106] That number would increase 1.2% each year thereafter, but no team could ever be required to spend more than 90%.[107] In the 2011 CBA, teams are now required to spend no less than 89% from 2013 through 2020.[108] In the event a team does not reach this number, it must distribute equally to each player the amount of salary needed to bring the team up to the 89% threshhold.[109] Ultimately, whatever concessions the owners made pales in comparison to the reduction in salary of over 12% suffered by the players. This 2011 CBA is just another example of how owners in the sports industry generally control the balance of power.

III. Career Planning, Financial Advising, and Atwater

The 1993 CBA introduced the Career Planning Program to help players enhance their career in the NFL and make a smooth transition to a second career, as well as to provide information to players on handling their personal finances.[110] The parties to the 2011 CBA committed to retaining the Career Planning Program, but altered the governing language in three significant ways. First, the 2011 CBA reaffirms the parties' commitment to the Career Planning Program by continuing the programs that were established under the 1993 CBA, which offered current and former players information about financial advisors and financial advisory firms.[111] Second, the 2011 CBA looks to the future by mandating that the parties jointly and separately "develop new methods to educate [] players concerning the risks of various investment strategies and products, as well as the provision of any background investigation services."[112] Third, while the 1993 CBA merely stated that the parties "understood that players shall be solely responsible for their personal finances,"[113] the 2011 CBA explicitly exculpates the NFL, Clubs, and NFLPA from any investment decision made by players, and further states that the players and their advisors bear "sole responsibility for any investment or financial decisions that are made."[114]

A Financial Advisors Program grew out of the parties' obligations under the 1993 CBA to use best efforts to build a comprehensive Career Planning Program. The NFLPA established the Financial Advisors Program in 2002 for its dues-paying members, which consists of both current and former

[101] NFL CBA 2011-2020, art. 12 § 7(a).
[102] NFL CBA 2011-2020, art. 12 § 6 (c)(i).
[103] NFL CBA 2011-2020, art. 12 § 6 (c)(ii).
[104] NFL CBA 2011-2020, art. 12 § 6 (c)(iii).
[105] NFL CBA 2011-2020, art. 12 § 7(a).
[106] NFL CBA 2006-2012, art. XXIV § 5.
[107] Id.
[108] NFL CBA 2011-2020, art. 12 § 9(a).
[109] NFL CBA 2011-2020, art. 12 § 9(b).
[110] NFL CBA 1993-2000, art. LV § 12.
[111] NFL CBA 2011-2020, art. 51 § 12.
[112] Id.
[113] NFL CBA 1993-2000, art. LV § 12.
[114] NFL CBA 2011-2020, art. 51 § 12.

players.[115] Under the Financial Advisors Program, players are given password-protected access to a list of registered financial advisors that players could contact for financial and other investment advice.[116] The NFLPA worked with the Securities and Exchange Commission before implementing the Financial Advisors Program.[117] This required the NFLPA to invite as many advisors as possible and ensure that the players' option were not limited..[118] The NFLPA only denied applications if a background check revealed certain actions against the advisor.[119] In accordance with the Security and Exchange Commission's guidelines, the NFLPA did not advise "players as to the merits or shortcomings" of the advisors.[120] The Financial Advisors Program also contains its own exculpatory language, which states that:

> [t]he NFLPA is not endorsing any Registered Player Financial Advisor and is not responsible for, and disclaims, any liability for the acts or omissions of any Registered Player Financial Advisor. The NFLPA is also not responsible for, and makes no representation concerning, the skill, honesty, or competence of any Registered Player Financial Advisor, or any other person.[121]

The Career Planning Program and the Financial Advisors Program were the subjects of litigation in Atwater v. Natl. Football League Players Ass'n.[122] Between 2004 and 2005, several former NFL players, the spouse of one of the players, and several investment entities controlled by them invested approximately $ 20 million with Kirk Wright and Nelson Bond, who along with others operated an investment company.[123] As it turns out, Mr. Wright was actually conducting a Ponzi scheme through which he stole most of the money invested by the plaintiffs.[124] The plaintiffs sued the NFL and NFLPA on state law claims of negligence, negligent misrepresentation, and breach of fiduciary duty.[125] The District Court for the Northern District of Georgia held that the Labor-Management Relations Act[126] (LMRA) preempted state law claims as to failed investments under the Career Planning Program.[127] Furthermore, the District Court held that even if the state law claims were not precluded under the LMRA, the exculpatory language of the Financial Advisors Program would have prevented the NFL and NFLPA from incurring liability.[128]

This is important because the district court provided independent grounds for defeating the plaintiffs' causes of action against the NFL and NFLPA: one under a federal statute and one rooted in the language of the contract itself. The plaintiffs' arguments that the Career Planning Program did not exist,[129] that the Financial Advisors Program did not stem from the Career Planning Program,[130] and that

[115] Atwater v. Nat'l Football League Player's Ass'n, Civil Action No. 1:06-CV-1510-JEC, 2009 U.S. Dist. LEXIS 98236, at*4-5 (N.D. Ga. Mar. 26, 2009).
[116] Id. at 5.
[117] Id.
[118] Id.
[119] Id. at 5-6.
[120] Id. (quoting NFLPA Regulations and Code of Conduct Governing Registered Player Financial Advisors ("Program Regulations") [180] at 198-200.).
[121] Atwater, Civil Action No. 1:06-CV-1510-JEC, 2009 U.S. Dist. LEXIS 98236 at *6 (citing NFLPA Regulations and Code of Conduct Governing Registered Player Financial Advisors ("Program Regulations") [180] at 16.).
[122] Atwater v. Nat'l Football League Players Ass'n, 626 F.3d 1170, 1174 (11th Cir. 2010).
[123] Atwater, 626 F.3d at 1174.
[124] Id.
[125] Id.
[126] 29 U.S.C. §141 (2012).
[127] Atwater, Civil Action No. 1:06-CV-1510-JEC, 2009 U.S. Dist. LEXIS 98236 at *9.
[128] Id. at *9-10.
[129] Id. at *7.
[130] Id. at *8.

the various exculpatory language was not specific enough,[131] did not persuade the district court. On appeal, the Eleventh Circuit affirmed the ruling of the district court but with a modified rationale.[132] The appeals court upheld the district court's determination that LMRA preempted plaintiffs' state-law claims; the panel did not reach the issue of whether the disclaimer contained in the Financial Advisors Program regulations should have precluded Plaintiffs' claims against it.[133] In limiting its analysis to the LMRA's preemption of state law claims, the Eleventh Circuit took the position that the language of the CBA was dispositive of the claims alleged by the plaintiffs. Therefore, the claims of negligence, negligent misrepresentation, and breach of fiduciary duty, all of which required the plaintiffs to establish the existence of a duty owed to them by the NFL and NFLPA, failed because each of these duties arose directly from the CBA's mandate that both the NFL and the NFLPA use best efforts to establish a Career Planning program.[134]

Consequently, the plaintiffs had no ability to establish that there was a duty created independent of the CBA – the LMRA makes the CBA's provisions dispositive of the issues. The Eleventh Circuit also noted that even if this were not the case, the determination of any duty defendants owed plaintiffs to provide information about the investment company was substantially dependent on the liability-limiting language of the Career Planning Program provision of the CBA – that players were "solely responsible for their personal finances."[135] Therefore, the Eleventh Circuit felt it was unnecessary to reach the issue of whether the exculpatory language of the Financial Advisor's program provided independent grounds to find for the defendants in Atwater.[136]

Atwater raises questions about the effect of the CBA's exculpatory language and the role of federal courts in adjudicating disputes lodged by players against the NFL and NFLPA. Although the district court in Atwater relied upon both the preclusive effects of the LMRA and the exculpatory language of the Financial Advisors Program, the appeals court affirmed the lower court's ruling based solely on the federal statute. Section 301(a) of the LMRA reads:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[137]

In order to insure the uniform interpretation of collective bargaining agreements throughout the nation, § 301(a) of the LMRA completely preempts state-law claims that require the interpretation or application of a CBA.[138] The Supreme Court has held that complete preemption exists when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common[-]law complaint into one stating a federal claim."[139] Where complete preemption exists, the matter will be resolved under federal labor principles rather than state law.[140]

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[131] Id.
[132] Atwater, 626 F.3d at 1174.
[133] Id.
[134] Id. at 1182-83.
[135] Atwater, 626 F.3d at 1182-83. See, NFL CBA 1993-2000, art. LV § 12.
[136] Atwater, 626 F.3d at 1174.
[137] 29 U.S.C. §185(a) (2012)
[138] Id.
[139] Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987) (quoting Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)).
[140] Lingle v. Norge Div. Magic Chef, Inc., 486 U.S. 399, 406 (1988).

The Eleventh Circuit's reliance on the LMRA's preemption of state law claims rather than the exculpatory language of the Financial Advisors Program casts doubt on the applicability of the district court's assertion that the exculpatory language might have an independent preclusive effect on similar claims. Surely, any future litigation stemming from Article 51, § 12 of the CBA may be resolved by a federal court's application of the LMRA, but what will the role of exculpatory language be in the court's analysis? In Atwater, the appeals court made passing reference to the exculpatory language of the Career Planning Program. The court wrote that even if Career Planning Program's best efforts clause did not resolve the instant matter, the determination of any duty defendants owed plaintiffs would be "sculptured"[141] by the language that the players were "solely responsible for their personal finances."[142] Curiously, the Eleventh Circuit explicitly rejects the Financial Advisors Program's exculpatory language as providing an independent preclusive effect on plaintiffs' claims, but uses the less explicit exculpatory language of the Career Planning Program as a "just in case" justification of its LMRA analysis. Consequently, the Eleventh Circuit has failed to concretely establish the effect of the exculpatory language in the Career Planning Program and the Financial Advisors Program.

With the effect of the exculpatory language left up in the air by the Eleventh Circuit, one must question the utility of attempting to limit liability in the Career Planning Program and the Financial Advisors Program. It seems that the appeals court has relegated it to boilerplate status for purposes of a court's analysis of a claim arising under the CBA's Career Planning Program. The Eleventh Circuit complicated matters even more by paying lip service to the Career Planning Program's exculpatory language but refusing to address the Financial Advisors Program's more explicit exculpatory language. The Atwater action was initiated under the amended 1993 CBA, several years prior to the adoption of the 2011 CBA. Therefore it is likely no coincidence that while the 1993 CBA merely stated that the parties "understood that players shall be solely responsible for their personal finances,"[143] the 2011 CBA explicitly exculpates the NFL, Clubs, and NFLPA from any investment decision made by players, and further states that the players and their advisors bear "sole responsibility for any investment or financial decisions that are made."[144] Unfortunately, the CBA parties' attempt to address a pitfall in the 1993 CBA by bolstering the exculpatory language of the 2011 Career Planning Program has at best been complicated by the court of appeals, but at worst been negated altogether. The Eleventh Circuit did use the CBA to resolve the Atwater claims, but in a selective manner that neglects the fact that the parties' to the CBA freely assented to the terms of their labor agreement.

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

One function of the 2011 CBA is to provide financial, medical, and educational benefits to current and retired players. In 1993 the NFLPA and NFL entered into a new collective bargaining agreement, which merged the Bert Bell Plan, created in 1967, and Pete Rozelle Plan, created in 1987, to form the Bert Bell/Pete Rozelle NFL Player Retirement Plan.[145] Since 1993, each amended version of the 1993 CBA and the 2011 CBA has incorporated by reference the terms of the Bert Bell/Pete Rozelle NFL Player Retirement Plan into the Collective Bargaining Agreements.[146] Because each CBA incorporates by reference the previous terms of the Bert Bell/Pete Rozelle NFL Player Retirement Plan, the physical text of the 2011 CBA itself does not contain any governing provisions of the retirement plan. Instead, the 2011 CBA contains miscellaneous provisions that supplement older ones found in the Bert Bell/Pete

[141] Atwater, 626 F.3d at 1183.
[142] NFL CBA 1993-2000, art. LV § 12.
[143] Id.
[144] NFL CBA 2011-2020, art. 51 § 12.
[145] Id.
[146] See, e.g., NFL CBA 2011-2020, art. 53 § 1 (incorporating by reference past and future amendments of the Plan into Article 53, subject to certain exceptions).

Rozelle NFL Player Retirement Plan, with unaffected portions of the retirement plan being incorporated into the newest CBA.[147] That the parties to each amended and new CBA since 1993 have not regularly redrafted the provisions of the Bert Bell/Pete Rozelle NFL Player Retirement Plan is perhaps a testament to its stability and comprehensiveness. As of 2009, the Bert Bell/Pete Rozelle NFL Player Retirement Plan held nearly $800 million in assets and paid out $6.5 million in pension, disability, widow's and surviving children's benefits monthly.[148] The Supplemental Disability Plan paid out an additional $10 million in benefits to disabled players annually.[149] The 2011 CBA codifies the Bert Bell/Pete Rozelle NFL Player Retirement Plan in Article 53.[150]

Only a few changes were made to the Bert Bell/Pete Rozelle NFL Player Retirement Plan for the 2011 CBA. Some of the changes include compelling owners to contribute to the Retirement Plan based on actuarial tables, increasing the amount of death benefits paid to players' families, and an auditing procedure to ensure that players receiving benefits under the Retirement Plan are actually eligible.[151] One of the more notable changes includes the establishment of a new arbitration procedure for disputes arising under the Retirement Plan. Before the 2011, when the Retirement Board was deadlocked on a matter not concerning medical or benefits issues, a Benefit Arbitrator broke the tie.[152] Section 8.3(c) of the 2007 Bert Bell/Pete Rozelle NFL Player Retirement Plan provided no guidelines on how such a determination was to be made.

The 2011 CBA overhauled § 8.3(c) to read as follows:

> Effective for benefit disputes arising under Retirement Plan Section 8.3(c) on and after September 1, 2011, the parties will amend the Retirement Plan to provide that the arbitrator selected to resolve the dispute must base his decision solely on the administrative record that was before the Retirement Board, as it may be supplemented by records that were in existence prior to the date the dispute is referred to the arbitrator.

In addition, each side shall be permitted to take depositions of any expert relied on by the other side based on the administrative record, supplemented as provided above.[153] By providing the Benefit Arbitrator with this direction and conferring new rights onto disputing parties, the 2011 CBA has attempted to clarify and add to an area of the agreement. By clearly defining the roles, procedures, and rights of the parties involved in § 8.3(a) disputes, the parties to the CBA have attempted to minimize litigation stemming from new claims. Whether enhancing § 8.3(c) will accomplish this is not clear, but this may be understood by looking at other sections of the Retirement Plan.

Section 8.3(a) concerning disputes over medical determinations made by the Retirement Board already had its own specific procedures for each respective dispute.[154] Section 8.3(a) of the Retirement Plan provides that when the Retirement Board is deadlocked on a medical issue, the matter is referred to a Medical Advisory Physician for a "final and binding determination" regarding the medical issue.[155] This

[147] Id.
[148] Bert Bell/Pete Rozelle Retirement Plan, WWW.NFLPLAYERS.COM, https://www.nflplayers.com/news.aspx?section=Articles&cat=Public-News&title=Bert-Bell-Pete-Rozelle-NFL-Player-Retirement-Plan (last visited Dec. 23, 2011).
[149] Id.
[150] NFL CBA 2011-2020, art. 53
[151] NFL CBA 2011-2020, art. 53, § 2, 5, 7.
[152] Bert Belle/Pete Rozelle Ret. Plan 2007, § 8.3(c).
[153] NFL CBA 2011-2020, art. 53 § 4.
[154] This article will examine only Section 8.3(a) concerning disputes over medical determinations of the Retirement Board, and not Section 8.3(b) concerning disputes over benefits determinations.
[155] Bert Belle/Pete Rozelle Ret. Plan 2007, § 8.3(a).

procedure gives the Medical Advisory Physician "full and absolute discretion, authority and power" to decide the medical issue. This was not altered for the 2011 CBA, which may initially come as a surprise considering the parties' decision to delineate procedures for § 8.3(c) disputes. Upon further review, it becomes clear why 8.3(a) disputes are left primarily in the hands of the Medical Advisory Physician. It is most likely because when the matter concerns whether or not a player has a medical condition that brings him within the purview of Plan benefits, a medical professional will best be able to resolve a deadlock by the Retirement Board because the concerns are wholly medical in nature.[156]

Section 8.3(a) determinations are not above the law as the Bert Bell/Pete Rozelle NFL Player Retirement Plan is still subject to the Employee Retirement Income Security Act (ERISA); this was the thrust of the In re Marshall litigation.[157] In Marshall, the plaintiffs Wilber B. Marshall Jr. and his trustee in bankruptcy sued the Retirement Plan and the NFL Player Supplemental Disability Plan[158] alleging violations of ERISA.[159] Over the course of a career spanning twelve seasons, Marshall sustained injuries leading to the development of degenerative arthritis "in both knees, his right elbow, his left shoulder, both ankles, his spine, and his hands."[160] He first applied for disability benefits under the Retirement and Disability Plans and would qualify if the Retirement Board determined that he was totally and permanently disabled.[161] Marshall was initially denied benefits on March 6, 1997, but upon further review by a Medical Advisory Physician on February 5, 1998 it was determined that Marshall was in fact totally and permanently disabled.[162] Under the terms of the Supplemental Disability Plan, he was awarded benefits retroactively to April 1, 1997.[163] Marshall periodically underwent physical evaluations to determine whether he was still totally and permanently disabled, and on September 11, 2000 another Medical Advisory Professional determined that Marshall no longer met the criteria.[164] His benefits were suspended effective April 27, 2001, and subsequent appeals to the Retirement Board were unsuccessful.[165]

On November 31, 2001, Marshall reapplied for benefits, and underwent a physical examination on December 7, 2001 performed by one Dr. Doren.[166] The physician reported that Marshall was totally and permanently disabled, which was confirmed by a Medical Advisory Physician on February 21, 2002.[167] The Retirement Board decided to reinstate the medical benefits retroactively to January 1, 2002, the first day of the month after Dr. Doren examined Marshall.[168] Marshall filed for bankruptcy on February 5, 2002, and in 2004 his trustee filed an ERISA complaint in bankruptcy court to recover benefits believed owed due between May 2001 and December 2001. [169] The defendants to this action were the Retirement Plan and Supplemental Disability Plan.

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[156] This of course leaves open the question of why the initial determination is not left up to the Medical Advisory Physician instead of the Retirement Board. However, the purpose of this article is not to question the effectiveness of the arbitration mechanisms created by the CBA. Rather, it is to explore the evolution of the CBA and see how different changes have addressed or failed to address problems confronting parties to the CBA.
[157] In re Marshall, 261 Fed. Appx. 522 (2008).
[158] NFL CBA 2011-2020, art. 51 § 1 (similar to the Bert Bell/Pete Rozelle NFL Player Retirement Plan, the NFL Player Supplemental Disability Plan was incorporated by reference into the 2007 version of the 1993 CBA).
[159] 29 U.S.C.§1132(a)(1)(B).
[160] In re Marshall, 261 Fed. Appx at 3.
[161] Id. at 3-4.
[162] Id. at 4.
[163] Id.
[164] Id. at 4-5.
[165] Id. at 5.
[166] Id.
[167] Id.
[168] Id.
[169] Id. at 6.

The bankruptcy court determined that plaintiffs should receive benefits retroactive to May 1, 2001, and the defendants appealed this decision to the district court.[170] The district court reversed, concluding that the Board's decision to award benefits retroactive only to January 1, 2002, was supported by substantial evidence and was reasonable. The plaintiffs then appealed the district court's decision to the Fourth Circuit. The question on review was whether the Retirement Board abused its discretion by using as the disability onset date the date of Dr. Doren's examination (December 7, 2001) that revealed Marshall was totally and permanently disabled.[171]

Under 29 U.S.C.§ 1132(a)(1)(B) of ERISA, a civil action may be brought to recover benefits owed to an employee under the terms of a retirement plan, to enforce his or her rights under the terms of the plan, or to clarify his or her rights to future benefits under the terms of the plan.[172] A court will only overturn the action of a retirement plan's administrative organ it if it finds an abuse of discretion. Here, the Fourth Circuit held:

> "We simply conclude here that the Board could not escape this tension by ignoring Dr. Doren's finding on January 3, 2002, that Marshall was totally and permanently disabled and that his symptoms had remained consistent since his initial medical evaluation in 1997."[173]

Based on this conclusion, the court found that the date set by the Retirement Board was arbitrary and awarded Marshall the benefits retroactive to May 1, 2001.[174]

Section 8.3(a) of the Bert Bell/Pete Rozelle NFL Player Retirement Plan did not change under the 2011 CBA. The Marshall case shows that despite Section 8.3(a) having a dispute resolution procedure tailored to the nature of the claims, it was not enough to prevent claims arising under ERISA. Although § 8.3(a) gives Medical Advisory Physicians tiebreaking power in deciding whether an applicant should receive medical benefits, there still exists the opportunity for the Retirement Board to abuse its discretion in determining when retroactive benefits should take effect. In other words, § 8.3(a) addresses the "if" question regarding medical benefits, but not the "when" question. As in Marshall, players who have been medically diagnosed as totally and permanently disabled might still exercise their rights under ERISA. However, this is a risky and time-consuming process for players that a comprehensive labor agreement should anticipate and prevent. Based on the problem raised by Marshall, one might be skeptical of the decision to overhaul § 8.3(c) and whether it will be enough to prevent litigation related to the provision. The 2011 CBA has clarified the procedure and enhanced the rights of parties under the Bert Bell/Pete Rozelle NFL Player Retirement Plan, but it remains to be seen whether this will be enough to conclusively resolve disputes in the manner prescribed by the Collective Bargaining Agreement.

[170] Id. at 7.
[171] Id. at 8.
[172] 29 U.S.C.§ 1132(a)(1)(B).
[173] In re Marshall, 261 Fed. Appx. at 11.
[174] Id.

CONCLUSION

When the new CBA was agreed to and signed by both parties, NFL Commissioner Roger Goodell proclaimed, "Football is back."[175] New England Patriots owner Robert Kraft added that "[t]he end result is we've been able to have an agreement that I think is going to allow this sport to flourish over the next decade."[176] Over the next ten years, there will be a myriad of events that will shape the future of football. If the economy ever recovers, maybe the players will be able to increase their shares in the revenue once again. Depending on how the current lawsuits filed by retired players turn out, maybe there will be a complete change in the way the retirees benefits are negotiated, as well as an adjustment to player safety. New issues accompany every CBA. It is important to remember that professional sports are a business. All the fans can do is continue to enjoy the sports they love, and hope that the players and owners can maintain a harmonious relationship.

[175] Roger Goodell: 'Football is Back', WWW.ESPN.COM, http://espn.go.com/nfl/story/_/id/6799301/nflpa-oks-deal-roger-goodell-says-football-back (last visited Dec. 30, 2011).
[176] Id.