Testimony of
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Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
"The National Football League's System for Compensating Retired Players: An Uneven Playing Field?"
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Good afternoon, Madame Chairwoman and Members of the Subcommittee. Thank you for inviting me to testify today. My name is Martha Jo Wagner and I am a partner in the Employee Benefits and Executive Compensation Group of Venable LLP in Washington, D.C. I have practiced law in the area of employee benefits for 25 years. Throughout that period, I have advised plans and plan administrators about their responsibilities under the laws and regulations that apply to benefit claims review and have litigated benefit claims cases nationwide. I am a Fellow of the American College of Employee Benefits Counsel, Management Co-chair of the Employee Benefits Committee of the American Bar Association Section of Labor and Employment Law, and an adjunct professor of law at Georgetown University Law Center.

I was asked to testify today by the Subcommittee regarding whether the claims procedures described in the Bert Bell/Pete Rozelle NFL Player Retirement Plan and the NFL Player Supplemental Disability Plan that apply to disability benefit claims were required by the Employee Retirement Income Security Act of 1974, as amended. I will refer to the act as ERISA and I will refer to the two plans at issue here, respectively, as the Retirement Plan and the Supplemental Disability Plan.[1]

My testimony today addresses only the disability claims procedures described in the plan documents that currently apply to players in general, and

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[1] I reviewed a copy of the Retirement Plan as amended and restated effective April 1, 2001 and amendments to that plan that were dated or effective April 1, 2001, January 15, 2004, November 18, 2004, December 16, 2004, January 13, 2005, April 6, 2005, February 9, 2006, September 12, 2006, and October 4, 2006. I reviewed a copy of the Supplemental Disability Plan as amended and restated effective April 1, 2001. I have not reviewed any amendments to the Supplemental Disability Plan. I have also not reviewed prior versions of either plan, nor any collective bargaining agreements.

does not address how those claims procedures are implemented. My testimony will cover three areas: first, the claims procedure required by ERISA and the claim procedure regulation promulgated by the Department of Labor pursuant to ERISA; second, the significant provisions of the claims procedure in the Retirement Plan; and third, the claims procedure in the Supplemental Disability Plan.

ERISA and the Department of Labor Claims Procedure Regulation

ERISA sets out very broad parameters for reviewing and granting or denying claims for benefits. ERISA requires a benefit plan to provide adequate written notice to every participant and beneficiary whose claim for benefits has been denied. This notice is statutorily required to include the specific reasons for the denial and be written in a manner calculated to be understood by the recipient. ERISA also requires that every participant and beneficiary whose benefit claim has been denied be provided a reasonable opportunity for a full and fair review of the denial by the appropriate fiduciary named in the plan. Finally, ERISA requires benefits be granted or denied only in accordance with the terms of the plan and other governing plan documents.[2]

Effective January 1, 2002, for plans such as those at issue here, the Department of Labor issued a significantly revised claims procedure regulation. The regulation sets forth minimum requirements for claims review, including at least two levels of mandatory review. Specifically, the claims procedure regulation includes detailed time frames for decision making, detailed

[2] The plan and other governing documents must, of course, be consistent with the statute.

requirements for the contents of adverse benefit determinations, and other detailed procedural requirements. The regulation does not require particular substantive rights, such as making disability benefits available. Moreover, ERISA permits plans to supplement the required claims procedure and, for practical reasons, plans generally do so.

Retirement Plan's Claims Procedures

In a nutshell, the significant provisions of the Retirement Plan's disability claims procedure generally involve the following terms and conditions.

Reviewing Entities. The Retirement Plan includes a two step mandatory claims procedure, involving initial review of a disability claim by the Disability Initial Claims Committee, which I will refer to as the Disability Committee, and review on appeal by the Retirement Board. The Disability Committee is made up of two voting members, one appointed by the NFL Players Association and one appointed by the NFL Management Council. The Retirement Board is made up of six voting members and the Commissioner of the NFL, a non-voting member. Three of the voting members of the Retirement Board are appointed by the NFL Players Association and three by the NFL Management Council. The Retirement Board is the named fiduciary of the Retirement Plan and, within certain limitations, has the power to amend the claims procedure in the plan. Neither ERISA nor the claims procedure regulation requires this evenly divided, jointly trusteed Retirement Board. However, in passing I would note that, in addition to ERISA, the Retirement Plan is subject to the Labor Management Relations Act of 1947, which I will refer to as the Taft-Hartley Act. The structure of the Retirement

Board, involving equal representation by labor and management, is consistent with the requirements of the Taft-Hartley Act.

Types of Disability Claims. Under the Retirement Plan there are two types of disability claims: claims for total and permanent disability benefits and claims for line-of-duty disability benefits. Neither ERISA nor the claims procedure regulation requires these benefits be made available to the players.

Total and Permanent and Line-of-Duty Disability Defined. Subject to certain limitations, a player is deemed to be totally and permanently disabled if the reviewing entity finds that the player is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit. In addition, according to news reports, last week the NFL Commissioner and the Executive Director of the NFL Players Association agreed that any player who qualifies for Social Security disability benefits will automatically be approved for NFL disability benefits.[3]

A player who incurs a substantial disablement arising out of league football activities is entitled to line-of-duty disability benefits. A substantial disablement is defined to include, for example, a permanent disability that results in a 50% or greater loss of speech or sight. A permanent disability is one that has persisted or is expected to persist for at least 12 months. A disability that arose out of any football game or other football activity supervised by a league team would constitute a disablement arising out of league football activities.

[3] Presumably the NFL disability benefits that would be automatically approved if a player was granted Social Security disability benefits would include total and permanent disability benefits under the Retirement Plan and also might include line-of-duty disability benefits under certain circumstances. Social Security disability determinations provide deference to the treating physician, which is not required by ERISA or currently provided for under the Retirement Plan.

Neither ERISA nor the claims procedure regulation requires or precludes a plan from using a particular definition of disability.

Arbitration of Certain Deadlocked Disputes. If the two voting members of the Disability Committee deadlock over, for example, a determination of whether a player is totally and permanently disabled, the claim is deemed denied. In contrast, if the six voting members of the Retirement Board deadlock over this or any other issue, three members of the Retirement Board can affirmatively vote to submit the matter to binding arbitration. Medical disputes regarding whether a player is entitled to total and permanent or line-of-duty disability benefits are submitted to a physician jointly designated by the NFL Players Association and the NFL Management Council. As I understand this process, the player whose disability is at issue is not a party to the arbitration. Other disputes are submitted to an arbitrator according to certain past practices and/or procedures depending upon the nature of the dispute. These arbitration provisions are not specifically required by ERISA or the claims procedure regulation. However, I believe that the Taft-Hartley Act requires arbitration of trustee deadlocks concerning administration of a benefit fund.

Retroactive Limits on Claims. Disability benefits will not be paid for periods that precede receipt of a written application for benefits by more than 42 months in the case of total and permanent disability benefits or by more than 48 months in the case of line-of-duty disability benefits, unless the player is physically or mentally incapacitated in a manner that substantially interferes with the filing of a claim. Limits on retroactive payments are not specifically required or precluded by ERISA or the claims procedure regulation.

Required Medical Examinations. A player may be required to submit to periodic medical examinations by a medical dispute arbitrator or a competent physician selected by a reviewing entity. Refusal to submit to any such medical examination is grounds for denial of the player's benefit claim. These provisions are not specifically required by ERISA or the claims procedure regulation but are commonly included in disability plans.

Initial Claims Review Process. The Disability Committee has 45 days to initially review a claim for disability benefits under the Retirement Plan. Two 30 day extensions of this time frame are available under certain circumstances. If the Disability Committee fails to notify the player within these time frames, the Disability Committee is deemed to have denied the player's claim and the appeals procedures discussed below are available.[4] On the other hand, the parties may extend the applicable time frames by mutual agreement. Players are given at least 45 days in which to provide additional information requested by the Disability Committee. The Disability Committee's notice of an adverse benefit determination, such as a denial of disability benefits, must set forth certain information, such as the specific reasons for the determination and reference to specific plan provisions on which the determination is based. These plan provisions conform to the minimum requirements of the claims procedure regulation, except for the mutual agreement and deemed denial provisions.

With respect to providing a mutually agreed upon extension, nothing in the claims procedure regulation or ERISA specifically requires or precludes such a

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[4] The amendment to the Retirement Plan adding this provision was effective April 1, 2001, before the current claims procedure regulation was effective.

provision. With respect to the deemed denial, at least one court has held that the current claims procedure regulation allows a participant whose initial claim has not been timely denied to proceed directly to court, rather than requiring the participant to exhaust the appeal process. Linder v. Byk-Chemie USA Inc., 313 F. Supp. 2d 88, 94 (D. Conn. 2004).

Claims Review Process on Appeal. The player has 180 days from receipt of an adverse benefit determination to file an appeal and may submit written comments, documents, and other information in support of his claim. The Retirement Board will review all the information provided, regardless of whether it was available to the Disability Committee. For claims involving medical judgments, the consulting health care professional will be independent of any consulting health care professional used to review the initial claim. Upon request, the identity of any consulting health care professional will be provided to the player. Decisions on appeal will be made at the first quarterly meeting of the Retirement Board after the claim is received, unless the appeal is received within 30 days preceding the date of that quarterly meeting. Determinations of such appeals will be made at the second quarterly meeting of the Retirement Board, unless special circumstances require an extension. If an extension is required, the Retirement Board will provide notice to the player before the extension begins and will make its determination at the third quarterly meeting of the Retirement Board following receipt of the appeal. Players will be notified of the results of the review within five days of the Retirement Board's determination. An adverse determination by the Retirement Board will set forth certain information, such as the specific reasons for the determination and references to specific plan

provisions on which the determination is based. These plan provisions conform to the minimum requirements of the claims procedure regulation.

Grants of Discretion and Standard of Review. With respect to adverse benefit determinations, reviewing courts apply one of two standards of review – de novo or abuse of discretion – depending upon, in part, the language of the plan and other governing documents. If an adverse benefit determination is litigated, based on the grants of discretionary authority to both the Disability Committee and the Retirement Board, I would expect the determinations of both entities to be entitled to deference from the court under the abuse of discretion standard of review. I would note, however, that these grants of discretion are not specifically required or precluded by ERISA or the claims procedure regulation.

Contractual Statute of Limitations. ERISA does not include a statute of limitations for benefit claims. Therefore, if there is no contractual statute of limitations in a benefit plan, the most analogous state law statute of limitations applies. Such state law statutes of limitations generally run from one to fifteen years. Under the terms of the Retirement Plan, no lawsuit regarding an adverse benefit determination may be commenced more than 42 months from the date of the final decision on appeal. Such a contractual statute of limitations is not specifically required or precluded by ERISA or the claims procedure regulation.

Supplemental Disability Plan's Claims Review Procedures

The Supplemental Disability Plan automatically provides additional disability benefits to players who qualify for total and permanent disability benefits under the Retirement Plan and, as a result, there is no claims review procedure for those determinations in the Supplemental Disability Plan. A player

who does not qualify for disability benefits under the Supplemental Disability Plan because he was not determined to be totally and permanently disabled under the Retirement Plan must utilize the claims procedure in the Retirement Plan to question his adverse benefit determination. All other determinations under the Supplemental Disability Plan are subject to a claims procedure that conforms to the applicable minimum requirements of the claims procedure regulation.

Conclusion

In summary, the initial claims review process and the review process on appeal described in the Retirement Plan and the claims process in the Supplemental Disability Plan are, for the most part, specifically required by the ERISA claims procedure regulation. The structure of the reviewing entities, the types of disability claims that are available, the definitions of total and permanent and line-of-duty disability, arbitration of certain deadlocked disputes, retroactive limits on claims, required medical examinations, grants of discretion, and contractual statutes of limitation in the Retirement Plan are not specifically required or precluded by ERISA or the claims procedure regulation. However, the structure of the reviewing entities and arbitration of certain deadlocked disputes may be required by other laws, and other plan provisions may be necessary for practical reasons.

I thank the Subcommittee for its time and attention.

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