Sports Litigation Alert

Reprinted from Sport Litigation Alert, Volume 7, Issue 4, March 12, 2010. Copyright © 2010 Hackney Publications.

California Workers' Compensation Laws Present Unique Challenges for Pro Sports Teams

By Irwin A. Kishner, Esq.

As they relate to injured former professional athletes, workers' compensation laws in California differ greatly from those in most other states. Athletes who played at least one professional game in that state — even on a visiting team and regardless of when, whether they were injured while on California soil or turf, or where they lived at the time or live now — can benefit from that state's extremely employee-friendly workers' compensation landscape and file claims years after an injury.

Most states require far greater showings of nexus to the state where the athletes file and set stringent time frames in which they must submit claims.

It is hardly surprising, then, that California has become a magnet for claims by injured former professional athletes, as noted in a recent series of articles in The New York Times. Just as the state's generous workers' compensation laws are attractive to former athletes, however, those same laws are creating huge disincentives for leagues and teams to locate themselves — or even show up to play — in what is otherwise an attractive locale. The Arena Football League (AFL) — which is planning to resume play this year with 15 franchises following a one-season hiatus — has publicly stated that it avoided California entirely, at least partly because placing a franchise there would expose all its franchises to the state's onerous workers' compensation scheme.

What factors do companies consider when deciding where they should form themselves and conduct their business? Among the most significant are the cost and ease of doing business. States are generally savvy to this notion and often offer various incentives, such as tax credits and a pro-business — or at least balanced — statutory frameworks. For example, many companies choose to form under the laws of Delaware or Nevada, largely because those two states' statutes and case law are business-friendly and because their systems are so efficient that companies can incorporate there quickly, efficiently and inexpensively. Companies that choose to domicile in Delaware and Nevada derive benefit, as do those states and their treasuries and economies.

Professional sports leagues and franchises are no different from traditional business entities in that regard. All other things being equal or nearly so, given a choice between a balanced workers' compensation scenario and one that is so heavily skewed toward employees, leagues and teams will surely choose the former and eschew the latter.

Businesses dread high costs, uncertainty as to what those costs will be, and uncertainty as to when those costs will hit. California's workers' compensation laws provide for an abundance of all three.

Consider:

- There are approximately 700 workers' compensation claims pending in California by former National Football League (NFL) players alone, according to The New York Times, and they are skewed toward older retired players with injuries from long ago. Most are orthopedic injuries and end up set-

Irwin A. Kishner, Esq., is chair of the Corporate Department and the sports and entertainment practice group at New York City-based Herrick, Feinstein. He represents a number of major and minor league professional sports franchises, including the New York Yankees, in general corporate matters; the sale, purchase and relocation of franchises; stadium and arena finance and development; media and new media contracts; naming rights and licensing deals; and memorabilia disposition.

tling for lump sums of $100,00 to $200,000. With the standard deductible on workers' compensation insurance policies at $250,000, the teams and the league must absorb much of that cost. Meanwhile, Ralph Wenzel, an NFL lineman from 1966 through 1973, has filed a test claim related to his dementia, seeking reimbursement of past and future medical costs. Those costs almost surely will eclipse a million dollars, given that the condition is degenerative and results in loss of cognitive ability and likely placement in an assisted-living facility. If Wenzel's lawyers can show sufficient medical evidence that his dementia was caused by concussions suffered during his playing days, this will unquestionably open the door for many more similar claims, especially at a time when so much scientific, medical and media attention is focused on the relationship between concussions and dementia. At least Wenzel played two years for the San Diego Chargers; some subsequent case, where an injured ex-player with almost no nexus to California goes forum-shopping for a favorable venue, might highlight more effectively the absurdity of the California statute.

- The sheer number of injuries suffered by professional athletes is staggering, with the NFL seeing the highest numbers and greatest severity. Two-thirds of NFL players sustain injuries serious enough to require surgery or sideline them for eight or more games, and approximately half retire because of injuries. With medical costs skyrocketing, it is hard enough for leagues and teams to gauge what aggregate health-care costs will be, even without California's statutory largesse.
- Possibly the most vexing feature of California's workers' compensation laws is that former players can file claims any time — years after their playing days are over, and even if they played for non-California franchises. This means that if a visiting East Coast player blew out his knee while in his 20's, he can bring a workers compensation claim for the costs of knee replacement surgery, rehabilitation and prescriptions decades later. Because there is no time limitation on when claims can be brought, teams are unable to estimate not only how high these costs will be but also when they will arise. Contrast that scenario to those in most states, where workers' compensation claims must be filed within one to five years of when an injury occurred. California's workers' compensation law provides that employers are statutorily barred — estopped, in legal parlance — from using a statute-of-limitations defense unless they formally advised the injured player of his workers compensation rights. Teams generally avoid advising players of those rights, hoping to avoid such claims — a perfectly legitimate posture in an employer-employee relationship, especially given that most professional athletes properly retain business managers and other business-savvy advisors. Even if teams now begin informing players of their workers' compensation rights, they still face liability for past injuries.

Scheduling one game in California can expose a team or league and their insurance carriers to medical costs arising from all injuries. Those include cumulative injuries and those that do not surface for decades, so long as the player can show that playing football was a contributory cause — not even necessarily the sole or primary cause — of the injury.

As a practical matter, what does all this mean in the world of professional sports?

The NFL reported an estimated $8.5 billion in revenues last year, meaning that it can shoulder workers' compensation payouts without significant detriment to its operations. That surely gives little comfort, however, to lesser leagues and their franchises. They need look no further than the AFL, whose commissioner stated publicly that California's workers' compensation law was "definitely part of the decision-making process" for avoiding fan-rich California like the plague. "I bring it up in the first conversation I have with anyone interested in bringing a team to California," Commissioner Jerry Kurz told The Times. More daunting is the fact that the state is not only losing new business but has already seen a drain on existing business; before its hiatus the AFL had two California-based franchises, in San Jose and Los Angeles, which presumably would have resumed operations but instead will remain on the shelf indefinitely.

Who will heed Kurz's warnings? Will the Western Hockey League choose to avoid doing business in California? What about the Class A California League? What about professional beach volleyball circuits, modest enterprises in the grand scheme of things but

popular with sponsors and cable networks and potentially profitable? Will they be forced to relocate or disband altogether due to their modest revenue streams, slim profit margins and inability to bear the high costs of workers' compensation liability?

Injured former players are rightly viewed as sympathetic figures — many hobbled and, sadly, some suffering from debilitating conditions that will stay with them for the rest of their lives and perhaps worsen dramatically. Relatively few were stars, retiring in extreme wealth and able to shoulder the costs of the health care they need. But a balanced approach to workers' compensation is necessary, and California's is badly out of whack. In its ill-conceived apparent attempt to strike a populist note, the state has created a massive disincentive for professional teams and leagues to locate there, and it comes at a time when that state could surely use additional revenue and economic activity.

As attorney and business counselor to my corporate clients — including the professional sports franchises I represent — I am often called on to analyze where a company might consider calling home. In the case of sports teams and leagues — particularly those at the lower rungs — I would be remiss not to point out the unknown and potentially crippling costs of workers' compensation benefits in California.

Beyond that, though, I would suggest that California's workers' compensation statute, in addition to being unbalanced, short-sighted, illogical and unfair, is constitutionally flawed and seemingly vulnerable to challenge. Its greatest vulnerability is probably that it essentially does not allow for a statute-of-limitations defense. I could envision constitutional challenges based on interstate commerce and equal protection laws, not to mention laches. Finally, I would argue — though only as a matter of logic, not necessarily as a matter of law, because on this point the law is stacked against employers — that franchises' and leagues' inability to argue contributory negligence on the part of players borders on the absurd. What role did athletes' injuries from pre-professional days — in recreational ball, high school and college, for instance — play in their current medical circumstances? Did they ignore doctors' warnings that future trauma would have long-lasting effects and, in essence, continue to play against medical advice? The teams and leagues will have to do a cost-benefit analysis and ultimately make a business decision about settling or fighting claims, whether to challenge the statute's constitutionality, and ultimately, whether to avoid California altogether.

Before employer and employee part ways for the final time, the teams should pay for and receive bulletproof, wide releases as to liability for future claims related to injuries suffered during competition. Valuable consideration is a part of any reasonable release, and that should apply in professional sports as well; the teams and players could agree that in exchange for one final payment, the players release the teams from liability for future claims based on past injury. This would give the athletes certainty of some additional revenue, and teams the financial certainty they would otherwise lack. A final risk-management tool that leagues should consider: Though the notion of assumption of risk is well-settled and accepted, league-wide collective bargaining agreements should include acknowledgement that players understand they are in danger of being injured while competing and accept that risk as an inherent part of employment.

The reality is that if the cost of doing business in one location is prohibitively high, and better conditions exist elsewhere, businesses will react accordingly. California is providing a boon to retired professional athletes from all over the country, while compromising its economy and creating a reputation as a business-unfriendly location at a time when it can ill afford to do so.

Julie Albinsky, Esq., an associate in the Corporate Department at Herrick, Feinstein, assisted in the preparation of this article.

Reprinted from Sport Litigation Alert, Volume 7, Issue 8, May 7, 2010. Copyright © 2010 Hackney Publications.