THE LEGAL & BUSINESS ASPECTS OF CAREER-ENDING DISABILITY INSURANCE POLICIES IN PROFESSIONAL AND COLLEGE SPORTS

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I. INTRODUCTION

Although the professional sports industry still pales in comparison to that of many other non-sports businesses,[1] its magnitude cannot be doubted, the National Football League (NFL), Major League Baseball (MLB), National Basketball Association (NBA) and the National Hockey League (NHL), collectively known as the "Big Four", generate over nineteen billion dollars in revenue annually.[2] Undoubtedly, the most important components of the product that is professional sports are the professional athletes themselves. Consequently, the collective bargaining agreements (CBAs) of the Big Four ensure, in both direct and indirect ways, that the players receive over fifty percent of gross revenues,[3] at aver-

1. GLENN M. WONG, THE COMPREHENSIVE GUIDE TO CAREERS IN SPORTS 5-6 (Glenn M. Wong, ed., Jones & Bartlett Publishers 1st ed. 2009) (2008).

2. *See also* Chris Isidore, *Baseball Close to Catching NFL as Top $ Sport*, CNN, Oct. 25, 2007, http://money.cnn.com/2007/10/25/commentary/sportsbiz/index.htm (noting how MLB generates over $6 billion annually); *see* Tripp Mickle, *Escrow Cash Will Boost NHL*, SPORTS BUSINESS JOURNAL, Mar. 2, 2009, http://www.sportsbusinessjournal.com/art./61684 (establishing that NHL generates approximately $2.64 billion annually); *see* Bryan Curtis, *The National Pastime(s)*, N.Y. TIMES, Feb. 1, 2009, at WK5 (reporting that NFL generates $7 billion in annual revenue); *see* John Lombardo, *NBA Increases Shared Revenue by 63 Percent*, SPORTS BUSINESS JOURNAL, Apr. 28, 2008, http://www.sportsbusinessjournal.com/art./58828 (discussing annual revenue of NBA as $3.5 billion).

3. *See* NFL CBA, art. XXIV, §3 (2006), *available at* http://www.nflpa.com/About-us/CBA-Download/ (guaranteeing players fifty percent of Total Revenue (TR)); *see* NBA CBA, art. VII, §2 (2005), *available at* http://www.nbpa.org/cba/2005 (setting team salary caps at fifty-one percent of Basketball Income (BRI)); *see* NHL CBA, art. 50.4 (2005), *available at* http://www.nhl.com/ice/page.htm?id=26366 (guaranteeing players fifty-seven of Hockey Related Revenues

age salaries ranging from $1.4 million in the NFL to $5.34 million in the NBA.[4]

Considering the salaries of professional athletes, investments made into their performance, and their potential earnings, it is not surprising that both teams and players seek disability insurance. This Comment will give examples of athletes and teams that might seek out disability insurance followed by an discussion of the basics of insurance, the underwriting process and the insurance policy. Next, the Comment will discuss some of the creative options used in disability insurance policies and the perspectives of the individuals and organizations involved in professional sports. After examining the few cases in which professional athlete disability insurance policies have been litigated, the Comment concludes by stressing that sports practitioners recognize the importance of this emerging issue and educate themselves accordingly.

A. The Athlete

In recent years, through a series of national television commercials, the NCAA has touted that the vast majority of its student-athletes eventually "go pro in something other than sports."[5] In fact the NCAA estimates that only about 2.0% of NCAA football student-athletes play professional football and that about 1.3% of NCAA men's basketball student-athletes ever play professional basketball.[6] Nevertheless, the average salaries of professional athletes indicate that a career as a professional athlete will earn you far more money than nearly all other professions.[7]

John Wall enrolled at the University of Kentucky in the fall of 2009 as one of the highest-ranked freshman basketball player in the

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(HRR)). It is important to note that TR, BRI and HRR are all defined differently and do not necessarily include the same revenue streams across all leagues.

4. *See* Glenn M. Wong, ESSENTIALS OF SPORTS LAW §1.2.1 (Greenwood Publishing Group, 4th ed. 2010) (discussing range of average salaries across various sports).

5. Jeff Zillgitt, TV Ads for NCAA Will Get Plenty of Playing Time; New Branding campaign Aims to Get Group's Message to Public, USA TODAY, Mar. 12, 2007, at 2E.

6. *See* NCAA, A CAREER IN PROFESSIONAL ATHLETICS: A GUIDE FOR MAKING THE TRANSITION 38 (Aug. 2004) (listing statistics regarding probability of competing in athletics beyond high school). In addition, the NCAA estimates only 1.0% of women's basketball student-athletes play professionally, 10.5% of baseball student-athletes play professionally, 4.1% of men's ice hockey student-athletes play professionally and 1.9% of men's soccer student-athletes play professionally. *See id.*

7. *See* Wong, *supra* note 4, at 13 (recognizing high salary professional athletes receive compared to other professions).

country.[8] If it weren't for the NBA eligibility rules, he may very well have skipped college altogether and declared himself eligible for the 2009 NBA Draft.[9] Some predict that Wall will be a "one-and-done" candidate, opting for the NBA Draft after just one season of college basketball.[10] While Wall does receive scholarships and other benefits worth tens of thousands of dollars, he will not be receiving the multi-million dollar salary of an NBA player while in college. Playing for new Kentucky head coach John Calipari in front of one of the most rabid fan bases in sports, Wall will be expected to give maximum effort towards a national championship.[11] Yet some people question whether it is in Wall's best interests to put his physical health at risk so that his school can reap millions of dollars from his effort, while an injury may put his professional career at risk.[12]

To combat this inherent conflict and to help prevent student-athletes from leaving school early for the professional ranks, largely as a result of undue influence from agents, the NCAA established the Exceptional Student-Athlete Disability Insurance (ESDI) Program in 1990.[13] The ESDI program, discussed in greater detail later in the article, helps student-athletes projected to have profes-

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8. *See* ESPN, *ESPNU 100,* http://insider.espn.go.com/ncb/recruiting/tracker/espnu100?&season=2009 (Feb. 10, 2010) (ranking incoming college freshmen basketball players and naming where they are attending college). John Wall was ranked number five out of one hundred athletes listed. *See id.*

9. *See* NBA CBA, *supra* note 3, at art. X (requiring that for American players, at least one NBA Season must have elapsed since players' graduation from high school).

10. *See* Brett Dawson, Three Years Later, Colleges Cooling To NBA Draft Rule, THE COURIER J., *July 11, 2009 (mentioning briefly that John Wall is expected to leave college for NBA after one-season minimum);* see *Bryan Burwell,* Is One College Year Enough? NBA's 'One-and-Done' Rule Comes Under Scrutiny, ST. LOUIS POST-DISPATCH, June 26, 2009, at C1 (determining, after considering arguments on both sides, that NBA's one-and-done rule is positive for players and coaches and, should perhaps be extended to two years); see *John Rohde,* Big 12 Coaches Would Like to See One-and-Done Rule Go, THE OKLAHOMAN, June 25, 2009, at 1C (reporting that much debate appears to be among colleges and not NBA officials who seem rather impartial to one-and-done rule).

11. *See* Dawson, *supra* note 10 (describing Calipari as Kentucky's head coach).

12. *See, e.g., Gene Wojciechowski, Soak Up the One-and-Done Experience of Love,* ESPN COMMENTARY, Mar. 28, 2008, http://sports.espn.go.com/espn/columns/story?columnist=Wojciechowski_gene&id=3316618&sportCat=ncb (mentioning injury risk of playing college basketball as incentive to go to professional level after only one season).

13. *See* NCAA Exceptional Student-Athlete Disability Insurance, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/Budget+and+Finances/Insurance/exceptional.html (last visited Apr. 3, 2010) (describing student-athlete insurance policy costs, benefits, and application process).

sional careers obtain insurance policies against potentially career-ending injuries.[14]

B. The Club

Most of the contracts in MLB, the NBA and the NHL are guaranteed, in the sense that if a player is injured or is cut from the team for skill or salary cap purposes, he is still paid the remaining value of the contract.[15] Guaranteed compensation (e.g. signing bonuses and other up-front cash payments) is one of the most contentious issues in the NFL, and almost 50% of compensation in the NFL is guaranteed.[16] Considering that the Big 4 dish out close to $10 billion in player compensation annually, it makes sense that a team would want to insure itself against a player's possible injury.[17]

Prior to the 2009 season, the New York Yankees signed free agent first baseman Mark Teixeira to an eight-year, $180-million contract.[18] Barring a few extreme circumstances under which a team may void a contract, Teixeira s is guaranteed $180 million.[19] It should be noted that it is common, especially in the NFL, for teams to require players to sign injury waivers, releasing the team from future financial obligations in the case a player reinjures a

14. For a further discussion of the ESDI, see *infra* notes 191-208 and accompanying text.

15. *See generally* NBA CBA, *supra* note 5 (describing terms of player contracts including provision providing for payment of balance of contract even if unable to play); s*ee generally* NHL CBA, *supra* note 3 (describing terms of player contracts including provision providing for payment of balance of contract even if unable to play).

16. *See* Chris Deubert & Glenn M. Wong, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations,* 16 UCLA ENT. L. REV. 179, 200-01 (2009) (suggesting ways in which guaranteed pay and bonuses may be avoided in NFL contracts).

17. For a discussion of annual revenues and percentage of revenue paid as compensation, see *supra* notes 4-5 and accompanying text.

18. *See* Kat O'Brien, *Yanks Try Again, Succeed at First; Reach Agreement with Teixeira for Eight Years, $180 million,* NEWSDAY, Dec. 24, 2008, at A50 (reporting on Yankees's acquisition of Teixeria along with two other top picks who will likely propel Yankees to top of league).

19. *See id.* (discussing terms of Yankee contract).

preexisting condition.[20] Insurance policies generally cover sixty to eighty percent of a contract's total value.[21]

There have been several high profile cases of teams purchasing insurance on a player's contract with varying degrees of success, including the New Jersey Nets on forward Jayson Williams,[22] the Baltimore Orioles on outfielder Albert Belle,[23] the New York Mets on first baseman Mo Vaughn,[24] and the Minnesota Twins on outfielder

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20. *See* Harvery Fialkov, *Veteran Receiver Glenn Being Considered*, S. FLA. SUN-SENTINEL, July 30, 2008, at 6C (noting how Glenn, who had recently undergone two surgeries on his right knee, refused to sign injury waiver and was released); *see* Nancy Gay, *Newberry Signs with Raiders*, S.F. CHRON., Mar. 7, 2007, at D3 (indicating that when Newberry joined Raiders he signed injury waiver to protect team from his well-documented knee problems); *see* Mike Reiss, *Dwight is Looking for the Biggest Return*, BOSTON GLOBE, Jan. 15, 2006, at C2 (establishing that when Dwight signed with Patriots his agreement included general injury waiver).

21. *See* T.J. Quinn, *Paying For It*, N.Y. DAILY NEWS, Nov. 25, 2001 (reporting on increasing insurance costs to sports teams due to more frequent player injuries). In 2001, "insurance premiums for major contracts [went] up an average of 250%." *Id.*

22. For a discussion of the high-profile insurance claim regarding Jayson Williams, see *infra* note 309 and accompanying text.

23. *See* La Velle E. Neal III, Major League Baseball Insider; Insuring Contracts Getting Expensive, STAR TRIBUNE, Apr. 29, 2001, at 10C (reporting that Orioles stood to collect $27.3 million on Belle's $39 million contract after Belle retired with hip injury). Though Belle was unable to play since 2000 because of his hip injury, the Orioles were forced to keep him on their 40-man roster until 2003 to collect on the insurance payments. *See* Joe Christensen and Roch Kubatko, O's waive Maduro, Cut Brock, 3 others; Likes of Belle, Bedard Fill Opened Roster Slot, THE BALTIMORE SUN, Oct. 2, 2002, at 3D. Prior to the 1999 season, Belle signed a five-year, $65 million contract with the Orioles. *See id.* During the spring training of 2001, Belle announced his retirement from the game due to a degenerative hip condition. *See id.* The Orioles were only responsible for $11.7 million of the $39 million remaining on Belle's guaranteed contract. *See id.* However, the Orioles were forced to keep Belle on their 40-man roster to collect on the insurance payments, which they did through the 2003 season. *See* Murry Chass, *Front Office Changes, But Will the Pirates?*, N.Y. TIMES, Nov. 11, 2007, at 8 (mentioning Belle's contract and subsequent injury that forced team to keep Belle on injured list for three years to collect insurance payments).

24. *See* Sam Borden, *If Mo's Done, Mets Cash In*, N.Y. DAILY NEWS, May 8, 2003 (discussing possibility of Vaughn leaving Mets and result this would have on Mets in terms of insurance payments). Vaughn, a player for the New York Mets, battled nagging injuries throughout his short tenure with the Mets before leaving the game for good on May 2, 2003. *See id.* Years of weighing over 250 pounds did Vaughn in as he considered options for his arthritic left knee. *See id.* Once Vaughn had not played for 90 consecutive days, the Mets began to recoup 75% of Vaughn's remaining 2003 salary. *See id.* While Vaughn never played again, because he never filed retirement papers with the league, the Mets kept him on the roster through 2004 to collect 75% of the nearly $29 million Vaughn was still owed. *See* Dave Caldwell, *Vaughn Is Out for the Year And Is Unlikely to Return*, N.Y. TIMES, Jan. 9, 2004, at D5 (noting potential insurance recovery for Mets after Vaughn leaves baseball). The Mets exercised a $2 million buyout of Vaughn's contract prior to the 2005 season.

Kirby Puckett.[25] Several disputes between teams and insurance companies over high-profile player contracts have been settled without terms being disclosed, including the Boston Bruins on forward Cam Neely[26], the Houston Astros on first baseman Jeff Bagwell[27] and the Los Angeles Dodgers on Kevin Brown.[28]

C. The Athlete and The Club

As explained earlier, nearly all contracts in MLB, the NBA and the NHL are fully guaranteed.[29] Nevertheless, some professional athletes may still find it in their best interests to seek out disability insurance. For example, LeBron James, a perennial All-Star, MVP candidate and one of the NBA's biggest stars entered the 2009-10 season as an impending free agent, assuming he doesn't exercise a

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25. *See* Sid Hartman, *Puckett Insurance Helpful to Twins*, STAR TRIB., July 16, 1996, at 3C (comparing premium payments made on Puckett's contract to return for team). Once Puckett had missed 60 days of the 1996 season the Twins began to collect 50% of Puckett's remaining 1996 salary, which amounted to an insurance collection of roughly $2 million. *See id.* The Twins collected insurance on 50% of Puckett's salary for the first 60 days of the 1997 season and 75% of his salary for the remainder of that season. *See id.* The Twins saved $4.67 million in 1997 through this insurance arrangement. *See id.*

26. For a discussion on Cam Neely's insurance settlement following litigation regarding payment for the claim, see *infra* notes 321 and accompanying text.

27. *See Astros' Insurance Claim on Bagwell Denied*, USA TODAY, Mar. 28, 2006, *available at* http://www.usatoday.com/sports/baseball/nl/astros/2006-03-28-bagwell-claim-denied_x.htm (reporting on insurance claim denial for Bagwell's injury). With Bagwell due $17 million in salary for the 2006 season, the Astros filed an insurance claim seeking to recover $15.6 million of Bagwell's guaranteed 2006 salary by claiming that Bagwell was too disabled to play. *See id.* In March of 2006, however, the insurance company ruled against the Astros, claiming "that there had been no adverse change in Mr. Bagwell's condition between the end of last season and the date the policy terminated." *Id.* In December 2006, the Astros and Connecticut General Life Insurance Co. settled the case with terms undisclosed. *See Wells in Elite Company; $126M Deal Sixth Largest in History*, S. FLA. SUN-SENTINEL, Dec. 17, 2006, at 2C (confirming out-of-court settlement between Astros and insurance company regarding Bagwell contract).

28. *See* Louinn Lota, *Dodgers Sue Insurance Company Over Brown's Injuries*, UNION TRIB., Apr. 8, 2003, *available at* http://legacy.signonsandiego.com/sports/baseball/20030407-2120-bbn-dodgerslawsuit.html (describing lawsuit for payment of insurance to cover losses on Brown's contract due to his injury). Prior to the 1999 season the Dodgers and Brown agreed to a seven-year, $105 million contract. *See id.* After injuries limited Brown to only 29 starts in 2001 and 2002 the Dodgers filed for an insurance claim, and then filed suit. *See id.* The case was settled with terms undisclosed. *See id.*; *see generally* L.A. Dodgers Inc v. Hartford Life Ins. Co, 2:03-cv-02442 (C.D. Cal. Apr. 7, 2003) (noting controversy between Dodgers and insurance company regarding payment on remainder of Brown's contract).

29. For a further discussion of contract guarantees, see *supra* notes 15-17 and accompanying text.

player option for the 2010-11 season.[30] In free agency, the contract James will sign will almost certainly be a "maximum" contract within the meaning of the NBA CBA.[31] With one season remaining on his contract at a salary of about $15.8 million, LeBron stands one major injury away from potentially losing dozens of millions of dollars in free agency.[32] Consequently, James and many athletes in a similar position may seek out insurance policies based on prospected future earnings. At the same time, the Cavaliers have an insurable interest in the year remaining on James's contract.[33] There are often scenarios in professional sports where an impending free agent has insurable interest in his potential contract but at the same time the team wants to insure the large salary the player is currently earning.[34]

The NFL presents a different situation that the other Big Four. Due to the non-guaranteed nature of most NFL compensation, some players may seek out insurance policies on their own.[35] One of the most notable cases was former Redskins quarterback Joe Theismann, who cashed in on a $1.4 million policy after a career-ending broken leg in 1985.[36] In general, NFL players are entitled to

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30. *See Free Agents: 2008 and 2009*, ESPN, Nov. 3, 2009, http://sports.espn.go.com/nba/news/story?page=FreeAgents-09-10 (discussing James' potential free agency).

31. *See* NBA CBA, *supra* note 3 at art. IX (limiting player contracts to five seasons or six if players resign with their former club); *see also id* at art. II, §7 (restricting players' maximum annual salary to twenty-five to thirty percent of league salary cap, depending on years in league). The 2008-09 NBA Salary Cap was $58.68 million. *See* NBA Salary Cap for 2008-09 Season, http://www.nba.com/news/salarycapset_080709.html (last visited Apr. 3, 2010) (discussing salary cap for 2008-09 season).

32. *See* Sportige, *NBA Top Ten Highest Player Salaries for 2009-2010*, http://sportige.com/2009-2010-biggest-contracts/ (last visited Feb. 25, 2010) (listing top NBA player salaries) [Rule 18.2.3 (c)]; *see also* Mike Starkey, *LeBron James Will Keep Contract Options Open Regarding Extension with Cleveland Cavaliers*, CLEVELAND.COM, Aug. 7, 2009, http://www.cleveland.com/cavs/index.ssf/2009/08/lebron_james_will_keep_contrac.html (stating that Lebron James has one more year left on his contract).

33. *See* LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §41:25 (3d ed. 2009) (defining insurable interest).

34. *See id.* (recognizing when one has insurable interest).

35. For a further discussion on the non-guaranteed nature of NFL contracts, see *supra* note 3 and accompanying text.

36. *See* Chrstine Brennan, *Insurance Could Bring Theismann $1.4 Million; Quarterback Appears Unlikely to Be Ready for Redskins' Training Camp*, WASH. POST, June 10, 1986, at D1 (reporting injury and insurance pay out given to Thiesmann after his career ending injury); *see also Theismann Opts for Waiver List*, N.Y. TIMES, July 26, 1986, at 45 (addressing Theismann's career-ending injury that was able to get him huge payout from insurance). Theismann's right leg was badly broken in a 1985 game against the New York Giants. When he failed his 1986 preseason physical, he was placed on waivers, set to earn a $650,000 salary and a $600,000 roster

some portion of their scheduled compensation if they are cut, but certainly not the balance of their multi-year contracts as in other sports.[37]

II. BASICS OF INSURANCE

In general, insurance provides coverage or protection in the event that something goes wrong.[38] Insurance can cover loss or theft of property, health issues (dental problems, broken legs, etc.) personal liability (involvement in an auto accident), damage to property (a house), death (life insurance) and disability (injury preventing one from working).[39]

Another way of looking at this is that the decision to purchase insurance is shifting risk to the insurance company.[40] For example, if there is a theft of $20,000 worth of your personal property, and you have insurance, then the insurance company has assumed the risk and will pay you $20,000.[41]

A premium is "[t]he periodic payment required to keep an insurance policy in effect."[42] A deductible is "the portion of the loss to be borne by the insured before the insurer becomes liable for payment."[43] Therefore, if as part of your insurance policy you paid a premium of $1,000 and have a deductible of $2,500, for the year

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bonus if he were on the active roster for the entire season. In 1984 Theismann had signed a $1.4 million career-ending injury insurance policy with Lloyd's of London. When Theismann failed physicals in 1986 and 1987, he was able to collect on the policy.

37. *See* NFL CBA, art. X, INJURY GRIEVANCE (2006), *available at* http://static.nfl.com/static/content/public/image/cba/nfl-cba-2006-2012.pdf (permitting injured player that was cut to recoupis weekly salary for number of weeks injury would have prevented him from playing (each team has several "injury settlements" each season)); *see also* NFL CBA, ART. XII, INJURY PROTECTION (2006), *available at* http://static.nfl.com/static/content/public/image/cba/nfl-cba-2006-2012.pdf (granting player injured prior season who then fails next season's preseason physical 50% of his salary for next season up to $275,000; operating Disability Plan pursuant to art. LI).

38. *See* BLACK'S LAW DICTIONARY 364 (3d ed. 1996) (defining insurance). Insurance is a contract by which one party (the *insurer*) undertakes to indemnify another party (the *insured*) against risk of loss, damage, or liability arising from the occurrence of some specified contingency, and usually to defend the insured or to pay for a defense regardless of whether the insured is ultimately found liable. *See id.*

39. *See id.* at 364-67 (listing types of insurance).

40. *See* LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §1:2 (3d ed. 2009) (noting purpose of purchasing insurance for protection from risk).

41. There are of course some costs associated with purchasing and then collecting on insurance coverage, known as premiums and deductibles.

42. BLACK'S LAW DICTIONARY 1219 (3d ed. 1996).

43. *Id.* at 444.

of the theft, instead of losing $20,000, you have lost only $3,500. On the other hand, if you did not purchase insurance and had not been the victim of theft, you would have saved the $1,000 premium cost. So the cost of the insurance, the likelihood of theft and peace of mind are all factors for each individual making this type of decision.

Disability insurance is insurance meant to "protect a person from a loss of income during a period of incapacity for work."[44] Disability insurance provides financial coverage for someone who is unable, as a result of injury, to work at his or her job for an extended period of time.[45] There are generally two types of disability insurance policies: permanent and temporary disability. Permanent disability insurance applies when the injury suffered prevents the person from ever working again. Temporary disability policies are applicable when the injury suffered prevents the person from working for an extended period of time but he or she will be able to return to work at some point. These terms will be discussed further in Section III. Most of the disability insurance policies purchased by athletes are for permanent disabilities, therefore these will be the focus of this article. Temporary disability insurance will be briefly discussed in Section V, Creative Options.

III. THE UNDERWRITING PROCESS

The underwriting process is the information collection and decision making process undertaken by the insurer in making a decision whether to insure an individual, and if so, for how much and how long. Underwriting is defined as "[t]he act of assuming a risk by insuring it."[46]

In many types of insurance polices, the number of people buying the insurance is enough so that precise statistical measures can be established to determine the premium amounts to be paid by the insured party.[47] For example, a twenty-five year-old buying a

44. BLACK'S LAW DICTIONARY 816 (8th ed. 2004) (defining disability insurance).

45. *See* LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §182:2 (3d ed. 2009) (stating what disability insurance entails). [Rule 15.4] Consequently, disability insurance is not meant to provide coverage for someone who is out sick for a week or even a month. *See id.*

46. BLACK'S LAW DICTIONARY 1528 (7th ed. 2004) (providing meaning of underwriting) .

47. For information more on the proper pricing of insurance, *see* Steven Kass, *Life Insurance Fundamentals*, 796 PLI/LIT 233 (2009); Justin Hurwitz, *Indexing Health Insurance to Marginal Health Status: A Spoonful of Economics Helps the Premiums Go Down*, 12 DEPAUL J. HEALTH CARE L. 43 (2009) T.13; Tom Baker, *Containing the*

term life insurance policy might pay two-hundred sixty-five dollars per year in premiums for a one million dollar policy. On the other hand, a sixty-five year-old person may pay $4,800 for the same one million dollar in coverage.[48] The insurance companies have statistical information, collected in actuarial tables,[49] indicating the likelihood of collection on the policy for both a twenty-five year-old and a sixty-five year-old. Furthermore, while the collection rate of twenty-five year-olds might be 2% hypothetically, the premiums paid by the other 98% of policy holders should more than cover the payouts. Insurance companies are obviously for-profit enterprises, and they consequently set premiums to reflect the statistical realities.

As compared with life insurance, disability insurance policies in sports generally do not have the wealth of statistical information available from which to properly price policies.[50] Therefore, disability insurance in sports is considered a specialty area of insurance that requires attentiveness to the market.[51] In addition to the wealth of data available on professional athletes, disability insurance premiums in sports are based on experience (i.e. previously collected premiums and payouts on policies) as best as possible, but there can be tremendous variation in prices.[52] The variations are generally caused by two factors: a change in the number of claims paid in a particular year or period and the amounts that may be paid out in that period.

The underwriting process begins with an application by the person seeking insurance.[53] Some of the basic information on the

Promise of Insurance: Adverse Selection and Risk Classification, 9 CONN. INS. L.J. 371 (2002/2003).

48. *See* Tim Bain, QUICK QUOTE, *Female vs. Male Term Life Insurance Premiums*, http://www.quickquote.com/cms/Blogs/Female_vs_Male_Term_Life_Insurance_Premiums_197.html (Nov. 3, 2008) (providing insurance examples).

49. *See* BLACK'S LAW DICTIONARY 1562 (8th ed. 2004) (stating an actuarial table is an organized chart of statistical data indicating life expectancies for people in various categories, such as age, family history, and chemical exposure).

50. Disability insurance provides financial coverage for any "loss of income during a period of incapacity for work." BLACK'S LAW DICTIONARY 816 (8th ed. 2004). There are generally two types of disability insurance policies, permanent and temporary disability, both of which are discussed in further detail below. For a further discussion of disability insurance, see *infra* notes 81-96 and accompanying notes.

51. *See* Daniel A. Engel, *The ADA and Life, Health, and Disability Insurance: Where is the Liability?*, 33 TORT & INS. L.J. 227 (1997-98) (discussing state of disability insurance).

52. *See id.* (discussing difficulty with valuation of disability insurance in sports).

53. *See, e.g.*, Florida Department of Financial Services- The Underwriting Process, http://www.myfloridacfo.com/consumers/purchasinginsurance/underwrit-

application helps the insurance company because it contains characteristics, or risk factors, that determine the premium rates and levels of insurability.[54] In the context of sports, the insurance rates (premium costs per $1,000 of coverage) can vary depending on the sport.[55] The age of the individual is another important factor because there is a higher probability of a career-ending injury for an older player than there is for a younger player.[56] A twenty-two year old pitcher is likely to be motivated to rehabilitate after "Tommy John" surgery, while a forty-two year-old pitcher may not be.[57] An athlete's position is also a factor that can cause changes in rates and is required by the insurance application.[58] For example, the rates for baseball pitchers will most likely be greater than the rates for position players because of the stress on pitchers' arm due to the amount of throwing required by the position.

Perhaps most importantly, the insurance application requests that the athlete disclose any injury history.[59] Rates will certainly vary if there is a previous injury, which may re-occur or may lead to other problems (i.e. a pitcher with previous elbow problems may be more likely to develop rotator cuff injuries).[60] The insurance company may also request medical records and/or require the player to undergo a physical examination.[61] Often insurance companies will want to obtain a medical opinion on the athlete's health from their own doctors or consultants.[62]

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ingprocess.htm (last visited Mar. 29, 2010) (describing underwriting process for various types of insurance).

54. *See id.* (noting bases for insurance company's decision to insure).

55. *See* Serwin Rosen and Allen Sanderson, *Labour Markets in Professional Sports*, THE ECONOMIC J. 111 (2001) (discussing premium rates in more detail).

56. *See* LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §4:14 (3d ed. 2009) (stating what disability insurance entails).

57. *See* Mike Dodd, *Tommy John surgery: Pitcher's best friend*, USA TODAY, July 28, 2003, http://www.usatoday.com/sports/baseball/2003-07-28-cover-tommy-john_x.htm (reporting benefits Tommy John surgery has had on pitcher's careers). The surgery is named after the first pitcher to have had the surgery, Tommy John surgery reconstructs the elbow's ulnar collateral ligament (the "UCL"); the usual effect is greater pitching velocity. Prior to Tommy John surgery, an injured elbow ligament was usually "a pitcher's sentence to the broadcast booth or the monthly autograph show at the local Holiday Inn." *Id.*

58. Krikor Meshefejian, *Professional Sports Injuries: Is Your Team Insured?*, U. ILL. J. BUS. L. SOC'Y (2005), *available at* http://iblsjournal.typepad.com/illinois_business_law_soc/2005/10/a_previous_arti.html.

59. *See* LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §4:4 (3d ed. 2009)

60. *See id.*

61. *See id.*

62. *See id.*

After the application and physical examination process is complete, the insurance company has three options: (1) decline coverage, (2) provide insurance coverage but exclude a particular part of the anatomy or charge a higher premium for a preexisting condition, or (3) provide insurance with no exclusions.[63] If the insurance company is willing to write an insurance policy, the next step is to determine the amount of coverage.[64] The amount of coverage is considered the amount the insured has "at risk."[65] For example, a college basketball student-athlete such as Wall will be considered to have his first NBA (or European league) contract at risk.

The NBA CBA has a rookie wage scale in which rookie contracts are slotted based on their draft position.[66] For instance, if John Wall is drafted during the early part of the first round of the NBA draft, he would be known as a "lottery pick and would likely have a contract in the range of four to thirteen million dollars.[67] Furthermore, because he is most likely to receive this money on a tax-free basis, Wall would have an insurable interest in the four million to thirteen million dollars range.[68] For a team that has insured a guaranteed contract, for example the New York Yankees and Mark Teixeira's $180 million contract, the insurable amount is the full one hundred eighty million dollars.[69]

In making decisions on the coverage amount, the insurer may take into consideration the likely earnings of the athlete given the

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63. *See* LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 102:6 (explaining option of insurance companies).

64. *See id.* (explaining the steps of insurance companies).

65. *See* 7 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §101:3 (3d ed. 1995) (defining risk generally as "the category of loss the insurer agreed to provide cover under the terms of the policy"). More specifically, the "risk" is the amount the insurer agrees to cover narrowed by any specified exclusions. *See id.*

66. *See* NBA CBA art. VIII, § 1, *available at* http://www.nbpa.org/ cba/2005/ art.-viii-rookie-scale (setting forth "Rookie Scale Contracts for First Round Picks"); *see also* Hoopsworld.com, 2009-10 NBA Rookie Scale, http://www.hoopsworld.com/Story.asp?story_id=9301 (last visited Feb. 24, 2010) (charting 2009-10 NBA Rookie Scale).

67. *Id.*

68. *See* 26 U.S.C. §104-05 (2000) (setting forth tax regulations for injury or sickness compensation and amounts received under accident and health plans). Payments from a disability insurance contract are not taxable if the recipient paid the premiums on the contract. *Id.* If the employer paid the premiums, the insurance payout is taxable income. *Id.* As a result, some teams will pay the player an up-front bonus so that he will pay the premiums himself. *Id.* To account for the player's tax-free benefit, insurance companies will often only agree to cover the percentage of the contract the player would have received after-taxes. *See* 26 U.S.C. §1 (2006) (setting forth tax filing rules for individuals).

69. *See* RUSS & SEGALLA, *supra* note 67, §101:3 (indicating that, unless subject to other exclusions, amount at risk will be amount insurer agreed to cover).

ability of the athlete, the team's potential and the conditions of the CBA.[70] Due to the NBA's wage scale, NFL rookies arguably receive closer to their fair market value than do NBA rookies.[71] Consequently, a college football player may have a greater insurable interest than a college basketball player. As stated earlier, all of the Big Four CBAs provide for varying levels of and opportunities for different insurance policies.[72] It is important for any party involved in an insurance contract to be aware of these rights in case the player needs to utilize them or to fill gaps in his or her coverage with other insurance policies.

The insurance company must also make an assessment of ability and demand for the player. A player of marginal ability is less likely to get opportunities to comeback from an injury, increasing the likelihood that he or she would file a disability claim.[73] Furthermore, a star player may have tremendous future earnings potential, but given the relatively high risk involved in sports, an insurance company may decide that the player has more at risk than the company is willing to insure.[74]

Another additional factor in the underwriting process is the character of the insured.[75] In recent years, the Big Four leagues have adopted or strengthened their personal conduct policies and, most notably in the NFL, several well-known players, such as Michael Vick and Adam "Pacman" Jones, have received lengthy suspensions for illegal or inappropriate off-the-field activities.[76] Fur-

70. *See* 1A LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §17:2 (3d ed. 1995) (discussing importance that insurance contract should fit both parties' needs). So long as there is no conflict with provision of law or public policy, the insurer (like the insured) can consider and contract for any specifics that are in its best interest. *See id.* (reiterating what is taken into consideration when contracting).

71. *See* NBA CBA art. VIII, *supra* note 66, § 1 (setting forth NBA wage scale).

72. For a further discussion of the Big Four CBA's opportunities for insurance policies, see *supra* notes 17-30 and accompanying text.

73. *See* 7 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §101:2 (3d ed. 1995) (noting that parties can contract for which risks insurers will or will not insure). Insurers are free to determine which risks they will not cover. *See id.*

74. *See id.* (indicating that policies do not cover risks that are substantially probable).

75. *See id.* ("Policies provide coverage for various risks, which differ from policy to policy. Except for the risk requirements previously discussed and barring public policy considerations, the parties are free to contract for which risks the insurer shall or shall not insure.").

76. *See* Mike Florio, *NFL's Conduct Policy Coming Up Short So Far*, SPORTINGNEWS.COM, June 23, 2008, http://www.sportingnews.com/nfl/art./2008-06-23/nfls-conduct-policy-coming-short-so-far (stating that NFL enacted new personal conduct policy in April of 2007); *NFL Personal Conduct Policy*, ESPN, Mar. 13, 2007, http://sports.espn.go.com/nfl/news/story?id=2798214 (laying out new policy).

thermore, athletes of questionable character may be less likely to be given a comeback opportunity, and thus, may not put in the necessary hard work to successfully rehabilitate a previous injury.

IV. THE INSURANCE POLICY

A. The Amount

The amount of the insurance policy constitutes the total sum of money that the insurance company has agreed to provide to the insured in the case of a valid claim.[77] Once the coverage amount is determined or agreed upon, the premiums and deductible amounts are established.[78] Assuming that insured individuals pay the premium amounts themselves, they will receive payouts as a tax-free lump sum.[79] Net present value is generally not a consideration in insurance contracts.[80]

B. The Definition of Career-Ending

One of the most contentious issues in an athlete disability insurance contract is whether the athlete has suffered the type of injury contemplated by the contract and worthy of a payout. Most athlete disability insurance contracts are meant to provide insurance for a career-ending injury, hence one that prevents the player

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Michael Vick was suspended after his conviction for allowing a dog-fighting ring to be run out of his Virginia home. *See NFL Suspends Vick Indefinitely*, CNN.COM, Aug. 24, 2007, http://www.cnn.com/2007/US/law/08/24/michael.vick/index.html (reporting Michael Vick's suspension). Adam "Pacman" Jones was indefinitely suspended in the summer of 2008 after a serious of off-field personal conduct violations. *See* Sam Farmer, *"Pacman" Jones Gets Indefinite Suspension*, L.A.TIMES.COM, Oct. 15, 2008, http://art.s.latimes.com/2008/oct/15/sports/sp-nflrep15 (reporting Jones suspension).

77. *See* 12 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §182:16 (3d ed. 1995) (documenting that recoverable amounts are contracted for by the parties). "If an insurer wishes to limit its liability for disability benefits to a certain period of time, or a specific amount of money, it must clearly state its intention to do so in the policy. Where clearly stated, such a limitation will be enforced according to its terms." *Id.*

78. *See* 5 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §69:1 (3d ed. 1995) (defining premium as "consideration paid an insurer for undertaking to indemnify the insured against a specified peril"). The premium amount is determined based on the risk assumed. *See id.* (clarifying method of establishing proper premium). The amount of a covered loss the insurer ultimately owes the insured is adjusted by any agreed upon additions or deductions. *See* 11 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §168:1 (3d ed. 1995) (explaining how much insured will be paid adjusted by certain things contained in policy, such as deductible).

79. *See* 26 U.S.C. §104-05 (2000) (exempting disability insurance payments from taxable income if recipient, rather than employer, pays premiums).

80. *See* Russ, *supra* note 67 (explaining insurance valuation generally).

from ever being able to play again. The issue gets controversial when it is difficult to ascertain whether the end of an athlete's career is a result of an injury or the player's skill level resulted in the end of his or her career.

Most of the contracts contain language requiring the athlete to suffer a "permanent total disability" or some variation thereof.[81] Permanent total disability typically requires that the athlete be completely unable to perform their profession or sport for an entire twelve-month period after the initial injury.[82] Typically, players can only buy permanent total disability policies while teams are able to buy temporary disability policies to protect their guaranteed contract obligations (discussed in more detail in Section V.A. Temporary Disability Policies).[83] In order to qualify for the permanent total disability benefit, policies generally will usually require that there be a medical determination that the disability will terminate the athlete's participation in his or her sport.[84]

Additionally, some contracts require that the athlete make best efforts to rehabilitate the injury.[85] In the absence of such a requirement, the insurer will use provisions to encourage a player to return. For example, many contracts allow the player to resume playing for a specified period of time without jeopardizing resumption of future insurance benefits if the comeback effort is unsuccessful.[86] In a permanent total disability policy such a provision is

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81. *See* Interviews with Barry Aframe, Senior Vice President of Legal Affairs, and William F. Hubbard, Chairman, of HCC Specialty Underwriters, A Subsidiary of HCC Insurance Holdings, Inc., the leading underwriter of sports insurance contracts. (on file with author) [Hereinafter HCC Specialty Underwriters]; *see also* Exceptional Student-Athlete Disability Insurance Program, NCAA.ORG, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/ncaa/NCAA/About+The+NCAA/Budget+and+Finances/Insurance/exceptional.html (last visited Feb. 25, 2010) (explaining that ESDI program offers permanent total disability plan). [

82. *See* HCC Specialty Underwriters, *supra* note 83 (indicating that permanent total disability policies pay lumps sums after expiration of twelve month elimination period).

83. *See* Exceptional Student-Athlete Disability Insurance Program, NCAA.ORG, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/ncaa/NCAA/About+The+NCAA/Budget+and+Finances/Insurance/exceptional.html (last visited Feb. 25, 2010) ("To be eligible for benefits, it must be medically determined, at the end of the elimination period and before the benefit is paid, that the insured student-athlete will never be able to participate in his or her sporting activity, at the professional level.").

84. *See* HCC Specialty Underwriters, *supra* note 81.

85. *See id.*

86. *See id.*

known as the "rehabilitation benefit" and in a temporary disability policy it is called the "recurrent disability provision."[87]

Issues often arise when a player attempts to rehabilitate the injury and at any time holds himself out as being completely healthy.[88] Once an athlete's contract expires, the athlete's previous team is only liable to continue paying the athlete during the typical time it takes for the athlete to recover from the injury, but if the contract is guaranteed the athlete will continue to be paid regardless.[89] If the team does not wish to keep the injured player on its roster it will often negotiate some sort of an injury settlement with the player.[90]

Health is an essential element for an unemployed team athlete to receive a new job. All contracts in the Big Four require that the athlete to agree that he is healthy and in excellent condition.[91] Consequently, any athlete who may potentially be eligible for a disability insurance claim must consider whether they have fully recovered from the injury and whether or not the earnings he may receive with a new team will exceed the potential insurance payout. Nevertheless, the insured athlete has the burden of proof to establish that he is disabled and entitled to benefits.[92] Once an athlete establishes that he is disabled and is not playing, it would be the insurer's responsibility to establish that the athlete has the ability to recover if the insurer chooses to contest the payment of benefits.[93] Ultimately, disability must be a fact question, not a player choice. In this situation, the insurers have an advantage because athletes are

87. *See id.*

88. *See* 12 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §182:23 (3d ed. 1995) (pointing out that some policies may provide rehabilitation benefits).

89. *See* HCC Specialty Underwriters, *supra* note 81.

90. *See id.*

91. *See* NFL CBA, *supra* note 8, at Appendix C: NFL Player Contract, Paragraph 8, *available at* http://www.nflplayers.com/About-us/CBA-Download/ (requiring that players represent that they are physically fit and will maintain that fitness); NBA CBA, Exhibit A: NBA Uniform Player Contract, Paragraph 7, *available at* http://www.nbpa.org/cba/2005/exhibit-national-basketball-association-uniform-player-contract (demanding players to report in good physical condition and maintain that condition through each NBA season); MLB CBA, Schedule A: Uniform Player's Contract, Condition, *available at* http://mlb.mlb.com/pa/info/cba.jsp (expecting players to represent that they have no known physical or mental defects that would prevent or impair their performance); NHL CBA, Exhibit 1, Standard Player's Contract, Paragraphs 2 and 6, *available at* http://www.nhlpa.com/About-Us/CBA/ (ordering that players report and remain in good physical condition).

92. For discussion of athlete's need to prove disability see *infra* notes 284-308 and accompanying text.

93. *See* HCC Specialty Underwriters, *supra* note 81.

typically highly motivated people who will make every effort to continue playing.

It is not uncommon for an athlete to attest that he is healthy in contract as requested by the team and then either have recurring troubles with the injury or not play well enough to stay on the team.[94] In these instances, the athlete has risked chance to claim permanent total disability.[95] Nevertheless, the rehabilitation benefit provision for permanent total disability policies (and the recurrent disability provision in temporary total disability policies) does, however, give the player the opportunity to test out his playing ability without risking entitlement to further benefits.[96]

C. The Waiting Period

Under an athlete disability insurance policy, the athlete cannot collect the insurance payout immediately following suffering a potentially career-ending injury. As part of the insurance contract, the athlete must establish permanent total disability, which requires the athlete be unable to perform at his sport for twelve months following the injury. The waiting period helps determine whether the injury suffered is temporary or legitimately career ending as contemplated by the policy. There are particularly rare and controversial situations where an athlete may be unable to perform for twelve months, collects on his insurance policy but then attempts later a comeback.[97] The permanent disability benefits are generally conditional on the fact that the athlete can no longer perform. Thus, if the athlete returns to play, the payment terms of the disability benefits usually mandate that the athlete return the insurance benefits before he or she is able to become an active member of an athletic program.[98]

D. Exclusions

It is rare for an athlete to reach an elite or professional status without having suffered an injury and many have suffered major

94. *See id.*

95. *See* Boston Mut. Ins. Co. v. N.Y. Islanders Hockey Club, L.P., 165 F.3d 93, 93-94 (1st Cir. 1999) (holding that misrepresentations made on players' insurance applications entitled insurers to rescission).

96. *See* 12 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §182:23 (3d ed. 1995) (indicating that clearly stated rehabilitation benefit provisions will benefit insured by offering option for rehabilitation).

97. For further discussion on returning after a career-ending injury, *see infra* notes 294-305 and accompanying test.

98. *See* HCC Specialty Underwriters, *supra* note 81.

injuries. Consequently, teams and insurance companies are often hesitant to employ or insure an athlete that is more likely to suffer a serious injury.[99] It is not uncommon for teams to require a player to execute an injury waiver, which describes a specific preexisting medical condition of the player.[100] Should the player suffer the same or a substantially related injury the team is not required to fulfill its obligations under the contract, i.e. the team can cut the athlete without compensation.[101]

Insurance companies execute very similar exclusion clauses in their athlete disability insurance contracts.[102] As part of the application process an athlete must submit a detailed medical history and may even have to undergo a physical examination by the insurance company's own doctor.[103] Failure to complete these forms accurately and honestly may nullify the insurance agreement.[104] If a player has a preexisting medical condition, the insurance contract may state that the athlete cannot recover under the disability insurance policy for an injury related to the preexisting condition or the policy may exclude all coverage to that area of that anatomy.[105] The relatively high risk of injury in sports is what makes it essential that the insurance company receive truthful and accurate information from the athlete-applicant.[106]

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99. *See* John C. Williams, J.D., Annotation, *Construction and Application of Provision in Health or Hospitalization Policy Excluding or Postponing Coverage of Illness Originating Prior to Issuance of Policy or Within Stated Time*, 94 A.L.R.3d 990 (1975) (majority rule is that illness must manifest itself or result in symptoms capable of diagnosis by doctor before policy is issued in order to qualify as pre-existing condition); *see also* HC Specialty Underwriters, *supra* note 83.

100. *See* NBA CBA, Exhibit A, NBA Uniform Player Contract, Exhibit 3, Prior Injury Exclusion, http://www.nbpa.org/sites/default/files/EXHIBIT%20A.pdf (last visited Feb. 26, 2010) (presenting NBA form for waiver of compensation in event of injury related to prior injury.).

101. *See id.* ("The Player's right to receive his Compensation as set forth in paragraphs 7(c), 16(a)(iii), 16(b) of this Contract, or otherwise is limited or eliminated with respect to the following reinjuring the injury or aggravation of the condition set forth below . . .").

102. *See* HCC Specialty Underwriters, *supra* note 81.

103. *See id.*

104. *See* Boston Mut. Ins. Co. v. N.Y. Islanders Hockey Club, L.P., 165 F.3d 93 (1st Cir. 1999) (noting that fraudulent statements on professional hockey player insurance application renders contract void).

105. *See* HCC Specialty Underwriters, *supra* note 81.

106. *See* Professional Athlete High Limit Disability Insurance- American Health Administrators, http://www.aha-ins.com/proathdisability.html (last visited Feb. 26, 2010) (noting exclusion of coverage for known and unknown pre-existing athlete injuries).

E. Type of Coverage and Term of Coverage

The insurance contract is very specific in that it will only cover injuries incurred during or related to the athlete's professional career.[107] Concussions and illnesses are also generally covered unless specifically excluded. All contracts in the Big Four require that the athlete withhold from participating in other activities that involve a significant risk of injury, including sports in which the athlete is not a professional.[108] If an athlete is injured participating in a different sport without the permission of his team, he risks having his contract voided.[109]

Contracts in MLB and the NBA are guaranteed for injuries that occur off the field and off-the-court, so long as the player has not violated the hazardous activities clause of his standard player contract.[110] In the NHL, contracts are only guaranteed for injuries that occur during hockey-related activities.[111] As a result, many NHL players buy insurance for off-ice injuries that covers them to the extent that MLB and NBA players are covered.[112] Regardless, an athlete's disability insurance contract does not normally provide coverage if he violates the hazardous activities clause of his standard player contract.[113] Nevertheless, some athletes do buy insurance that protects them and their contracts if they are injured during a barred hazardous activity.[114]

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107. *See* HCC Specialty Underwriters, *supra* note 81.

108. *See* NFL CBA, Appendix C NFL Player Contract, Paragraph 3, *available at* http://viewer.zmags.com/publication/34732966#/34732966/1 (last visited Feb. 26, 2010) (requiring that NFL players not engage in activities involving significant risk of personal injury); NBA CBA *supra* note 103 (prohibiting NBA players from engaging in activities that present risk of personal injury); MLB CBA, Schedule A Uniform Player's Contract, Other Sports, *available at* http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf (last visited Feb. 26, 2010) (ordering that MLB players refrain from non-baseball activities presenting significant risk of personal injury); NHL CBA, Exhibit 1, Standard Player's Contract, Paragraph 7, *available at* http://www.nhl.com/cba/2005-CBA.pdf (last visited Feb. 26, 2010) (mandating that NHL players refrain from non-hockey related activities presenting risk of personal injury).).

109. *See* Aaron Portzline, *Off-Field Fun for Athletes Can Be Risky Business*, Columbus Dis, May 4, 2005, at S01E. The New York Yankees voided third-baseman Aaron Boone's contract before the 2005 season after Boone suffered a severe knee injury playing pick-up basketball. Boone had months earlier hit a dramatic game-winning home run in Game 7 of the ALCS to carry the Yankees over the Boston Red Sox. *See id.* Boone's departure cleared the way for the Yankees to acquire Alex Rodriguez. *See id.*

110. *See* HCC Specialty Underwriters, *supra* note 81.

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

The term of the contract is simply the number of years or seasons for which the insurance company agrees to provide coverage to the athlete.[115] The term is an essential component of the coverage, premium and deductible calculations. Many athlete disability insurance contracts reserve the insurer's right to discontinue coverage in the event that the athlete is traded.[116] This provision gives the insurer the opportunity to reevaluate the risk, in light of possible changes in risk due to such things as changing role, different playing surface, different risk management or training strategies.[117]

F. Death

An athlete may choose to purchase a life insurance policy, however, such a policy is generally separate and unrelated to an athlete disability insurance policy. A life insurance policy covers a much broader spectrum of events upon which collection can be based.[118] A life insurance policy is paid to its designated beneficiaries upon the death of the insured, but the death certainly need not be related to the athlete's participation in an athletic event. Typically disability benefits cannot be collected after death of the insured.[119] Nevertheless, teams can insure against the sudden loss of a player, even upon accidental death.[120]

V. CREATIVE OPTIONS

A. Temporary Disability Policies

A disability is temporary if it "exists until an injured worker is as far restored as the nature of the injury will permit."[121] A temporary disability policy allows the insured to recover during the time in which the insured or the subject of the insurance is unable to work. In the sports context, this is a policy, which is typically only used by a team and not the player.[122] The goal or purpose of a team

115. *See id.*
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.*
120. *See id.*
121. BLACK'S LAW DICTIONARY (8th ed. 2004). *See also* Alaska Indust. Bd. v. Chugach Elec. Ass'n, 356 U.S. 320 (1958) (delineating employee's permanent disability from temporary disability for insurance coverage purposes); Air Am., Inc. v. Director, Officer of Workers' Compensation Programs, 597 F.2d 773 (1st Cir. 1979) (upholding award for partial temporary disability and excluding and defining permanent disability and total temporary disability).
122. *See* HCC Specialty Underwriters, *supra* note 81.

purchasing a temporary disability policy is to provide protection in a situation where a player suffers a serious, but less than career-ending injury.

Considering that most contracts are guaranteed in professional sports, teams are still obligated to pay injured players. Consequently teams may take out insurance on some of their higher priced players, such that if that player is unable to play, at least the team does not have to pay all of his salary. For example, if Yankees pitcher and recipient of a seven-year, one hundred sixty one million dollar contract CC Sabathia injured his arm and required "Tommy John" surgery, he may not be able to pitch for a year or two.[123] While the Yankees would not be able to collect on a permanent disability insurance policy, they could collect under a temporary disability policy.[124]

MLB does not have a league-wide disability insurance program. Consequently, teams contract individually on certain player contracts, typically up to a maximum of three years at a time.[125] Typically temporary disability insurance contracts in MLB contain a sixty-day, ninety-day or full-season waiting policy.[126] The range in premium amounts accounts for the player's position and age: the cost for a 25 year-old shortstop would be less than that of a thirty two year-old pitcher.[127] The ninety-day policy is the most common policy. It is believed that the NBA's required waiting period is forty-one games or half a season and that the NHL requires a thirty game waiting period.[128]

B. "Key-Man" Insurance Policies

"Key-man" insurance is a relatively new insurance arrangement that provides benefits to probable playoff teams that do not make the playoffs as a result of an injury to a star player, or "key-man."[129]

123. *See* Kat O'Brien, *Yankees: Expectations a mound high*, NEWSDAY (New York), Dec. 19, 2008, at A94 (noting potential results of Sabathia hypothetical injury under contract).

124. *See* HCC Specialty Underwriters, *supra* note 81.

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See* Zurich Financial Services Australia, Key Person Insurance- Who Needs It?, http://www.zurich.com.au/zportal/cs/ContentServer?pagename=Brokers/Page/ThreeColumnLeadImage&cid=1242903898768&p=1242903898006 (last visited Feb. 10, 2010) (explaining purpose and importance of key person insurance as applied to businesses and highlighting professional sports teams as examples of such). Outside of the sporting world, "key man" insurance is used to protect businesses from loss of revenue due to the illness, incapacitation, or death

Based on team expectations, in the preseason, an insurance company will offer to reimburse the amount of a typical postseason game's revenues if an agreed upon star player misses a certain number of games during that season.[130]

For example, in 2008, the New England Patriots was considered a prime candidate to make the postseason since the team had made the playoffs from 2003 until 2007, including Super Bowl appearances in 2003, 2004 and 2007. An injury to star quarterback, Tom Brady, in the first game of the season left Brady unavailable for the remainder of the season.[131] Perhaps in part because of Brady's absence, the Patriots failed to make the playoffs. If the Patriots had "key-man" insurance, they could have recovered an amount equal to the projected revenues from that missed playoff game.[132] Some teams may base their policies on the health of several key players. For example, the 2009 Philadelphia Eagles might have had a policy based on the health of quarterback Donovan McNabb and running back Brian Westbrook – both of relatively equal value to the team's success.[133]

C. Loss of Value Insurance

One increasingly popular option for athletes approaching free agency, particularly NFL players, is "loss of value" insurance. In general, "loss of value" policies allow a player to recoup money the player would have made as a free agent absent an injury.[134] In general, insurance companies are reluctant to provide coverage on these types of policies. A "loss of value" policy may work in different ways, in the first example, the policy requires a player to miss a certain amount of games but includes a threshold amount of value lost based on the player's most recent contract offer.[135] For example, a player that is a season away from free agency and is offered a fifty million dollar contract by his existing team and misses at least four games in the final season of his existing contract can recover

of an individual whose special talents or expertise provide the business with an economic advantage. *See Id.* ("Key person insurance is designed to protect the business should it lose someone who makes such a significant contribution towards the company's profitability, stability and growth potential").

130. HCC Specialty Underwriters, *supra* note 81.

131. *See id.*

132. *See id.* Teams might also use insurance policies that allow them to recover for future lost playoff game revenues resulting from losing a playoff game at home. *See id.*

133. *See id.*

134. *See id.*

135. *See* HCC Specialty Underwriters, *supra* note 81

the policy amount only if his most recent contract offer is less than twenty five million dollars. If he receives an offer over twenty million dollar, he cannot recover.[136]

In the second type of "loss of value", a maximum benefit amount is agreed to and if the player receives an offer for less than that amount and the reason for the reduction is because of sickness or injury the insurance company agrees to pay the difference between the highest offer and the maximum benefit amount. For example, if the maximum benefit is ten million dollars and the player suffers an injury that causes him to receive an offer of only eight million dollars the insurance company will pay the difference of two million dollars. If, however, during the life of that eight million dollar contract the player eventually receives more than the eight million dollars he must return the benefits up to the two million dollars he recovered.[137]

While the threshold amount has deterred some players from using the expensive policies because premiums can cost well over $100,000, "loss of value" insurance can prove a useful tool to a player and agent who feel that a player is not being offered his fair market value. One player known to have purchased such a policy is Dallas Cowboys quarterback Tony Romo, who purchased a thirty million dollar policy prior to the 2007 season, during which he eventually signed a six-year, $67.5 million contract extension.[138]

D. "Loss of Draft" Position

A loss of draft position policy covers professional prospects who are not drafted as highly as expected and the loss of income associated with that drop in draft status. Such policies, though most common in the NFL, have recently become less prevalent given the general financial situation in the United States and uncertainty over how an impending NFL CBA might alter rookie wages.[139]

Insurance companies offer contingent personal accident policies meant to protect a player's anticipated draft position and consequent compensation.[140] The policy does not require that the player miss a particular number of games, but instead requires that

136. *See id.*

137. *See id.*

138. *See Even if he drops ball, Romo cashes in*, CHI. TRIB., Oct. 26, 2007 at C2 (calling Romo a "forward thinker" for purchasing "loss of value" insurance enabling him to collect insurance payments for non career-ending injuries),

139. *See* HCC Specialty Underwriters, *supra* note 81.

140. *See id.*

for coverage to apply, the injury must be serious and lasting.[141] In order to be serious the injury must negatively affect the player's skills in a manner that causes substantial and material deterioration in his or her ability to perform; the illness must negatively affect his or her skills permanently.[142]

The player's anticipated compensation is determined from by his expected draft position, with a maximum limit of liability (generally half of the anticipated compensation).[143] For example, if the player anticipated to be drafted at position garnering a twelve million dollar contract, the maximum limit of liability for the insurance coverage would be six million dollar. If the player ultimately only receives a three million dollar contract because of a covered injury or illness, insurance would only provide six million dollar of the nine million dollar difference between his expected and actual contracts.

The insurance contract requires that if benefits are paid and the player ends up earning an amount that, combined with the benefits paid exceeds the anticipated compensation within a specified number of years, the player must return the excess amount of benefits he received.[144] Consequently, using the above example, if the player eventually earns eight million dollars in compensation during the first six years of his career, combined with the six million dollars insurance benefit, he has now received fourteen million dollars. As a result, he would be required to return two million dollars of the insurance benefit.

E. Reducing Exposure

As mentioned earlier, athlete disability insurance is a specialty item with a relatively high level of risk considering the uncertainty of statistical information and the comparatively low number of policyholders. To combat risk, insurance companies often "reinsure" the policies they underwrite. Reinsurance is the "[i]nsurance of all or part of one insurer's risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium."[145] Effectively, the original insurance company sells a part of the insurance contract to another insurance company. Reinsurance serves three main purposes for the insurance company:

141. *See id.*
142. *See id.*
143. *See id.*
144. *See id.*
145. BLACK'S LAW DICTIONARY (8th ed. 2004).

> First, reinsurance can increase the capacity of the insurer to accept risk. The insurer may be enabled to take on larger individual risks, or a large number of smaller risks, or a combination of both . . . . Secondly, reinsurance can promote financial stability by ameliorating the adverse consequences of an unexpected accumulation of losses or of single catastrophic losses, because these will, at least in part, be absorbed by reinsurers. Thirdly, reinsurance can strengthen the solvency of an insurer from the point of view of any regulations under which the insurer must operate which provide for a minimum 'solvency margin,' generally expressed as a ratio of net premium income over capital and free reserves.[146]

Taking the example from earlier, if Kentucky's John Wall is insured for four million dollars, his policy may be broken up and sold off to several insurance companies. This reduces the risk for the company that writes the original policy and spreads the risk and return for the insurance companies.

The practice of reinsurance began in the Fourteenth and Fifteenth centuries as a way of protecting companies from the expensive and risky adventures involved in the marine shipping industry.[147] The practice was proliferated with the establishment of Lloyd's of London in 1710.[148] The same concepts apply today, some things do not happen very often, but when they do, the loss can be very large. Therefore, it is wise to spread the risk among companies by reinsurance.

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146. *See* P.T. O'NEILL & J.W. WOLONIECKI, THE LAW OF REINSURANCE IN ENGLAND AND BERMUDA 4 (1998). *See also* EDWIN W. KOPF, NOTES ON ORIGIN AND DEVELOPMENT OF REINSURANCE 25 (1929). (describing purposes of reinsurance). The practice of reinsurance began in the Fourteenth and Fifteenth centuries as a way to protect companies from the expensive and risky adventures involved in the marine shipping industry. *See id.* The practice was proliferated with the establishment of Lloyd's of London in 1710. *See id.* The same concepts apply today, some things do not happen very often, but when they do, the loss can be very large. *See id* at 25-27.

147. *See* Edwin W. Kopf, NOTES ON ORIGIN AND DEVELOPMENT OF REINSURANCE (Globe Printing Company, Inc. 1929) (offering early history regarding reinsurance industry).

148. *See id.* (noting economical growth of reinsurance industry).

VI. THE BUSINESS SIDE- PERSPECTIVES

A. Brokers

In general, a "broker" is someone who represents persons seeking insurance, as opposed to an "agent" who represents the entities that sell insurance.[149] In most statutes, brokers are referred to as "insurance producers."[150] Brokers must be licensed and can sell, solicit or negotiate insurance.[151] Generally brokers are compensated either through fee arrangements or commissions on the insurance premiums.[152] There is generally no fiduciary duty for a broker towards their customer; they are "to exercise reasonable skill and ordinary diligence."[153]

The brokers' interest in the use of disability insurance policies in sports is simply an enlarged insurance market and more employment opportunities. As the financial stakes increase for players and teams, more insurance policies are likely and insurance brokers stand to reap the rewards. Although the market for premiums is comparatively unstable in the insurance field, brokers can still stand to make sizable profits off insurance policies that routinely have premiums in the hundreds of thousands of dollars. In general, it is good practice for insurance brokers to be careful not to try and oversell unnecessary policies, or face potential liability.[154]

B. Insurance Companies

With properly calculated risk, insurance companies should not only be willing, but be actively looking to insure almost anything. The fundamental principle of insurance is that even if the under-

149. *See* Richard E. Quinby, *Insurance Brokers, Agents and Advisors*, *in* MASSACHUSETTS LIABILITY INSURANCE MANUAL 10 (2009) (defining broker and agent).

150. *See id.* (explaining statutory status of brokers).

151. *See id.* at §10.2 (defining broker as one who is licensed to sell, solicit or negotiate insurance).

152. *See* Priya Cherian Huskins & Clark Morton, *Choosing Your Insurance Broker*, *in* 796 PRAC. LAW INST. LITIG. & ADMIN. HANDBOOK SERIES 501, 505-06 (2009) (describing traditional methods for compensating brokers as either commissions on insurance premiums or contingent fee arrangements).

153. *See* Quinby, *supra* note 151, at §10.4.1 (citing Hartford Nat'l Bank & Trust Co. v. United Truck Leasing Corp., 511 N.E.2d 637, 640-41 (Mass. App. Ct. 1987), *review denied*, 513 N.E.2d 1289 (1987)) (outlining broker's duty).

154. *See* Johnson v. Amerus Life Ins. Co., 2006 WL 3826774, 1-4 (S.D.Fla. 2006) (entertaining case where broker allegedly took advantage of professional football player). In 2005, Andre Johnson, a Pro Bowl wide receiver with the Houston Texans, filed suit against Rodney Brown and Amerus Life Insurance, contending that they took advantage of him when he was 22 years old and convinced him to purchase over $43 million in life insurance with annual premiums of $375,000. *See id.* The case was eventually settled out of court. *See id.*

writer has to pay out on a few claims, the policies and premiums where a claim is not made will more than make up for the financial loss of the claims. Consequently, athlete disability insurance policies are just another extension of the constantly growing insurance field.[155]

One major issue, with which insurance companies have had to deal with, is properly pricing the insurance premiums on athlete disability policies.[156] As salary inflation and the rates of injury in professional sports have been difficult things to predict, insurance premiums have had trouble adjusting appropriately.[157] The events of September 11th had a dramatic impact on the entire insurance industry.[158] In 2002, the premium on a MLB outfielder was about seven dollars and twenty-seven cents per $1,000 insured and twenty-four dollars and twenty-five cents per $1,000 insured for a pitcher, about twenty percent more than in previous years.[159] At the same time, an NHL player paid about six dollars and fifty cents for every $1,000 insured.[160]

As competitive pressures have pushed salaries higher and made contracts longer, insurance companies have been less willing to assume the risks. Coverage amounts dipped as low as fifty to seventy percent of contracts in 2004 as opposed to eighty percent earlier years.[161] In addition, insurance companies are less willing to insure long-term contracts, often drawing the line at three years.[162]

Although the market has proved difficult to ascertain, there are still billions of dollars of contracts capable of being insured. Over time, as insurance companies develop a better understanding

155. *See* Nando Di Fino, *Fantasy Football Insurance: A New Kind of Pocket Protection Against NFL Injuries*, WALL ST. J., Sept. 1, 2009 (reporting that disability insurance policies have even extended to fantasy sports leagues and owners).

156. *See* Michael Loney, *Playing Hardball*, *in* 22 REACTIONS 8 (2002) (noting how recently insurance rates for players is increasing as players' skill value continuously increase).

157. *See id.* (discussing adjustments of insurance premiums in multiple sports).

158. *See id.* ("'The market was changing before September 11,' says Idelson at ASU. 'But September 11 really accelerated that. Now there are less insurers available.'").

159. *See id.* (noting examples of premium rates for MLB players).

160. *See* Steve Caulk, *Olympians Find Insurance Costly, Athletes Safeguard Financial Future Against Career-Ending Injuries*, DENVER ROCKY MOUNTAIN NEWS, Feb. 2, 2002, at 8S (listing cost for average twenty-two-year-old hockey player in NHL).

161. *See* Gordon Edes, *Club Policy Has Shifted On Insurance Policy Shift On Insurance C*, Boston Globe, May 5, 2004, at E1 (relaying drop in available insurance coverage for pitchers).

162. *See id.* (mentioning limits to insurance coverage that companies are willing to afford).

of the market and can develop more fluid pricing models, underwriting disability insurance policies for athletes and teams should be a profitable enterprise.[163] Considering that benefit amounts are quite large and the risk of injury substantial, in order to be profitable, insurance companies must obtain all of the relevant information available on the applicant and underwrite the risk carefully.[164] Like many of the companies that do business with a sports organization, insurance companies may be more likely to get involved with the sports industry for the fringe benefits and the association with that sports organization or athlete. Nonetheless, the risk for an insurance company is much more than that of a sponsor or business partner. Although the sports industry may not be as large as other industrial sectors, it still generates billions of dollars. As a result, insurance companies actively participate in representing a sports organization or player's insurance needs including professional and malpractice, facilities, or events.[165]

Two of the most important organizations involved in the sports insurance business are Lloyd's of London ("Lloyd's") and HCC Insurance Holdings, Inc ("HCC").[166] Lloyd's is not an insurance company but instead a specialist insurance market consisting of a complex web of insurance companies, agents and brokers.[167] Over one thousand member insurance companies operate in syndicates or groups, covering many specialty areas of insurance.[168] The companies conduct business through specialist managing agents, which are companies specifically established for the purpose of managing the syndicate.[169] The agents, through the syndicates, then deal with Lloyd's member brokers, who represent potential clients.[170]

A syndicate with expertise in the area will sign on as the lead and take a portion of the risk. Other syndicates will then follow and

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163. *See What is Lloyd's?*, http://www.lloyds.com/About_Us/What_is_Lloyds/, (last visited Nov. 19, 2009); *see also Lloyd's Market*, http://www.lloyds.com/lloyds_market/ (last visited Mar. 31, 2010) (introducing Lloyd's and their insurance market).

164. *See What is Lloyd's?*, *supra* note 165. (describing what Lloyd's operation of business).

165. *See id.* (articulating agent/client relationship at Lloyd's).

166. *See id.* (outlining syndicate expertise and management of risk by syndicate underwriting).

167. *See id* ("Lloyd's is not an insurance company, it is a partially mutual market where members of Lloyds join together as syndicates to insure risks.")

168. *See id* (depicting graph listing unique classes covered by Lloyds).

169. *See id.* ("The Lloyd's market is made up of 51 managing agents running 80 syndicates.").

170. *See id.* (describing how Lloyd's brokers "shop around" within syndicates to find best policies and coverage for clients).

subscribe to the risk until it is fully underwritten.[171] For example the lead may take a fifteen percent share and four following syndicates may each take ten percent and nine other following syndicates may each take five percent; this way there is a broad sharing of the risk. This risk sharing system enables Lloyd's to have the advantage of being able to write large and volatile risks through its built in risk sharing system. Individual insurers based in the United States can achieve similar risk sharing by obtaining reinsurance for the coverage from a number of reinsurers.[172]

HCC is a specialty insurance group with offices in several countries.[173] HCC's business strategy involves writing insurance in "selected, narrowly defined specialty lines of businesses where underwriting profits can be achieved."[174] Among the areas of insurance in HCC's Sports, Entertainment and Executives line of business are temporary and permanent total disability, contractual bonus, image protection, and team stop-loss.[175] The temporary and permanent disability policies are for individual athletes while the team stop-loss policies are for teams.[176] A team stop-loss policy provides insurance coverage to teams based on the number and type of injuries to its roster.[177] HCC personnel have been underwriting sports insurance risks in the United States for over thirty years and have been pioneers in the development of policy language, products and rate structures unique to the sports disability business.

C. Agents

Athlete-agents or player representatives have a fiduciary duty to act in the best interests of their clients and other players in the league at all times.[178] Consequently, in a situation where an athlete

171. *See* HCC Specialty Underwriters, *supra* note 81.

172. For further discussion on this topic *see supra* notes 143-46 and accompanying text.

173. *See About HCC*, http://www.hcc.com/about.html (last visited Feb. 26, 2010) (outlining HCC and its origins).

174. *See Lines of Business, Sports Entertainment and Executives*, http://www.hcc.com/lines_of_business.php?category=29 (last visited Feb. 26, 2010) (listing areas of HCC's business).

175. *See Team Stop Loss*, http://www.hccsu.com/products/sports/team-stop.htm (last visited Feb. 26, 2010) (describing essence of Team Stop-Loss and availability).

176. *See id.* (explaining Team Stop Loss coverage is appropriate when total amount of claims exceeds team's pre-specified amount).

177. *See id.* (noting coverage for what team stop-loss is available).

178. *See* NFPLA Regulations Governing Contract Advisors (as amended through March 2007) §3.A(17) , *available at* http://images.nflplayers.com/media Resources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf [hereinafter NFLPA Agent Regs] (describing duty of agent in NFL); NHLPA Regulations

has an injury history, impending free agency , a non-guaranteed contract, or other situation which might make his future cash flows reasonably uncertain, it may make sense for that athlete to obtain insurance on those future cash flows, notably his contract with the team.

One of the cardinal rules of player representation is that the agent cannot charge or collect a commission of any kind until the player receives his compensation upon which that fee is based, except for tax purposes.[179] Only two of the Big Four players associations (the NFLPA and NBPA) restrict that commission an agent can collect on a player contract.[180] At the same time, none of the unions restrict the commission, fee or wage an agent can collect on off-the-field contracts, such as marketing, appearances and endorsements.[181] Despite these allowances, very few agents charge on any off-the-field income due to the competitiveness of the agent business: a billed client may easily become an ex-client. So while a player may recoup millions on a disability insurance policy, one that the agent probably helped him receive, it is unlikely that an agent would see a dime of that. In addition, many of the disability insurance policies are based around "career-ending" injuries, which may persuade a player to retire injured rather than work arduously for an indefinite return to the game.[182] There is no commission from a retired client.[183]

Governing Agent Certification, Introduction (June 25, 2002) *available at* http://www.title17.org/scott/NHL.pdf [hereinafter NHLPA Agent Regs] (noting agent obligations to NHL players); and MLBPA Regulations Governing Player Agents, art. IV, §2.B. (Dec. 2, 2005) *available at* http://www.bizofbaseball.com/docs/MLBPARegsPlayerAgents.pdf (stating that agents must act in interest of player).

179. *See* NFLPA Agent Regs, *supra* note 158, at §4.B(4) ("A Contract Advisor is prohibited from receiving any fee for his/her services until and unless the player receives the compensation upon which the fee is based."); NBPA Regulations Governing Player Agents (as amended June, 1991) §4.B, *available at* http://66.113.231.191/downloads/NBPA_Regulation.pdf [hereinafter NBPA Agent Regs] (requiring that any compensation for agent must be after player receives compensation for which services were provided); NHLPA Agent Regs, *supra* note 158, at §4.B ("An agent is prohibited from receiving any fee for his services until and unless the player receives the compensation upon which the fee is based.").

See NFLPA Agent Regs, *supra* note 158, at §4.B(1) (establishing hat NFLPA's maximum allowable fee as three percent); *see also* NBPA Agent Regs, *supra* note 159, at §4.B (standardizing NBPA's maximum allowable fee to four percent).

180. *See* NFLPA Agent Regs, *supra* note 158, at §4.B(1) (in general NFLPA's maximum allowable fee is 3%; s*ee also* NBPA Agent Regs, *supra* note 159, at §4.B. (NBPA's maximum allowable fee is 4%)

181. *See* HCC Specialty Underwriters, *supra* note 81.

182. *See id.*

183. *See id.*

Despite these inherent conflicts of interest, agents must and do help their clients receive disability insurance policies. Due to the fiercely competitive representation industry, it is paramount at all times that an agent convince his client that he is doing what is in the client's best interests.[184] In fact, agents may use career-ending injuries or their knowledge of disability insurance as a talking point when recruiting potential clients, particularly student-athletes.

One key reason an agent may want to pursue disability insurance policies for his player is to gain leverage in contract negotiations with a team. An agent for a player either still under contract or not yet a free agent, that does not think he is receiving a fair-market offer from a team can buy a variety of insurance policies that will allow the player to play under the last year of his contract, a franchise tender or a restricted free agent tender, without fear that he is jeopardizing future earnings.[185] If the player never collects the desired contract, or collects disability insurance instead, he will have made some portion of the money he thought he was due.[186]

Although critics are quick to suggest that agents agree to sub-par contracts in order to collect commissions, the competitive nature of the agent business does not easily allow for such breaches of duty. One of the agent's most important tools for recruiting amateur athletes or new clients is their contract history and any agent with a mediocre resume in that regard faces an uphill battle. As a result, encouraging a player to buy disability insurance provides an agent, and most importantly his player, with a degree of comfort and leverage.[187]

D. Financial Advisors

Nearly every professional athlete has a financial advisor in addition to and typically unrelated to their agent. The financial services market for professional athletes is a lucrative and increasingly competitive one, especially in the NFL.[188] Often it is the financial advisor's responsibility to seek out, understand and potentially negotiate a disability insurance policy for the athlete. In this capacity, financial advisors can potentially do away with the need for brokers.

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184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.*

188. *See Financial Programs and Advisor Administration*, (last visited Feb. 26, 2010), http://www.nflpa.com/Member-Services/Resources/Financial-Advisors/ (outlining information on NFLPA's financial advisors).

Financial advisors are typically paid an annual percentage commission (around 1%) based on the assets under management.[189] While an insurance policy does not qualify as an asset under management, financial advisors charge a commissioned fee based on the insurance premiums, typically around fifteen percent.[190] As a result, financial advisors have the same interest as brokers in the proliferation of insurance policies: an increased market in which they can charge for their services.

E. NCAA

The NCAA is one of the most oft-criticized sports organizations.[191] While the NFL and NBA have age/eligibility restrictions which essentially force athletes to attend college, NCAA rules allow players to be drafted in both MLB and the NHL and still return to college so long as they did not ask to be drafted and do not subsequently sign a professional contract.[192] As a result, the NCAA and its student-athletes can take on an image solely as professionals-in-waiting.[193]

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189. *See id.*

190. *See* HCC Specialty Underwriters, *supra* note 81.

191. *See* Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 505-09 (2008) (noting disconnect between NCAA's intended purpose and their actual intentions); Bradley S. Pensyl, *Whistling a Foul on the NCAA: How NCAA Recruiting Bylaws Violate the Sherman Antitrust Act*, 58 SYRACUSE L. REV. 397, 425-26 (2008) (concluding that NCAA rules are invalid under Sherman Antitrust Act), William C. Martin, *The Graduate Transfer Rule: Is the NCAA Unnecessarily Hindering Student-Athletes from Traversing the Educational Paths They Desire?*, 15 VILL. SPORTS & ENT. L.J. 103, 111-12 (2008) (outlining criticism of NCAA); James Potter, *The NCAA as State Actor: Tarkanian, Brentwood and Due Process*, 155 U. PA. L. REV. 1269, 1270-71 (2007) (arguing that NCAA lacks fairness and sensibility). *See also* Phillip C. Blackman, *The NCAA's Academic Performance Program: Academic Reform or Academic Racism?*, 15 UCLA ENT. L. REV. 225, 287-89 (2008) (comparing effect of APP and APR on student athletes with respect to race and noting its unfair tendencies towards education); Gabriel A. Morgan, *No More Playing Favorites: Reconsidering the Conclusive Congressional Presumption that Intercollegiate Athletics Are Substantially Related to Educational Purposes*, 81 S. CAL. L. REV 149, 172-76 (2007) (describing academic admissions for student-athletes and lack of good NCAA support in increasing academic standards for student-athletes).

192. *See* NFL CBA, *supra* note 5, at Art. XVI, §2 (stating that three NFL regular seasons must have passed since player's high school graduation for him to be eligible for NFL Draft); *see also* NBA CBA, *supra* note 5, at Art. X (requiring that at least one NBA season must have passed since player's high school graduation for American player to be eligible for NBA Draft); *2009-10 NCAA Division I Manual*, art. 12.2.4 (Aug. 1, 2009), *available at* http://www.ncaapublications.com/Uploads/PDF/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf (providing rules for drafting into professional sports).

193. *See* NFL CBA, *supra* note 5, at Art. XVI, §2.

In order to diminish the allure of professional athletics and the money involved therein, the NCAA relies on its athletes to stay for the typical duration of college. Outside of increased age and eligibility restrictions and the antitrust lawsuits which would inevitably follow, the best way for the NCAA to keep its student-athletes as student-athletes is to help them obtain some sort of insurance policy to protect them against suffering a career ending injury. By supplying athletes with a financial worst-case scenario similar to that of many top professional rookies in their sport, it is hoped that student-athletes will not feel the need to leave the collegiate ranks as soon as possible.[194]

In addition, the disability insurance programs provide the NCAA with a needed public relations boost. By subsidizing and facilitating such a program, the NCAA is more closely looking out for the best interests of the young men and women participating as opposed to their own financial coffers, as is often the accusation.

As mentioned earlier, the NCAA started an Exceptional Student-Athlete Disability Insurance (ESDI) program in 1990 to help protect student-athlete's interests against both injury and agents who might attempt to encourage the student-athlete to leave school early for professional leagues. The ESDI program began with football and men's basketball student-athletes but has since expanded to include baseball, ice hockey, and women's basketball.[195] Student-athletes who have demonstrated that they have the potential to be selected in the first three rounds of the NFL or NHL drafts, or the first round of the NBA, MLB or WNBA drafts are eligible for the program.[196] The policy provides the student-athlete with a lump sum payment 12 months after it has been determined that he/she has suffered permanent total disability.[197] Student-athletes are eligible for loans to pay the premiums without jeopardizing their amateur status.[198]

The main advantage of the NCAA's program is that it is a group program, subsidized by the NCAA's roughly 1,280 member

194. *See* Morgan, *supra* note 191 (stating actions taken by NCAA).

195. *See Exceptional Student-Athlete Disability Insurance Program: Introduction,* (last visited Feb. 26, 2010) http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/ncaa/NCAA/About+The+NCAA/Budget+and+Finances/Insurance/exceptional.html (chronicling Exceptional Student Disability Insurance program)..

196. *See id.* (setting forth requirements of eligibility for ESDI).

197. *See id.* at *Permanent Total Disability (PTD) Form* (articulating coverage upon determination of permanent disability).

198. *See id.* at *Premium Financing* (noting that payment of loans does not prevent draft into professional sports).

institutions. As a result, the risk is widely spread and no single institution is faced with the proposition of a multi-million dollar insurance payout. Costs of the program are shared equally and therefore are much less expensive than typical private insurance policies.

The NCAA's ESDI program, administered through HCC Life Insurance Company, caps coverage at $5 million for projected first-round NFL draft picks and for men's basketball student-athletes. Coverage for baseball, men's ice hockey and women's basketball is capped at $1.5 million, $1.2 million and $250,000 respectively.[199] The premiums cost between ten and twelve thousand dollars for each one million dollars of coverage, which is a few thousand dollars cheaper than a private policy.[200] It is reported that some eighty to one hundred athletes participate in the ESDI program each year, and that approximately seventy-five to eighty percent of those are college football players.[201] Further, several prominent student-athletes have enlisted in the NCAA's ESDI program.[202]

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199. *See* Mike Knobler, *Tech Blog: Georgia Tech at Clemson: 7:45 P.M. Saturday * ESPN, 790 AM; Premium receiver finds coverage*, Atlanta J. & Const., Oct. 19, 2006, at C1 (explaining maximum coverage for ESDI).

200. *See* Gary Klein, *Premium Players: Insurance Policies Are Becoming Standard for Elite College Athletes*, L.A. TIMES, Feb. 20, 2005, at D1 (reporting rates for insurance against career-ending injuries).

201. *See id.* (noting typical ESDI participation).

202. Including 2007 Heisman Trophy winner Florida quarterback Tim Tebow, #2 overall pick Georgia Tech wide receiver Calvin Johnson, Mike Knobler, a 2004 first round cornerback from Arkansas, Ahmad Carroll, a 2004 first round offensive lineman from Arkansas, Roy Willliams, a first round wide receiver from Texas, David West, a 2003 first round power forward from Xavier, 1996 second overall pick UMass center Marcus Camby, 1996 first round pick Villanova shooting guard Kerry Kittles, 1996 first round pick, Georgia Tech point guard Stephon Marbury, 1994 first round pick, Michigan forward Juwan Howard, 1994 first round pick Michigan guard Jalen Rose, 1993 first overall pick Michigan forward Chris Webber, and 1994 second overall pick San Diego State running back Marshall Faulk. *See Report: Tebow Insured for Roughly $2M*, http://sports.espn.go.com/ncf/news/story?id=4352538 (last updated July 27, 2009) (reporting on Florida quarterback's multi-million dollar insurance policy on himself); *see also Georgia Tech at Clemson: 7:45 P.M. Saturday* * ESPN RADIO, 790 AM (Sept. 29, 2007) (covering game); *Premium Receiver Finds Coverage*, THE ATL. JOURNAL-CONST. Oct. 19, 2006, at 1C; Andrews Scott Cain, *Athletes Feeling Need for Coverage*, AK. DEMOCRAT-GAZETTE, Feb. 15, 2004; *See Williams Gladly Comes Back;* Texas Receiver Figures Playing Another Year Will Work for Him, SAN ANTONIO EXPRESS-NEWS, Dec. 18, 2002 at 1C; Insurers Play Talent Scouts for Finest College Athletes; if Players Get Disability Insurance, They're Considered Pro Material, PHIL. INQ., Jan. 30, 1996, at A01; *Sports Shorts (?); Michigan Sophomores Insured for Million-Plus*, ST. LOUIS POST-DISPATCH, Dec. 19, 1992, at 2C; Ken Davis, *Burrell, Baker Play it Safe; Insurance Program Assists Some Premium Players*, HARTFORD COUR., Jan. 3, 1993, at C4.

Several other notable student-athletes have been known to have secured private policies: former Miami running back and Heisman Trophy finalist Willis McGahee; 2005 Heisman winner, USC running back Reggie Bush; 2004 Heisman

Approximately seventy-five percent of first round picks in the NFL and NBA are enrolled in the ESDI program.[203] Participation among MLB and NHL first round picks may be approximately ten percent while each year only one or two WNBA first round picks are enrolled in the ESDI program.[204] The fact that WNBA salaries only range from $35,190 to $99,500 may make the ESDI cost prohibitive or even unnecessary for women's basketball players.[205]

In addition to the ESDI program, the NCAA's Catastrophic Injury Insurance Program provides coverage to student-athletes, student-coaches, student-managers, student-trainers and student-cheerleaders who are catastrophically injured during a covered sporting event.[206] The policy allows for maximum benefits of $20 million with a deductible of $75,000.[207] The NCAA contributes approximately $10 million in annual premiums to the insurance company as part of the program.[208]

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winner, USC quarterback Matt Leinart; 2001 first round pick, Miami wide receiver Santana Moss; 1999 first round pick, Florida defensive end Jevon Kearse; 1999 first overall pick, Kentucky quarterback Tim Couch; 1999 first round pick, Georgia cornerback Champ Bailey; 1998 first overall pick, Miami third baseman Pat Burrell; 1998 first overall pick, Tennessee quarterback Peyton Manning; 1997 second overall pick, Florida State outfielder J.D. Drew; 1995 first overall pick, Maryland forward Joe Smith; and 1986 first round pick, Iowa quarterback Chuck Long. *See* Gary Klein, *Premium Players: Insurance Policies Are Becoming Standard for Elite College Athletes.* L.A. TIMES, Feb. 20, 2005, at D1; Larry Guest, *Culpepper's Next Options May Be Insurance Policy,* ORLANDO SENTINEL, Aug. 28, 1996, at D1; Andrea Szulszteyn, *The Best Policy: Insurance; More College Athletes Are Signing Up, and Earlier, for Protection Against Career-ending Injuries,* SUN-SENT., Oct. 17, 1999, at 1D; Don Markus, *Terps' Smith Gets $1 million Policy,* Balt. Sun, June 14, 1994, at 1C; Gary Libman, *Insurance: Athletes Hedge Career Bets,* THE TIMES MIRROR, July 12, 1985, at 5-1.

203. *See* HCC Specialty Underwriters, *supra* note 81.

204. *See id.*

205. *See* WNBA COLLECTIVE BARGAINING AGREEMENT Art. V, §§7-8, 32-33, available at http://www.wnbpa.com/documents/2008WNBACBA_003.pdf [hereinafter WNBA CBA] (setting forth minimum and maximum player salaries).

206. *See NCAA Insurance Programs,* NCAA.org, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/budget+and+finances/insurance/index.html (last visited Mar. 30, 2010); *see also* NCAA Website: Information about Catastrophic Injury Insurance Program, http://www.ncaa.org (follow link to "About the NCAA"; then follow "Budget and Finances"; then follow "Insurance Programs") (describing program details).

207. *See NCAA Catastrophic Injury Insurance Program Benefit Summary,* NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/a44ffd804e0d55379fe3ff1ad6fc8b25/09-10+CAT+benefit+summary.pdf?MOD=AJPERES&CACHEID=a44ffd804e0d55 379fe3ff1ad6fc8b25 (last visited Mar. 30, 2010) (explaining policy benefits and deductibles).

208. *See* Lance Pugmire, *Staying Put Has Higher Cost; Many Leaving for NFL Because Colleges Can't Guarantee Players' Financial Futures Through Insurance,* L.A. TIMES, Jan. 16, 2003, at S1 (defining NCAA contribution to insurance program).

F. Private Alternatives to ESDI

For a student-athlete who desires insurance coverage, his or her best option is generally to choose the NCAA's ESDI program. There are several scenarios, however, where the student-athlete would want to use an insurer and purchase a policy outside of the NCAA program. If the ESDI program rejects the student-athlete, he or she might then want to look into other private options. One of the primary qualifications for coverage under the ESDI program is that the student-athlete projects as a reasonably high draft pick in his or her professional sport's draft.[209] Consequently, many student-athletes with professional ambitions might not have a sufficiently high projection to qualify for coverage.[210] Ultimately, that leaves approximately one hundred and fifty-five drafted players out of the coverage realm, not to mention the hundreds of undrafted players who do sign NFL contracts, for example, and have a legitimate chance to make the professional roster.[211]

A private insurance company may have different guidelines for coverage than the ESDI, and is more likely to insure late round or undrafted prospects. In addition, the insurance company may use or have a different assessment of the student-athletes draft projection. Nevertheless, draft projections are still an incredibly inexact science, both for the professional team and the experts like ESPN's Mel Kiper. It has been shown that NFL roster populations are equally populated with undrafted free agents as they are with first, second or third round draft picks.[212] Insurance companies may also differ on injury evaluations. While one company may decline to quote based on a previous or potential injury, another may be willing to provide coverage. In addition, the insurance companies may also differ on whether they will exclude certain injuries from coverage.[213]

Student-athletes may also want to supplement his or her insurance with a private policy because, as discussed earlier, there are

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209. *See* Klein, *supra* note 202 (stating that most students-athletes do not qualify for ESDI).

210. *See id.* For example, a college football student-athlete must be projected into the first three rounds of the seven round NFL draft to enroll in the ESDI. *See id.*

211. *See id.* (including compensatory draft picks).

212. *See* Joe Landers, *The Importance of Day One; NFL Two-Deeps Tell Us Where to Find Talent*, OURLADS SCOUTING SERVICES, Nov. 30, 2007, available at http://lowdownskinny.com/modules.php?op=modload&name=News&file=art.&sid=217&mode=thread&order=0&thold=0&POSTNUKESID=c9e5a5cbc410cb9e2c219585b742259d (last updated Jan. 30, 2008) (explaining composition of NFL rosters).

213. *See* HCC Specialty Underwriters, *supra* note 81.

maximum amounts of coverage offered under the NCAA's ESDI program. If the athlete can demonstrate that he or she has an insurable interest greater than the maximum allowed by the NCAA's ESDI policy then he or she may be able to purchase additional policy coverage.[214] The athlete can demonstrate this by his or her likely draft position and the corresponding likely contract amount.[215] The athlete may also be able to demonstrate an additional insurable interest through potential endorsement money.[216]

Further, although unlikely, is that the athlete is able to find a less expensive insurance policy than the ESDI program.[217] The reason this is unlikely is that the ESDI program is a group program, which, as discussed earlier, provides valuable economies of scale, sharing of administrative costs, and spreading of the risk for the members of the group (NCAA member institutions). The advantages of the ESDI group program provide for lower premium costs, almost certainly lower than comparable policies by private insurance companies.[218]

In addition, a student-athlete may prefer the terms of the insurance policy contract, as discussed earlier, of the outside company as compared the NCAA's ESDI program. For example, the waiting period may be less, or more unlikely, there could be a different definition of a career-ending injury. More likely, however, is that the added language or terms and conditions are different.[219] For example, the ESDI policy may exclude from coverage the right knee based on a previous ACL injury while the private company

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214. *See id.*

215. *See id.* (providing example of how student-athletes demonstrates high insurable interest).

216. *See* Fireman's Fund Ins. Co. v. University of Georgia Athletic Ass'n, Inc., 654 S.E.2d (Ga. Ct. App. 2007) (noting other ways student-athlete may be able to prove insurable interest). During the 2003 college football season, Georgia safety Decory Bryant began the process to obtain disability insurance under the NCAA's ESDI program. However, Hoke Wilder, the Georgia athletic department employee responsible for coordinating the ESDI program, failed to file the proper paperwork just days before Bryant suffered a career-ending spinal injury in a game. Bryant brought suit against Georgia and Wilder alleging breach of fiduciary duty, breach of contract and negligence. Bryant sought the $500,000 he would have been due under the policy plus punitive damages. Georgia sought indemnification from its insurance company. A Georgia state court dismissed the suit in late 2009 based on sovereign immunity. To avoid further litigation, Georgia and Bryant settled the case in February 2010 for $400,000. *See* Tim Tucker, *Former Bulldog Awarded $400K; Athletic Association Settles Lawsuit With Injured DB Bryant*, ATLANTA JOURNAL-CONST., Feb. 25, 2010, at 6C (reporting facts and settlement of suit).

217. For a further discussion regarding the terms of insurance contracts, see *supra* notes 116-24.

218. *See* HCC Specialty Underwriters, *supra* note 81.

219. *See id.*

does not. The athlete may prefer, even with a likely higher insurance premium cost, the private insurance company's policy.

G. Leagues

There are two different types of league programs: one for the benefit of players and the other for the benefit of teams. The NFL, NBA and the NHL all operate league-administered disability plans for the benefit of players in cases of permanent total disability.[220] These plans are part of the collective bargaining agreements and require teams to contribute money each year towards post-career health or disability plans. Some of the plans are optional, yet in others the players accrue accounts to be used in the case of health problems under the plans based on their years of experience in the league.

It is indisputable that a key to success for the Big Four is sustainable fan knowledge and admiration for players and teams. One important factor in such continuity is the health of the players. The leagues' success depends very much on the success of its recognized stars.[221] For example, when the NFL announced it was modifying a rule that would prohibit "a defender on the ground who hasn't been blocked or fouled directly into the quarterback from lunging or diving at the quarterback's lower legs," many people took to calling it the "Tom Brady Rule." The Tom Brady Rule was named for the three-time Super Bowl winning quarterback of the New England Patriots who missed almost the entire 2008 season because of an injury incurred in such a manner.[222]

In recent years, the NFL and NFL Players Association (NFLPA) have been under intense scrutiny for their disability and pension plans, which have allegedly left many retired players with insuffi-

220. *See* NFL CBA, *supra* note 5, at art. LI; *see also* NBA CBA, *supra* note 5, at art. IV: Benefits, § 5; NHL CBA, *supra* note 5, at art. 23.

221. *See* Michael Hiestand, *NBA Playoff Ratings Are Looking Up*, USA TODAY, May 26, 2009, at 3C (explaining that 2009 NBA playoff television ratings were up from previous years, with many contributing boost to playoff performances of Cleveland Cavaliers' LeBron James and Los Angeles Lakers' Kobe Bryant). In addition, five of the six highest rated NBA Finals included Michael Jordan of the Chicago Bulls, one of the world's most famous athletes. The 2009 Stanley Cup Finals between the Pittsburgh Penguins and the Detroit Red Wings recorded some of the highest television ratings in years, in large part because of the presence of Pittsburgh's young stars Sidney Crosby and Evgeni Malkin. *See* Dan Steinberg, *Hot Series Nets Big TV Ratings*, WASH. POST, May 12, 2009, at D04 (emphasizing importance of star players during playoffs).

222. *See* Christopher L. Gasper, *Brady Rule: Steps Taken to Protect QBs' Knees*, BOSTON GLOBE, Mar. 24, 2009, at C1 (implying that rule protecting quarterback's legs was result of Tom Brady injury).

cient health care and benefits.[223] Ultimately, it is a superior business practice for the NFL to ensure the prolonged health and well being of its players, not only for the health of its players but also to avoid public relations controversies.[224] Encouraging and administering disability insurance policies and programs for players helps to achieve these goals.

As mentioned earlier, the NFL does not guarantee much of its contracts, due in large part to the high injury rates and roster turnover in the sport. By encouraging players to insure the unguaranteed portions of their contracts, the NFL can maintain its status quo.[225] Effectively, the league and its teams can shift the burden of the player's future earnings to the player and continue to operate a system that is financially beneficial to the teams and the league.

There are also league-wide programs for the benefit of the teams, should they be required to continue paying the contract of a disabled player, as mentioned earlier in the Mark Teixera and C.C. Sabathia examples.[226] These policies generally only cover temporary total disability. These policies do not have to be collectively bargained since they do not affect the wages, hours or terms and conditions of employment of the players.[227] Consequently, the details of these programs are less available. It has been reported that the NBA group program through MetLife insures the top one hundred and fifty salaries in the league but gives MetLife the right to exclude fourteen players they deem to be high-risk.[228]

By creating a league-wide program, whereby each team contributes to the premium costs, it allows teams to have insurance coverage where they might otherwise be taking unnecessary risks. In

223. *See* Brett Edwin LoVellette, "*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); A. Jason Huebinger, *Beyond the Injured Reserve: The Struggle Facing Former NFL Players in Obtaining Much Needed Disability Assistance*, 16 SPORTS LAW. J. 279 (2009); Bryan Lipsky, *Dealing with the NFL's Concussion Problems of Yesterday, Today, and Tomorrow*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 959 (2008).

224. *See* Lipsky, *supra* note 225 (detailing how NFL players can lack benefits).

225. *See* HCC Specialty Underwriters, *supra* note 81.

226. For further discussion on this topic, *see supra* notes 17-30 and accompanying text.

227. *See* 9 U.S.C. §158(d). *See also* United Mine Workers of America v. Pennington, 381 U.S. 676 (1965) and Brown v. Pro Football Inc., 518 U.S. 231 (1996).

228. *See* Matt Watson, *Insurance Problems May Keep Luol Deng Out of 2012 Olympics*, http://nba.fanhouse.com/2008/08/28/insurance-problems-may-keep-loul-deng-out-of-2012-olympics/ (last visited Jan. 23, 2010) (noting Deng has been excluded from coverage due to large outstanding money to be paid and back injury).

the same way that the NCAA is able to spread risk and costs through its many member institutions, leagues and their member clubs do the same thing. By administering one collective league program, it saves teams the costs of purchasing policies for themselves.

H. Teams

As stated earlier, Big 4 teams pay out close to ten billion dollars annually in player compensation. Yet, despite the massive investment made in player personnel, it is still a very unsure investment: the average career in the Big Four ranges from 3.5 to 5.6 years and the rate of injuries has continually increased.[229] As a result, teams use disability insurance policies to help protect against the fact that in most cases, if a highly paid player is injured, the team must still pay him. As a result, insurance policies help to reduce the risk of having a large financial obligation.[230]

For that same reason, disability insurance can also help reduce some of the pressure agents may feel to get a long-term, high-income deal done. It can help prevent contract disputes and holdouts, situations teams certainly try to avoid. Conceivably, if a player has a policy that allows him to recover a considerable sum of money despite not having agreed to a long-term contract, he is less likely to feel the need to holdout and demand a new contract to the relief of the team.[231] In addition, teams have no interest in seeing players hurt and uncompensated. For the same reasons leagues look to avoid embarrassing situations of disabled alumni, teams should

229. *See* Dustin Dow, *Much Pain, No Gain?*, CINCINNATI. ENQUIRER, July 1, 2007, at 1C (providing that average NFL career is about 3.5 years); *see also* Rob Hiaasen, *Getting All the Breaks; As Head Trainer, Bill Tessendorf Works to Get Sidelined Ravens Back in the Game*, BALT. SUN, Dec. 28, 2002, at 1D (emphasizing difficulty in keeping some players on field); David Parkinson, *When the Lights Go Out*, THE GLOBE AND MAIL, Sept. 18, 2008, at 17 (discussing NHL players' difficulty in finances); *Salary Inflation Caused NHL Troubles*, BUFFALO NEWS, Nov. 21, 2004, at C4 (explaining that average NHL career is about five years); Mark Montieth, *NBA Draft – High Hopes*, IND. STAR, June 25, 2006, at 1C (explaining that average NBA career is about four years); Desmond Ryan, *Basketball Dreamers Come up Against Reality*, PHILA. INQUIRER, Dec. 31, 2005, at C01 (discussing reality that NBA careers are often short); Sam Roberts, *Just How Long Does the Average Career Last?* N.Y. TIMES, July 15, 2007, at SP6 (concluding that average MLB career is about 5.6 years).

230. *See* Michael S. Schmidt, *Baseball Injuries Rise, and Reason Is a Mystery*, N.Y. TIMES, July 7, 2009, at A1 (discussing baseball injuries increasing for unknown reason); *see also* Erik Spanberg, *Sidelined!* CHRISTIAN SCIENCE MONITOR, Aug. 5, 2004, at 11 (detailing amount of injuries found in sports now); *Bodychecking Raises Risk of Concussion, Study Says*, THE GLOBE AND MAIL, July 22, 2003, at S2 (emphasizing growing frequency of injury problems in four major sports).

231. *See* HCC Specialty Underwriters, *supra* note 81.

work to ensure that their players are adequately covered for post-career health and financial well-being.

An additional area in which teams and leagues have commingled insurance interests is out-of-league competitions, namely the Olympics, World Baseball Classic or World Cup. These competitions provide a debatable benefit to the leagues and teams certainly provide plenty of risk to the players and the contracts associated with those players.[232]

Olympic competitions are held entirely outside the control or direction of the professional sports leagues where athletes are typically involved, specifically the NBA and NHL. The involvement in the Olympics has been so important to NHL players that the topic is included in the NHL CBA.[233] In addition to the Olympics, many NHL players also participate in the International Ice Hockey Federation's (IIHF) World Cup. The IIHF provision in the NHL CBA explicitly states that Clubs will permit players to participate so long as the IIHF or the player's national team agrees to insure the remaining value of the player's contract and any potential loss of earning capacity for the player.[234] The Olympics provision in the NHL CBA merely states that the parties will work towards a mutually agreeable solution and indications have been that the terms must be the same as other IIHF contests.[235]

Additionally, although the NBA's CBA does not specially address Olympic participation, basketball players have also had to reach mutual agreeable arrangements in order to compete for medals. As mentioned in the previous section, the NBA's group

232. *See id.*

233. *See* Shelly Anderson, *Sports is Cultural Equalizer*, PITTSBURGH POST-GAZETTE, Apr. 14, 2006, at F2 (discussing significance of Olympics to hockey players). *See* NHL CBA, ART. 24, International Hockey 111 (2005), *available at* http://www.nhlpa.com/About-Us/CBA/ In addition, one of the NHL's biggest stars, Washington Capital forward Alex Ovechkin, has said he would risk suspension or even consider leaving the NHL if it did not agree to let the players play in the 2014 Olympics in Ovechkin's home country of Russia. *See* Jeff Klein, *Ovechkin Not Wavering On Support of Olympics*, N.Y. TIMES, Oct. 9, 2009, at B11 (detailing Ovechkin's interest in Olympics).

234. *See* NHL CBA, *supra* note 233, at 111 (explaining insurance of players by national teams).

235. *See* Greg Wyshynski, *Agent: NHL Won't Pay Players Hurt in Olympic Camps*, YAHOO! SPORTS, Aug. 5, 2009, http://sports.yahoo.com/nhl/blog/puck_daddy/post/Agent-NHL-won-rsquo-t-pay-players-hurt-in-Olymp?urn=nhl,180950 (explaining that in August of 2009 it was reported that NHL would not pay players hurt during Olympics because of insurance disputes). The problem seems to have at least been partially resolved as Hockey Canada, the Canadian national team, agreed to fully cover its players. *See* NHL.com Staff, *Hockey Canada to Fully Cover Players*, Aug. 21, 2009, http://www.nhl.com/ice/news.htm?id=480104 (indicating reluctance of national teams to insure players).

insurance policy allows MetLife to exclude fourteen of the top one hundred and fifty players from insurance coverage. When the Chicago Bulls and star forward Luol Deng agreed to a seventy one million dollar contract prior to the 2008 season, MetLife chose to exclude coverage of Deng's contract due to a previous back injury.[236] The exclusion raised concerns about Deng's possible participation for Great Britain when London hosts the 2012 Olympics. The issue was resolved when Great Britain Basketball agreed to provide insurance coverage for Deng's contract.[237]

Meanwhile, the World Baseball Classic is an international baseball tournament sanctioned by the International Baseball Federation (IBAF) and created by MLB, the MLBPA, Nippon Professional Baseball (Japan) and the Korean Baseball Organization.[238] Consequently, MLB strongly encourages its players to participate. Nevertheless, several major players were unable to participate in the 2009 World Baseball Classic because of insurance issues, including Albert Pujols and Johan Santana.[239] In general, teams will want the national team or governing body to obtain insurance on the player's contract. If the player is a current free agent, he may have to purchase his own insurance protecting possible future earnings.

Teams must understandably act prudently and aggressively in protecting their own interests. For example, after American defender Oguchi Onyewu tore his patellar tendon in a World Cup qualifier. AC Milan, the team for whom Onyewu played, said it would demand compensation from the US Soccer Federation for an injury likely to keep Onyewu sidelined for four months.[240]

I. Athletes

In general, contracts in MLB, the NBA and the NHL are guaranteed, relieving a player of any concern about the probability of his future earnings. However, before a player signs a major con-

236. *See* Watson, *supra* note 228. (discussing MetLife decision to exclude Deng and his contract extension from coverage).

237. *See id.* (outlining solution to issue of insuring Luol Deng at around $500,000 each summer).

238. *See* World Baseball Classic Tournament Rules and Regulations, http://web.worldbaseballclassic.com/about/rules.jsp (last visited Oct. 19, 2009) (describing organization of World Baseball Classic).

239. *See* Kevin Baxter, *World Baseball Classic is a Mixed Bag*, L.A. TIMES, Mar. 4, 2009, at C1 (listing players unable to play in WBC due to insurance issues).

240. *See Milan to Seek Damages From US After Oguchi Onyewu Injures Knee*, THE GUARDIAN, Oct. 15, 2009, http://www.guardian.co.uk/football/2009/oct/15/milan-damages-oguchi-onyewu-knee-injury (emphasizing displeasure by European club at World Cup related injury).

tract, they most likely have many worries about the possibility of a major pay day. Considering the injury and success rates in professional sports, one of the athlete's best tools for protecting themselves against the possibility that an injury will derail their career is disability insurance. Disability insurance can provide a player with the assurance that they need not rush to accept a subpar contract offer and can continue to play at maximum effort without fear of a financially crippling injury.[241]

Nonetheless, in the sport with the highest injury rate and shortest careers, the NFL, most of the compensation in a contract is not guaranteed.[242] Consequently, it is very important that NFL players consider disability insurance policies to lower the risk associated with their future earnings.

As discussed earlier, student-athletes should obtain quotes from both, and compare the costs and maximum amount of insurance coverage provided. The student-athlete who is declined by the NCAA program (based on ability, projected draft status, injury or other risk factor) may also want to consider a private insurance policy. Further, the student-athlete may also want to supplement an NCAA policy with a private policy, given that the NCAA has maximum amounts of coverage and, in certain situations, the student-athlete may have a greater insurable interest.[243]

J. Unions

A union, as the exclusive representative of the workers, must, in good faith, act on behalf of the employees in negotiating the terms and conditions of employment.[244] Fundamentally, a union exists because of and for the employees and must do whatever it legally can to protect the interests of those employees.[245] There-

241. *See* HCC Specialty Underwriters, *supra* note 81.

242. *See id.*

243. *See id.* For example, the top overall pick in the NFL or NBA draft, often has significant off-the-field or off-the-court value in marketing and endorsements, thereby justifying more insurance. *See id.*

244. *See* Chaffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 561 (1990) (explaining role of union and ways for employees to seek remedies from them).

245. *See* 29 U.S.C.A. § 159(a) (describing general union duties); s*ee also* Humphrey v. Moore, 375 U.S. 335 (1964).

> The National Labor Relations Act has been interpreted to impose 'duty of fair representation' (DFR) on labor unions, which union breaches when its conduct toward member of bargaining unit is arbitrary, discriminatory, or in bad faith; this duty extends to challenges leveled not only at union's contract administration and enforcement efforts but at its negotiation activities as well.

fore, for many of the same reasons that it makes sense for players to obtain disability insurance policies, it makes sense for the unions to encourage players to take out such policies, namely to ensure the long-term financial well-being of the athlete.

As part of the CBAs, the unions are responsible for negotiating and monitoring retirement and insurance benefits.[246] As a result, it is ultimately the union's responsibility to promote and ensure the physical and financial health of its player-members. Nevertheless, the case could be made that the unions, particularly the NFLPA, have not made a major issue out of disability and retirement benefits. By encouraging player-members to instead take out disability insurance policies on their own, it shifts the burden of protection to the player.[247] As a result the union might not have to consider it a major issue of contention during the collective bargaining process.

VII. THE GRAY AREA- LITIGATION

There are very few cases involving athlete disability insurance policies that have not resulted in a settlement. The majority of disability insurance disputes are settled or resolved in arbitration and the results of those decisions do not become public.[248] As a result, it is quite difficult for those not working in the insurance field to have a good grasp of the expected costs, payouts or rejection rates with regards to disability insurance policies. The few litigated cases discussed below are important because they show the type of issues that can be raised during disability insurance disputes.

A. Misrepresentation by Athlete or Pre-Existing Conditions

In *Boston Mutual v. New York Islanders*, Brett Lindros was drafted as the ninth overall pick in the 1994 NHL Draft, the younger brother of then-emerging star and the 1991 1st overall pick Eric Lindros of the Philadelphia Flyers.[249] A few months later, the Islanders submitted an application to Boston Mutual Insurance Company to insure Lindros for temporary total disability as part of the

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Id.

246. *NFLPA - Our History*, http://www.nflplayers.com/about-us/ (last visited July 30, 2009) and *About the NBPA*, *available at* http://www.nbpa.org/about-us (last visited July 30, 2009).

247. *See* HCC Specialty Underwriters, *supra* note 81.

248. *See id.*

249. *See* Boston Mutt. Ins. Co. v. New York Islanders Hockey Club, L.P., 165 F.3d 93 (1st Cir. 1999) (addressing that insurance companies are not responsible to make sure applications are filled out correctly).

NHL's group insurance plan.[250] As part of the application, the Islanders filled out a detailed medical history on Lindros.[251] The approved application failed to disclose that Lindros had suffered three fairly serious concussions in the previous year and that he had received medical care for them.[252]

Lindros began playing for the Islanders in the spring of 1995. From that time through November 1995, Lindros suffered three more serious concussions.[253] When Lindros was forced to retire later that year, "the Islanders filed a claim under the insurance policy, seeking to recover approximately $4.3 million – the bulk of Lindros' salary for the period remaining in his five-year contract term."[254] Under the policy, Boston Mutual would reimburse the team for eighty percent of Lindros's salary during his disability once the Islanders met the deductible and he missed thirty consecutive regular season games because of the disability.[255] Boston Mutual denied the claim on the grounds that the Islanders failed to reveal Lindros's three previous concussions, which it deemed relevant information on the initial insurance application.[256]

Boston Mutual filed suit to rescind the policy, and was granted summary judgment in Massachusetts District Court.[257] Under Massachusetts law, an insurance company can void a policy based on misrepresentation of the insured if one of two prongs are met under Massachusetts state insurance law: (1) the misrepresentation or warranty is made with actual intent to deceive or (2) the matter either misrepresented or increased the risk of loss.[258] The First Circuit Court of Appeals reviewed the district court decision *de novo* to determine if either of the prongs was met.[259]

The circuit court affirmed the holding of the district court.[260] First, it found that the Islanders conduct was "indisputably reckless" and "careless in the extreme." The Court then considered whether

250. *See id.* at 94 (providing insurance application process for Brett Lindros).

251. *See id.* at 95 (explaining detailed medical reporting required in insurance application process).

252. *See id.* (indicating that Islanders failed to disclose certain information).

253. *See id.* (depicting mounting number of concussions).

254. *See id.* (describing Islanders' attempt at making insurance claim on Lindros).

255. *See id.* (explaining insurance policy provisions).

256. *See id.* (describing reasoning for denial of insurance claim).

257. *See id.* at 96 (presenting origins of lawsuit to reclaim policy).

258. *See id.* (detailing Massachusetts law in regard effect of misrepresentation by insured (citing Mass. Gen Laws ch. 175 § 186 (1998)).

259. *See id.* (setting forth standard of review).

260. *See id.* at 99 (affirming lower court decision).

the Islanders misrepresentation was material as a matter of Massachusetts's insurance law to warrant the lower court's grant of summary judgment for the insurance company.[261] Although the Islanders claimed that Boston Mutual would have underwritten the same policy had Lindros's past concussions been disclosed,[262] the court held that Massachusetts law "does not go so far as to require proof by the insurer that it *would* have acted differently."[263] Also, though the determination as to whether a misstatement on an insurance form increases the insurer's risk of loss is normally a question of fact, Massachusetts law allows such an issue to be resolved as a matter of law if "the health condition or occurrence falsely concealed is objectively serious enough that no reasonable person could doubt that it increased the risk of loss."[264] Considering that the Islanders' own expert witness doctor admitted that a history of concussions increases the health risks to those players, the First Circuit affirmed summary judgment, finding that the misrepresentations were material and increased the risk of loss to Boston Mutual.[265]

B. Statute of Limitations for Claims: *Smagala v. Owen*[266]

After two mostly unproductive seasons with the Dallas Cowboys, Stanley Smagala, a defensive back, signed with the Pittsburgh Steelers prior to the 1992 season.[267] Smagala signed a one-year deal with a base salary of $160,000 and a signing bonus for

261. *See id.* at 97 (agreeing with district judge based on facts of case). "A false answer is material if the matter misrepresented increased the risk of loss' for the insurer." *Id.* (citing § 186). Discussing the Massachusetts standard for "actual intent to deceive," the court stated:

> In general, a false answer does not itself automatically prove deceitful intent- the mistake could easily be a reasonable one or merely negligent. At the other end of the spectrum, a false statement in an insurance policy, known by the applicant to be untrue and deliberately intended to induce reliance on the false statement, indicates actual deceit.

Id. at 96 (reviewing standard for intent to deceive under Massachusetts state law (citing Danca v. Taunton Savings Bank, 429 N.E.2d 1129 (Mass. 1982)).

262. *See id.* at 98-99 (determining whether "the increased risk should be disregarded if, as the Islanders claim to be true, the insurers would *in fact* have issued the same policy for Lindros, without any exclusion, and without any change in premium, even if they had known all of the information about the prior concussions.").

263. *Id.* at 97 (discussing standards for materiality).

264. *Id.*

265. *See id.* at 99 ("Under Massachusetts law, it is enough that the application was false in substantial respects and that the information omitted did materially increase the risk to the insurer.").

266. Smagala v. Owen, 717 N.E.2d 491 (Ill. App. Ct. 1999).

267. *See id.* at 493-94 (noting Smagala's team employers).

$22,500.[268] Following his signing Smagala purchased a personal accident insurance policy from Colin Owen, an agent for Lloyd's of London at a cost of $2,532.[269] As part of the policy, Smagala could only recover for "permanent total disablement," defined as the "total physical inability to engage in his occupation . . . for twelve continuous months."[270] In addition, the policy stated that no claim could be made until "permanent total disablement" had been established and that no lawsuit could be filed more than three years after permanent total disability had been established.[271]

On August 17, 1992, Smagala injured his right knee during a preseason game.[272] Smagala underwent arthroscopic surgery about a week later but was unable to play during the 1992 season.[273] Smagala underwent surgery again before the 1993 season but returned to Steelers training camp in 1993.[274] When Smagala continued to have knee problems and pulled a hamstring, he was cut by the Steelers on August 23, 1993.[275] At a March 1994 tryout in front of NFL scouts, Smagala ran a 4.6 second forty-yard dash, not a time befitting a top defensive back in the NFL.[276] Unable to land a job, Smagala filed for payment with Lloyd's but was denied.[277] Smagala filed suit on December 31, 1996 alleging breach of contract.[278] An Illinois trial court granted Lloyd's motion to dismiss and Smagala appealed.[279]

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268. *See id.*

269. *See id.* at 493. The policy was effetive from June 15, 1992 to July 21, 1993. *Id.*

270. *Id.* at 493.

271. *Id.*

272. *See id.* at 494 (commenting that Smagala injured himself playing for Pittsburgh).

273. *See id.* ("As a result [of his injury] plaintiff was unable to play football during the 1992 season."); *see also Around the NFL Camps American Conference*, ATLANTA J. & CONST., Aug. 25, 1992, at E3 (listing injuries to various players in preseason workouts as well as mentioning Smagala's arthroscopic surgery on his left knee).

274. *See Smagala*, 717 N.E.2d at 494. Smagala also underwent rehabilitation therapy prior to the 1993 season. *See id.*

275. *See id.* (noting Smagala's brief injury-plagued tenure with Pittsburgh).

276. *See id.* ("Plaintiff's amended complaint alleged that 4.39 seconds is the standard time for a person in the position of defensive cornerback to run the 40-yard dash."). Smagala never was again able to run a 4.39 seconds 40-yard dash following his injury and rehabilitation. *Id.*

277. *See id.* Lloyd's of London refused to pay Smagala as required by his insurance policy. *See id.*

278. *See id.* The breach of contract complaint alleged that Lloyd's "failed to perform its obligations under the insurance policy." *Id.*

279. *See id.* Lloyd's motion to strike and dismiss Smagala's complaint was based on three rationales: Smagala's disability did not occur within a year of the

Smagala contended that his permanent total disablement did not begin until March 13, 1994 when he failed at the NFL tryout.[280] This date would have given Smagala until March 13, 1997 to file suit against Lloyd's. However, the appellate court found that the date of permanent total disablement was August 17, 1993, one year after Smagala's injury and the last time he successfully played in the NFL.[281] Consequently, Smagala needed to file suit by August 17, 1996, over four months before Smagala actually filed suit. Smagala urged the court to follow the common law discovery rule, which states that the "the statute of limitations begins to run when a party knows or reasonably should know that an injury has occurred."[282] Finding the language of the contract to be "clear and unambiguous," the appellate court affirmed the defendant's motion to dismiss.[283]

C. Is it a Career-Ending Injury?

1. Underwriters v. Rychel[284]

On December 17, 1998, Colorado Avalanche left wing Warren Rychel broke his hand during a fight with Murray Baron of the Vancouver Canucks.[285] As a result of the injury, Rychel was unable to make a tight fist.[286] Consequently, Rychel claimed that no team in the NHL was interested in signing him.[287] Rychel subsequently filed a claim with Lloyd's of London, with whom he had a professional athlete disability insurance policy.[288] Pursuant to the policy,

injury, Smagala's complaint was not filed within the applicable policy period, and Smagala failed to give Lloyd's notice of his injury. *Id.*

280. *See id.* at 495 (discussing Smagala's first notice of disability).

281. *See id.* at 496 ("Plaintiff's inability to perform as defensive cornerback for the Pittsburgh Steelers after surgery and therapy during the year after the injury should have put him on notice that he suffered from a permanent total disability."). The court further pointed out that Smagala did not play professional football again after being released by Pittsburgh in August 1993. *See id.*

282. *Id.*

283. *Id.*

284. 126 P.3d 234 (Colo.Ct. App. 2005) (ruling that benefits are entitled only for unexpected events).

285. *See* Howard Pankratz, *NHL Appeals Court Denies Rychel Former Av Claimed Lloyd's of London Failed to Pay Insurance Policy*, DENVER POST, July 1, 2005 at D-06 (reporting cause of Rychel's injury).

286. *See Rychel*, 126 P.3d at 234-36 (stating Rychel argued that his role was as an "enforcer," requiring him to play physical and engage in occasional fights, thus his inability to fight adequately was his disablement).

287. *See id.* ("Underwriters denied the claim and filed a complaint for declaratory relief, seeking a determination that Rychel is not entitled to benefits under the policy.").

288. *See id.* (explaining terms of insurance policy).

Rychel was eligible for coverage should he sustain an injury that was caused by an accident and resulted in permanent total disablement.[289] Lloyd's denied the claim, and filed for declaratory relief that Rychel was not entitled to benefits under the policy.[290]

Lloyd's argued, and the trial court agreed by granting it summary judgment, that neither a fight nor an injury resulting from a fight were unexpected events triggering coverage under the policy because of self-proclaimed enforcer role.[291] In the previous six seasons, Rychel had been in a total of thirty-three fights.[292] Rychel, however, argued that the relevant event and cause of the injury was actually his hand getting caught in his opponent's sweater, which is an unexpected event in a hockey fight.[293] Rejecting this assertion, the court of appeals held that the "injury was caused by the fight, and the fight was not unexpected."[294]

2. Mitchell v. Ace American Insurance Company[295]

Donald Mitchell, a cornerback from Southern Methodist was drafted in the fourth round of the 1999 NFL Draft by the Tennessee Titans. In March of 2003, Mitchell signed a three-year, $2.6 million deal with the Dallas Cowboys.[296] A month later, Mitchell

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289. *See id.* (stating policy as defining "accident" as "single, sudden, and unexpected event, which occurs at an identifiable time and place and which causes unexpected [b]odily [i]njury at the time it occurs.").

290. *See id.* (noting Underwriters' sale of disability insurance policy to Rychel).

291. *See id.* (explaining trial court's rationale for granting Lloyd's motion for summary judgment).

292. *See* Pankratz, *supra* note 287 (describing Rychel's history of on-ice fights).

293. *See Rychel*, 126 P.3d at 236 (arguing that "a legitimate inference is that he was hurt in an unexpected event and that summary judgment [by the trial court] was improper because there is a genuine issue of material fact"). Specifically, Rychel argued that the policy's term "event" meant "only the precise moment when his hand became tangled in the opponent's sweater and does not refer to the general circumstances immediately preceding that moment." *Id.* The pertinent section of the policy stated:

> In the event that the insured sustains Bodily Injury caused in and of itself by an Accident occurring during the Policy Period and which, solely and independently of any other cause, results in the Total Disablement directly culminating in the Permanent Total Disablement of the insured and providing the Total Disablement commenced within six (6) months of the date of such Accident, then the Insurer agrees to pay the benefits, stated in the Schedule, to the insured.

Id. at 235.

294. *Id.* at 237-38 (holding that there was no genuine issue of material fact and affirming trial court decision).

295. 265 Fed. Appx. 420 (5th Cir. 2008).

296. *Sports Log; After Losing Coles, Jets Get Conway*, Boston Globe, Mar. 21, 2003, at E2 (noting Mitchell's signing with Dallas).

purchased a one-year one million dollars athlete individual disability income policy from Ace.[297] Mitchell injured his left ankle during an August 28th preseason game and was placed on injured reserve, missing the entire 2003 season.[298]

On July 30, 2004, at the start of Cowboys' training camp, Mitchell signed an Acknowledgement of Receipt of Medical Information in which he declared that he was "not [at that time] suffering from any physical and/or mental disability" that prevented him from playing football.[299] After just three days of training camp, however Mitchell said he had pain in his ankle.[300] He played through the pain but was cut from the team at the end of training camp.[301] Upon being cut, Mitchell signed a medical waiver stating that "he [was] not [at that time] suffering from any disability, physical or mental, incurred as a result of his service as a professional football player for the Club."[302]

After his release from the Cowboys, Mitchell consulted a foot and ankle specialist who told Mitchell that he could not play professional football as a result of his ankle condition.[303] On September 22, 2004, Mitchell filed for disability benefits with Ace.[304] Ace denied the claim and Mitchell brought suit in February 2006.[305] Pursuant to Mitchell's policy, to be eligible for benefits, he must have been "Totally Disabled for [twelve months] and certified to be Permanently Totally Disabled at the end of the [twelve months]."[306]

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297. *See Mitchell*, 265 Fed. Appx. 420 (revealing that team physician released Mitchell and his ability to play from June 5, 2004 to June 11, 2004).

298. *See id.* at 421-22 (discussing circumstances surrounding injury and noting that medical staff of Cowboys noted injury to be "acute posterior tibial tendinitis").

299. *Id.*

300. *See id.* (explaining Mitchell's recurrent pain).

301. *See id.* (providing Mitchell's dismissal). Mitchell, with a tentative roster spot, practiced and played in preseason games through the pain, though he says the injury hindered his performance. *Id.*

302. *Id.* In addition, the waiver stated that, so far as Mitchell could determine, "he [was] not physically unable to play professional football for the Club as a result of any injury suffered during the period of employment with the Club." *Id.*

303. *See id.* (noting that based on outside knowledge he was unable to continue play).

304. *See id.* (providing Mitchell's benefits claim).

305. *See id.* (providing facts of Mitchell's benefit denial). Eventually, after the case was removed to federal district court, all of Mitchell's claims were dismissed in May of 2007. Mitchell appealed the breach of contract claim to the Fifth Circuit. *Id.*

306. *Id.* at 423. The policy defined "Totally Disabled" as "the Insured's complete and total physical inability as a result of the Accidental Bodily Injury or Sickness or Disease to Participate, as defined in the Policy, in his or her Occupation . . . ." Participation under the policy included being "dressed (in uniform) or available or physically able to practice or play for a team in the League. . . . ."

Ace argued that Mitchell was not "Totally Disabled" within the meaning of the policy because he did participate in football activities with the Cowboys, notably mini-camp, training camp and preseason games, during the twelve-month period following the initial injury.[307] In the end the court agreed with Ace's position and upheld the denial of coverage.[308]

D. Returning After a Career-Ending Injury - Darius Miles (NBA)[309]

Darius Miles was the third overall pick in the 2000 NBA Draft by the Los Angeles Clippers. Prior to the 2004-05 season, Miles signed a six-year, $48 million contract with the Portland Trailblaz-

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307. *See id.* (detailing Ace's argument).

308. *See id.* (providing holding of Fifth Circuit). In addition, Mitchell claimed that he was still eligible for coverage because he did not satisfy the requirements of the Rehabilitation clause. *See id.* The Rehabilitation clause stated that Mitchell would be deemed fully recovered from an injury and hence ineligible for a claim if he signed a new professional contract and passed the team physical or participated in four regular season or playoff games in the twelve month period following the injury. *See id.* The Fifth Circuit disagreed, finding that "[t]he purpose of the rehabilitation clause is to restrict, not to enlarge, the scope of coverage by providing more ways in which claims may be denied . . . ." *Id.*

309. *See, e.g.*, Adrian Wojnarowski, *Jayson Leery of Those On His Side*, THE RECORD , Mar. 13, 2000, at S1 (explaining Jayson Williams broken leg and rupture of right knee and attempts of Nets General Manager Don Casey to get him on court). If Williams played and permanently injured his leg, Williams would lose out on the rest of his guaranteed contract. *See id.* (explaining option to sacrifice his body for playoffs). Also, a proposed waiver would have removed the obligation of the Nets to continue to pay twenty-percent of Williams' remaining salary with insurance covering the rest. *See id.* (noting option to free Nets from liability). Williams never agreed to the waiver and never played in the NBA again. *See id.* (revealing ultimate outcome of situation). Consequently, when Williams officially retired in June of 2000, after having missed the entire 1999-2000 season, insurance began to pay eighty percent of his remaining salary. *See* Bob Considine, *Agreement In Place for Nets' Williams to Leave*, USA TODAY, June 27, 2000, at 10C (revealing William's will get paid remainder and insurance will reimburse Nets for significant portion). In April 2003, Williams was convicted of multiple obstruction of justice charges as well as aggravated manslaughter stemming from the accidental shooting death and attempted cover-up by Williams of limousine driver Gus Christofi in February 2002. *See* Robert Hanley, *Williams Guilty of Cover-Up, But Not of Manslaughter*, N.Y. TIMES, May 1, 2004, at B1 (noting factual situation; however, greater extent not necessary for discussion here). Nevertheless, what is relevant is that in January of 2005, after the expiration of his Nets contract, the 36 year-old Williams took the first step in an NBA comeback when he played nine minutes with the Idaho Stampede of the CBA. *See* Darren Rovell, *Insurance Companies Could Seek Repayment*, ESPN, Jan. 13 2005, http://sports.espn.go.com/nba/news/story?id=1966345 (suggesting possible return of Williams and discussion regarding whether or not Williams return to NBA, which never materialized, would have required him to return some money to either Nets or insurance company).

ers.[310] Miles had surgery on his injured right knee in December of 2005, but returned that season after missing thirty-four games.[311] Miles had microfracture surgery on the knee in November of 2006 and missed the entire 2006-07 and 2007-08 seasons.[312] In April 2008, Miles was examined by an independent doctor who deemed that Miles' injuries were career-ending.[313] As a result, the Blazers subsequently waived Miles with two years and eighteen million dollars remaining on his guaranteed contract.[314] As a condition of the Blazers' salary cap credit, Miles could not play in ten or more games in any one season during the remaining term of his contract.[315]

Nevertheless, Miles played in six preseason games with the Boston Celtics prior to the 2008-09 season before being released. Miles subsequently signed with the Memphis Grizzlies and played two games for them in December before being released again.[316] With Miles two games away from nullifying the Blazers' salary cap credit, the Blazers sent an email to NBA general managers warning that the franchise would "safeguard its rights, including, without limitation, litigation," should a team sign Miles solely to negatively impact the Blazers' salary cap and luxury tax threshold.[317] Fearing collusion charges, the NBA stressed that Miles was a free agent, though the NBPA did still file a grievance.[318]

The Grizzlies ignored the Blazers' threat and signed Miles to a ten-day contract and eventually signed him for the remainder of

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310. *See* Jason Quick, *Miles Gets $48 Million, No Promises*, THE OREGONIAN, Sept. 2, 2004, at D01 (noting Miles stated "[i]t's more than I thought I could get when the season ended").

311. *See* Jason Quick, *Miles: Says He Was "Fallback Guy" Last Season, Too*, THE OREGONIAN, Apr. 21, 2006, at C01 (revealing injury and noting Miles' belief that he became franchise's scapegoat and that he was rushed into playing after injury).

312. *See* Joe Freeman, *Blazers Send NBA a Warning*, THE OREGONIAN, Jan. 10, 2009 (noting period of time missed by Trail Blazer's once starting forward).

313. *See id.* (discussing independent doctor evaluation from April 2008).

314. *See id.* (highlighting benefit to Trail Blazers that Miles' salary would not be counted toward salary-cap since injury was career-ending); *see also* 2005 NBA COLLECTIVE BARGAINING AGREEMENT, Art. VII, §6(c), at 162-66, *available at* http://www.nbpa.org/sites/default/files/ART.%20VII.pdf (revealing exceptions to salary cap for disabled players).

315. *See* Freeman, *supra* note 314 (providing terms that must be followed enabling Trail Blazer's to receive salary cap credit).

316. *See id.* (explaining Miles' participation on Celtic's training camp and exhibition games).

317. *See id.* (emphasizing that Miles' signed with Grizzlies after no other interest and that he also served ten game suspension after his violation of NBA drug policy).

318. *See* Marc J. Spears, *Blazers Threaten Lawsuit, Union Grieves E-mail About Signing Miles*, BOSTON GLOBE, Jan. 10, 2009, at C5 (reporting that Player's Association filed grievance with Trail Blazers due to threatening email).

the season.[319] Miles wound up playing thirty-four games for the Grizzlies during the 2008-09 season, averaging three and a half points per game and counting nine million dollars against the Blazers' salary cap.[320]

E. Proximate Cause Injuries: Cam Neely (NHL)

Cam Neely was one of Boston's most popular sports figures in a Bruins career that spanned from 1986 through 1996 and an NHL career that dated back to 1983. Neely captained the Bruins to two Stanley Cup appearances but his career was derailed by numerous leg injuries that limited him to only 162 games over his final five seasons.

Neely retired following the 1995-96 season due $2.7 million in 1996-97 salary and $1.6 million in 1997-98.[321] Prior to the 1995-96 season, the Bruins executed a disability insurance agreement with Boston Mutual Life, whereby Boston Mutual would pay 80% of Neely's salary if he were to become disabled. The policy partially excluded coverage for any injury relating to Neely's previously injured left knee. Ultimately, it was injuries to Neely's hips that forced him out of the lineup in February 1996. The Bruins alleged that Boston Mutual and its partners attempted to add a hip exclusion in March 1996, after an agreement had already been reached.[322] Boston Mutual contended that the September offer was made contingent on receiving further information regarding Neely's hip condition, which would have allowed them to apply exclusions where appropriate.[323] The disagreement resulted with the Bruins suing Boston Mutual and two other insurance companies for

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319. *See Grizzlies Ignore Blazers' Warning*, ORLANDO SENTINEL, Jan. 11, 2009, at C4 (showing Grizzlies' disregard for Trail Blazer's threat to sue and insist on his benefit to franchise); *see also Grizzlies Sign Miles For Rest of Season*, WASH. POST, Jan. 31, 2009, http://www.washingtonpost.com/wp-dyn/content/art./2009/01/30/AR2009013003561.html (communicating decision to sign for remainder of season and further explaining that Miles' return but Trail Blazers on hook for remaining contract price). .

320. *See Grizzlies Sign Miles For Rest of Season, supra* note 319. (summarizing result of Mile's return).

321. *See* Nancy L. Marrapese, *Club Files Lawsuit Over Neely Insurance Coverage*, BOSTON GLOBE, Apr. 11, 1997, at E9 (discussing remainder left on contract prior to retirement).

322. *See id.* (revealing allegations of lawsuit explaining that late exclusions to policy were improper).

323. *See id.* (explaining terms of offer).

their failure to pay Neely, and the parties ultimately settled out of court with terms undisclosed.[324]

VIII. CONCLUSION

It is important for anyone working in the sports industry to have a good, overall understanding on how insurance works, the process and the options. Ultimately, it is a business decision for all of the impacted parties. And this particular specialty niche of insurance is driven by both the statistics and the market.

It is important to bear in mind that this area of insurance is relatively new, and has changed and evolved considerably throughout its short history. League programs and the NCAA and ESDI programs have only come into existence in the last twenty-five years. As a result, the most important factor to consider is not how this specialty area of insurance has evolved but rather how it will continue to evolve. As sports disability insurance policies become more ubiquitous, the data and pricing models will become more accurate, predictable and stable. Nevertheless, it is important for people in the industry to keep up with developments as changes will be made to address market conditions, to address the needs of athletes, teams and leagues, to address changes in medical issues and rehabilitation and return from injuries and litigation decisions.

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324. *See id.* (acknowledging counter arguments and explaining that policy initially made was pending hip condition details).