

# INSURANCE COVERAGE FOR ELITE STUDENT-ATHLETES

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## INTRODUCTION

In 2008, Ball State wide receiver Dante Love was projected by many as likely to be drafted in the first round of the National Football League draft. That high of a selection would mean millions in compensation for Love. Unfortunately, he suffered a spinal cord injury early that season.<sup>1</sup> He recovered and was expected to live a normal life, but he never played football again.<sup>2</sup> He also would never see those millions in compensation from playing professional football.

Similar stories were common in 2014, although, fortunately, with less severe injuries. University of Southern California linebacker Morgan Breslin was originally projected as a first round draft pick.<sup>3</sup> After those projections, he suffered a hip injury and was unable to play the entire season.<sup>4</sup> He was not drafted and later signed as an undrafted free agent with the San Francisco 49ers.<sup>5</sup> As an undrafted free agent, he likely will not even make the team.<sup>6</sup> Additionally, University of Southern California wide

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<sup>1</sup> See Graham Watson, *Ball State's Love OK After Spinal Fracture, but Career Likely Over*, ESPN (Sept. 22, 2008, 7:21 PM), <http://sports.espn.go.com/nfl/news/story?id=3602536>.

<sup>2</sup> See *id.*

<sup>3</sup> See Will Carroll, *Marqise Lee Injuries Drop Him in NFL Draft but Will Lead to Insurance Payout*, BLEACHER REP. (May 13, 2014, 7:00 PM), <http://bleacherreport.com/articles/2052089-marqise-lee-injuries-drop-him-in-nfl-draft-but-lead-to-insurance-payout>.

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* In fact, the 49ers released Breslin in May 2014. See David Fucillo, *49ers Waive 2 Players, Sign 2 Tryout Candidates, Including Lesser Known Kevin Greene*, NINERS NATION (May 27, 2014, 12:34 PM), <http://www.ninersnation.com/2014/5/27/5755306/49ers-waive-2-players-sign-2-tryout-candidates-kevin-greene-chase-thomas>.

receiver Marqise Lee sprained his MCL during his 2013 season.<sup>7</sup> Before the season, he was projected as a first round draft pick. After the season, he was drafted—but not until the second round.<sup>8</sup> That drop likely cost Lee around \$5 million in salary.<sup>9</sup>

To protect themselves against the risks illustrated in these anecdotes, elite student-athletes have begun exploring insurance,<sup>10</sup> specifically something akin to traditional disability insurance. Two relevant forms exist. The first is total disability insurance, which insures against the risk that the student-athlete would be injured and unable to ever play football again. The second is loss-of-value insurance, which insures against the risk of an injury causing the student-athlete to fall in the professional sports draft.

Although insurance is a solution to these risks undertaken by elite student-athletes, it is not easy to come by. Current National Collegiate Athletic Association (NCAA) rules make it unnecessarily difficult for elite student-athletes to obtain loss-of-value insurance, which may be more useful to the insured. Those rules should change and provide equal access to both total disability and loss-of-value insurance.

Insurance is a solution, but it is still insurance—it transfers the risk, it does not eliminate it. Elite student-athletes must be aware that the insurance provides only a partial substitute for their potential losses. They also must be aware that collecting the benefits may be difficult as they will have the burden to demonstrate coverage. And last, elite student-athletes need to be aware that because the issuance of the insurance is so dependent on unscientific draft projections, the insurance may undervalue the insured and provide a smaller payout than it should.

Part I of this Article generally explores student-athletes' insurance needs, focusing on health and disability insurance. Part II discusses how elite student-athletes are hampered in their

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<sup>7</sup> See Carroll, *supra* note 3.

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> Just applied to the players mentioned in the Introduction, Love did not have a total disability policy. See *id.* Both Breslin and Lee had loss-of-value policies and may currently be seeking to collect on those policies. See *id.*

ability to obtain disability insurance, and argues for enabling similar access to both total disability and loss-of-value insurance. Part II also discusses recent reform possibilities of schools paying premiums for elite student-athletes. Part III cautions that neither type of insurance provides perfect protection because of the possible difficulties of collecting the benefits and the possible inadequacy of the benefits.

## I. INSURANCE NEEDS FOR STUDENT-ATHLETES

### A. Health Insurance

Health insurance is “written to reimburse the insured personally for financial loss arising out of illness caused by specified diseases or, as more frequently written, from any except specified diseases.”<sup>11</sup> It often also includes coverage for financial loss arising out of an accident.<sup>12</sup> The reimbursement for financial loss includes “such items as medical, hospital and nursing care.”<sup>13</sup> Theoretically, most Americans have access to health insurance through government programs, employer-sponsored programs, or individual policies.

Student-athletes today have better access to health insurance. Before 2005, if a student-athlete was injured while participating in her sport, she likely had few options as far as resources to cover the expenses of those injuries. Maybe she had her own individual policy, or maybe she was covered by her parents’ insurance policies. Student-athletes got creative trying to recoup the medical costs. For instance, some “[c]ollege football players have filed worker’s compensation and disability insurance claims against universities in which they have contended that they are employees.”<sup>14</sup> If the student-athletes were employees, they would have access to this state insurance system. This system “provides employees who are injured in the course of

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<sup>11</sup> 31 JOHN ALAN APPLEMAN, APPLEMAN ON INSURANCE § 186.01, at 41 (2d ed. 2007).

<sup>12</sup> *See id.*

<sup>13</sup> *Id.*

<sup>14</sup> Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1102.

employment with benefits such as medical care, rehabilitative services and equipment, payment for lost capacity, and income replacement.”<sup>15</sup> Although there are exceptions, most states have denied these worker’s compensation claims because the student-athletes are not employees.<sup>16</sup>

Luckily, the situation has improved. In 2005, the NCAA mandated that every student-athlete have personal health insurance: “[a]n active member institution [of the NCAA] must certify insurance coverage for medical expenses resulting from athletically related injuries sustained . . . while participating in a covered event.”<sup>17</sup> This certification must cover “[a] student-athlete participating in a covered event in an intercollegiate sport as recognized by the participating institution” and “[a] prospective student-athlete participating in a covered event.”<sup>18</sup> Whatever the source of insurance coverage, it covers “athletically related injuries . . . that are a direct result of participation in a covered event.”<sup>19</sup> The NCAA separately defines a covered event as “[a]ny intercollegiate sports activity, including team travel, competition, practices and conditioning sessions,”<sup>20</sup> “[a]n NCAA-sanctioned competition in which the insured person is an official competitor,”<sup>21</sup> and “[p]ractice and conditioning sessions that are authorized, organized or directly supervised by athletics

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<sup>15</sup> *Id.* In March 2014, an official from the National Labor Relations Board concluded that “Northwestern University football players on scholarship are employees of the school.” Alejandra Cancino, *Northwestern Ruling Could ‘Rattle the Universe of Universities’*, CHI. TRIB. (Mar. 26, 2014), [http://articles.chicagotribune.com/2014-03-26/business/chi-northwestern-union-bid-20140326\\_1\\_labor-law-football-players-college-sports](http://articles.chicagotribune.com/2014-03-26/business/chi-northwestern-union-bid-20140326_1_labor-law-football-players-college-sports). One consequence of this decision, if affirmed on appeal, is that if injured during practice or a game, they may, as employees, have access to the state’s workers’ compensation system. *See id.* The Northwestern football players interested in unionizing are backed by the College Athletes Players Association (CAPA). *See id.* One of the CAPA’s demands is “financial coverage for former players with sports-related medical expenses.” *Id.*

<sup>16</sup> *See* LeRoy, *supra* note 14, at 1102.

<sup>17</sup> 2013-14 NCAA DIVISION I MANUAL § 3.2.4.8 (2013) [hereinafter MANUAL]; *see also* Cory McCune, *NCAA Policies for Student-Athlete Medical Insurance Breakdown*, BLEACHER REP. (Apr. 8, 2013), <http://bleacherreport.com/articles/1595326-ncaa-policies-for-student-athlete-medical-insurance-breakdown>.

<sup>18</sup> MANUAL, *supra* note 17, §§ 3.2.4.8(a)-(b).

<sup>19</sup> *Id.* § 3.2.4.8.2.

<sup>20</sup> *Id.* § 3.2.4.8.3(a).

<sup>21</sup> *Id.* § 3.2.4.8.3(b).

department personnel at the member institution other than during the playing season.”<sup>22</sup>

The required insurance coverage must be at least \$90,000<sup>23</sup> and can come from one of three sources: the student-athlete’s “[p]arents’ or guardians’ insurance coverage,” the student-athlete’s “personal insurance coverage,” or the “[i]nstitution’s insurance program.”<sup>24</sup> If the student-athlete is covered only by his parent’s policy, then the terms of that policy control the extent of medical costs covered.

Most student-athletes will not have to rely on their parents’ policies because the majority of NCAA Division I programs provide insurance for their student-athletes.<sup>25</sup> Schools may set coverage plans to constitute only secondary insurance, covering expenses only to the extent that they are not covered by the parent’s coverage.<sup>26</sup> Even as secondary insurance though, the student-athlete or parent should avoid any out-of-pocket costs. Schools may also set coverage plans to exist regardless of any parental coverage. Some schools end the benefits “once a student-athlete is no longer enrolled and under scholarship.”<sup>27</sup> Others may be more generous. As of August 1, 2013, NCAA bylaws allow a school to “provide medical and related expenses and services to a student-athlete.”<sup>28</sup> The NCAA also clarified that this rule allows

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<sup>22</sup> *Id.* § 3.2.4.8.3(c).

<sup>23</sup> NCAA bylaws do not specify this amount, but instead mandate that the coverage “be of equal or greater value than the deductible of the NCAA catastrophic injury insurance program.” *Id.* § 3.2.4.8.1. The NCAA catastrophic injury insurance program is discussed at Part I.B.2.a.

<sup>24</sup> MANUAL, *supra* note 17, § 3.2.4.8.1. For example, the University of Louisville provided insurance coverage and covered the medical costs for Kevin Ware when he was injured in the 2013 NCAA March Madness basketball tournament. *See* McCune, *supra* note 17. When Kyle Hardrick, a basketball player, was injured at the University of Oklahoma, he was covered only by his parents’ insurance. *See id.* His parents’ insurance did not cover all of the costs and his parents were then forced to pay for the care out of pocket. *See id.*

<sup>25</sup> *See* McCune, *supra* note 17 (describing University of Louisville as “one of the majority of NCAA Division I programs that cover their student-athletes”).

<sup>26</sup> *See* Jon Solomon, *College Athletes’ Rights: NCAA Requires Health Insurance, but Schools Decide What to Pay*, AL.COM (Feb. 19, 2012, 7:55 AM), [http://www.al.com/sports/index.ssf/2012/02/college\\_athletes\\_rights\\_ncaa\\_r.html](http://www.al.com/sports/index.ssf/2012/02/college_athletes_rights_ncaa_r.html).

<sup>27</sup> McCune, *supra* note 17.

<sup>28</sup> MANUAL, *supra* note 17, § 16.4.

schools to cover the medical expenses of its former student-athletes,<sup>29</sup> as some schools have done.<sup>30</sup>

Any medical expenses over \$90,000, the extent of coverage that the NCAA requires, are covered by the NCAA's catastrophic injury insurance program. The NCAA pays the premiums for this insurance and all student-athletes at NCAA institutions are covered.<sup>31</sup> The insurance covers injuries incurred in covered events, including "competitions scheduled by [the student-athlete's] institution, official team activities, conditioning, and practice sessions that are authorized by, organized by, or directly supervised by an official representative of the institution."<sup>32</sup> Notably, covered events do not include "camps, clinics, or other events that are hosted by outside organizations."<sup>33</sup>

### *B. Disability Insurance*

Disability, like health insurance, reimburses the insured for financial loss. The reimbursed loss is different though. "Disability insurance insures against an individual's inability to pursue a livelihood arising either from accident or illness."<sup>34</sup> If the insured becomes unable to pursue a livelihood because of a disabling injury or illness, the insured can collect from a disability policy.

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<sup>29</sup> See NCAA, 2012-13 NCAA WORKING GROUP ON COLLEGIATE MODEL—RULES QUESTION AND ANSWER DOCUMENT 16 (2013), available at <https://www.ncaa.org/sites/default/files/RWG%2BQ%2Band%2BA%2BVol%2B3.pdf> [hereinafter NCAA WORKING GROUP] (clarifying that the institution can "provide medical services to former student-athletes and to those who quit the team").

<sup>30</sup> See McCune, *supra* note 17 (reporting that the University of Alabama paid for all of the surgeries of a former wide receiver).

<sup>31</sup> See NCAA, NCAA CATASTROPHIC INJURY INSURANCE PROGRAM FREQUENTLY ASKED QUESTIONS 1 (2012), available at <https://www.ncaa.org/sites/default/files/Cat%2BFQA%2B8.12.pdf> [hereinafter NCAA CATASTROPHIC INJURY].

<sup>32</sup> *Id.* at 3.

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

<sup>34</sup> APPLEMAN, *supra* note 11, § 187.01, at 157; see also Alena Allen, *State-Mandated Disability Insurance as Salve to the Consumer Bankruptcy Imbroglia*, 2011 BYU L. REV. 1327, 1343 ("[S]hort-term and long-term disability insurance are designed to provide a portion of the income lost when workers are forced to miss work due to an injury or sickness.").

### 1. Types of Traditional Disability Insurance

Generally, two types of traditional disability insurance exist, which govern different time periods. Short-term disability insurance provides income replacement to the insured for a designated, short period of time.<sup>35</sup> “Typically, short-term disability policies provide a worker with a portion of her pre-disability wages, most commonly one-half to two-thirds of her pre-disability income for a period of thirteen, twenty-six, or fifty-two weeks.”<sup>36</sup>

Long-term disability insurance is meant to provide an individual with income replacement for the long term. The benefits usually begin at the expiration of the short-term disability benefits. The benefits pay a worker a portion of her pre-disability wages, anywhere from one-half to two-thirds of those wages.<sup>37</sup>

Whether benefits are due depends on the policy’s definition of disability. There are two types of long-term disability insurance, which differ depending on whether the insured is unable to continue in her usual occupation or unable to undertake any work for which she is generally qualified.<sup>38</sup> The first will find the insured disabled if the “insured can no longer perform occupational duties.”<sup>39</sup> “The term ‘occupation’ refers to the occupation that the insured was carrying on at the time of injury.”<sup>40</sup> The second precludes a finding of disability “if the insured can follow any remunerative occupation, whether his or her present vocation or another.”<sup>41</sup> Courts have limited this in holding that “the insured can only be expected to follow occupations for which the insured’s age, health, training, and

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<sup>35</sup> See Allen, *supra* note 34, at 1342.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 1342-43.

<sup>38</sup> See APPLEMAN, *supra* note 11, § 187.01, at 157 (“[C]ourts regard an individual as entitled to compensation if the individual is substantially unable to carry on his or her usual occupation or another occupation for which he or she is reasonably well qualified by training and experience.”).

<sup>39</sup> *Id.* § 187.06, at 232.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* § 187.07, at 250.

experience have fitted him or her and for which he or she is reasonably qualified.”<sup>42</sup>

Regardless of the definition of disability, a long-term disability period will usually have a waiting, or elimination, period before benefits will be paid.<sup>43</sup> The insured must remain disabled during this period to obtain the benefits.<sup>44</sup> The length of the period can vary; it may be as short as ninety days or as long as a year.<sup>45</sup> The purpose of this waiting period is to ensure that the insured is actually disabled.

If disabled as required by the policy, the insured will be eligible for the insurance benefits. Again, the benefits will be some portion of the insured’s prior income. As however specified in the policy, the insurance company will continue to pay the benefits as long as the insured is disabled, which could be for the rest of the insured’s working life.

## 2. Student-Athletes’ Need for Disability Insurance

Unlike with health insurance, a student-athlete is unlikely to have any disability insurance coverage. A parent’s disability policy would not cover a child’s lost income due to disability; the parent’s policy covers that parent’s lost income due to disability, not the child’s. Plus, while in school the student-athlete likely does not work. So, the student-athlete may not lose any present income due to the disability.

At the same time, the student-athlete may lose some income if he suffers a disabling injury or illness—lost *future* income. If a student-athlete is elite and expected to play professional sports, the student-athlete has a very high expected future income. And thus, an elite student-athlete should consider insurance to cover his losses should he suffer an injury or illness.

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<sup>42</sup> *Id.* § 187.07, at 251.

<sup>43</sup> *See id.* § 187.02, at 180.

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

*a. The NCAA's Catastrophic Injury Insurance Program*

The NCAA's catastrophic injury program provides some disability insurance for student-athletes. Besides medical benefits, the policy also provides true catastrophic injury benefits for those "individuals who are Totally Disabled" as defined in the policy.<sup>46</sup>

The NCAA does not make the policy publicly available, but separately provides this definition of "Totally Disabled":

the individual must have suffered the irrevocable loss of speech, hearing in both ears, sight in both eyes, use of both arms, use of both legs, use of one arm and one leg, or have severely diminished mental capacity due to brain stem or other neurological injury such that the person is unable to perform normal daily functions. In addition, the person must also meet the following criteria: 1) For the period beginning on the date of the accident through the fourth anniversary, the inability to engage in substantially the same activities as the person engaged in immediately prior to the accident; and 2) For the period thereafter, the inability to engage in any gainful occupation or employment for compensation or profit for which he or she is or may become reasonably fitted by education, training, or experience.<sup>47</sup>

If totally disabled, the insured is eligible for disability-like benefits. The NCAA has explained that those "benefits cover things such as special benefits for home and vehicle modifications, family counseling, rehabilitation, and college education."<sup>48</sup> As the NCAA does not make this policy public, the amount of the benefits is unknown. Regardless, the publicly listed benefits do not appear to include the traditional benefit under a disability policy—income or wage replacement. Any insured who is unable to perform normal daily functions would also likely be unable to perform the duties of any occupation.

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<sup>46</sup> NCAA CATASTROPHIC INJURY, *supra* note 31, at 2.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.* at 2.

*b. Total Disability Insurance*

Student-athletes who expect to play professional sports should have a special interest in disability insurance's traditional role of income replacement. If a student-athlete—talented enough to play professionally—is injured or becomes ill while still in school and is then unable to play, that student-athlete will never see the wages he could have earned from professional sports.<sup>49</sup> Disability insurance could provide partial income replacement for that lost income.

Total disability policies are available for elite student-athletes through the NCAA and private insurers.<sup>50</sup> The NCAA created a disability insurance program for certain elite student-athletes in 1990.<sup>51</sup> At first, it only covered student-athletes who participated in football and men's basketball. It was later expanded to cover student-athletes who participated in baseball, men's ice hockey, and, eventually, women's basketball.<sup>52</sup> To be eligible for coverage, the student-athlete has to be projected to be drafted in the first three rounds of the NFL draft (football) or the NHL draft (ice hockey), or the first round of the NBA draft (men's basketball), the MLB draft (baseball), or the WNBA draft

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<sup>49</sup> If it was tortious conduct that rendered the student-athlete unable to play, there is no doubt that the student-athlete could recover damages for his future lost wages in a tort claim. The damages are called either future lost wages or lost future earning capacity. "The standard measure of damages for lost earning capacity can therefore be stated in general terms as the difference between what the plaintiff was capable of earning before the defendant's conduct and what the plaintiff is capable of earning thereafter." Richard T. Karcher, *Rethinking Damages for Lost Earning Capacity in a Professional Sports Career: How to Translate Today's Athletic Potential into Tomorrow's Dollars*, 14 *CHAP. L. REV.* 75, 77 (2010). The student-athlete would have to show that he would have played professional sports and how much he would have made doing so. But if the student-athlete can meet this burden, he would be entitled to damages based on his lost future earning capacity as a professional athlete.

<sup>50</sup> See Michael DiRocco, *A Matter of Policy: Insurance Helps College Athletes Protect Earnings*, *FLA. TIMES-UNION* (Feb. 19, 2003), [http://jacksonville.com/tu-online/stories/021903/spo\\_11787503.shtml](http://jacksonville.com/tu-online/stories/021903/spo_11787503.shtml).

<sup>51</sup> See *Student-Athlete Insurance Programs*, NCAA, <http://www.ncaa.org/about/resources/insurance/student-athlete-insurance-programs> (last visited Oct. 22, 2014).

<sup>52</sup> See *id.* Because the NCAA's program is available for student-athletes in five sports and four of those five are men's sports, this Article will usually refer to a student-athlete as a "he." See *id.*

(women's basketball).<sup>53</sup> Student-athletes projected to be drafted this high are generally considered "elite" student-athletes. Private insurers may have different standards for who is eligible for the coverage, but it will similarly only issue the policy for elite student-athletes.

This type of disability policy is similar to a traditional disability policy in that it provides future income replacement. It is unlike a traditional disability policy, however, in that there is a set benefit. Instead of continuous payments based on some percentage of the expected income, the insured receives a one-time payment.<sup>54</sup> The NCAA program sets maximum available coverages. They are: \$5 million for men's basketball and football, \$1.5 million for baseball, \$1.2 million for men's ice hockey, and \$250,000 for women's basketball.<sup>55</sup> These limits do not apply to policies issued by private insurers.

The fact that the benefit is a one-time payment implicitly recognizes that an elite student-athlete is not expected to play professional sports for the entirety of his adult life. At some point, professional athletes retire and enter the work force with a more normal job. And thus, the wage replacement for professional sports players likely should not cover the rest of the student-athlete's life. Of course, if a student-athlete is totally disabled—like suffering brain damage from a hit in football—he will likely also be unable to obtain other work.

Numerous similarities exist between traditional disability insurance and total disability insurance for elite student-athletes. In both, there is a waiting period before benefits are paid. "[T]he athlete must establish permanent total disability, which requires the athlete be unable to perform at his sport for twelve months following the injury."<sup>56</sup> This "waiting period helps determine

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<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> UNIV. OF S.C., EXCEPTIONAL STUDENT-ATHLETE DISABILITY INSURANCE PROGRAM 4 (2013), available at [http://grfx.cstv.com/photos/schools/scar/genrel/auto\\_pdf/exceptional-sa-dias-prog.pdf](http://grfx.cstv.com/photos/schools/scar/genrel/auto_pdf/exceptional-sa-dias-prog.pdf). The NCAA program may make adjustments to these limits based on the player being insured. *See id.*

<sup>56</sup> Glenn M. Wong & Chris Deubert, *The Legal & Business Aspects of Career-Ending Disability Insurance Policies in Professional and College Sports*, 17 VILL. SPORTS & ENT. L.J. 473, 490 (2010).

whether the injury suffered is temporary or legitimately career ending as contemplated by the policy.”<sup>57</sup> After the waiting period, though, if a student-athlete is able to demonstrate his inability to participate in professional athletics, the student-athlete will be able to collect on the policy.

One difference between traditional disability insurance and total disability insurance for elite student-athletes is the definition of total disability. In a traditional policy, total disability could mean unable to perform any comparable occupation. But a student-athlete policy is specific to the professional sports context. Total disability exists if the student-athlete is unable to pursue professional athletics, as opposed to being unable to pursue any occupation. Applied to a college student-athlete, a finding of total disability means that the injury or illness ends a student-athlete’s professional career before it starts.<sup>58</sup>

Ultimately, total disability insurance is a safeguard for elite student-athletes—just in case the worst happens. Former University of Florida football student-athlete Travis Taylor purchased a \$2 million policy that he thought would ease his mind and provide for his wife and daughter should something happen.<sup>59</sup> However, he said at the time,

It hasn’t really done that at all . . . . I won’t say it puts [the potential for injury] in the back of your head, but there’s always that sense that it can end any day. As quickly as God gives it to you, He can take it away. I just want my family to be taken care of in case something does happen.<sup>60</sup>

Former University of Arkansas quarterback Ryan Mallett participated in the NCAA program, describing it as “kind of like a

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<sup>57</sup> *Id.*

<sup>58</sup> *See id.* at 487-88 (“Most athlete disability insurance contracts are meant to provide insurance for a career-ending injury, hence one that prevents the player from ever being able to play again.”).

<sup>59</sup> *See* Matt Hayes, *Injury Protection: Gator Wide Receiver Among Insured Players*, *FLA. TIMES-UNION* (Aug. 26, 1999), [http://jacksonville.com/tu-online/stories/082699/col\\_1e1insured.html](http://jacksonville.com/tu-online/stories/082699/col_1e1insured.html).

<sup>60</sup> *Id.*

backup plan in case something happens.”<sup>61</sup> Former Louisiana State University star football student-athlete Patrick Peterson described his decision to participate in the NCAA program as being an easy and smart decision. “With so many high-profile guys, you have so much to lose. To have that so you know you have something where you can be stable after football, it’s the right thing to do.”<sup>62</sup> Former Ohio State University basketball player Evan Turner decided not to enter the NBA draft after his sophomore year and returned to school for his junior year.<sup>63</sup> Turner described the policy as “just a little comfort.”<sup>64</sup>

*c. Loss-of-Value Insurance for Elite Student-Athletes*

Total disability insurance may not be enough protection, however. The insurer pays the benefit only if the elite student-athlete is totally disabled. Thus, the insurance does nothing for an elite student-athlete who suffers something less than a career-ending injury or illness. That student-athlete still suffers a loss in the form of lost future income. If an elite student-athlete is hurt and unable to play his college sport for a time in the year he is drafted, that student-athlete could very easily fall in the draft—and make less income than he would have made had he not been hurt.<sup>65</sup>

Take Willis McGahee as an example: Just hours prior to the 2003 Fiesta Bowl, University of Miami running back Willis McGahee purchased a total disability policy.<sup>66</sup> In the Fiesta Bowl,

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<sup>61</sup> Mike Herndon, *NCAA Insurance Program Protects Elite Athletes, Future Earnings Against Injury*, AL.COM (Aug. 1, 2010, 7:17 AM), [http://www.al.com/sports/index.ssf/2010/08/are\\_you\\_in\\_good\\_hands.html](http://www.al.com/sports/index.ssf/2010/08/are_you_in_good_hands.html).

<sup>62</sup> *Id.*

<sup>63</sup> See Andy Staples, *Protective Insurance Policies Now Norm for Top College Prospects*, SPORTS ILLUSTRATED (June 23, 2009), <http://www.si.com/more-sports/2009/06/23/insurance-policies1>.

<sup>64</sup> *Id.*

<sup>65</sup> See Marc Isenberg, *The “Student-Athlete Disability Insurance Program” Isn’t What the NCAA Cracks It up to Be*, GEORGE RAVELING COACHING FOR SUCCESS (Mar. 20, 2013), <http://coachgeorgeraveling.com/the-student-athlete-disability-insurance-program-isnt-what-the-ncaa-cracks-it-up-to-be/>.

<sup>66</sup> See Darren Rovell, *Decision Could Secure McGahee’s Financial Future*, ESPN (Jan. 7, 2003, 6:52 PM), <http://espn.go.com/sportsbusiness/news/2003/0106/1488252.html>.

McGahee suffered a gruesome knee injury, tearing multiple ligaments.<sup>67</sup> Had he been totally disabled and unable to play professional football, McGahee likely would have been able to collect on his \$2.5 million disability policy.<sup>68</sup> But McGahee was not totally disabled; he was just unable to play for a short period of time (and ultimately went on to enjoy a productive professional football career). Even though not career-ending, the knee injury had the capability of causing him a potentially large economic injury. Before the injury, he was projected to be a first round selection in the NFL draft.<sup>69</sup> After the injury, he was projected to be selected in the third or fourth round.<sup>70</sup> That's a difference of hundreds of thousands of dollars in compensation.<sup>71</sup> Fortunately for him, McGahee was still drafted in the first round. But if he had fallen in the draft, the total disability policy he purchased before the Fiesta Bowl would not have helped him replace the income he lost due to the knee injury.

Total disability insurance does not cover this type of loss, but another disability-like insurance does. That insurance is called loss of value, or draft protection. Although the language of an individual loss-of-value policy can differ, a typical policy "covers professional prospects who are not drafted as highly as expected and the loss of income associated with that drop in draft status."<sup>72</sup> Thus, "[l]oss of value insurance is designed to protect against the risk that an elite student-athlete's draft stock will slip following an injury or illness."<sup>73</sup> The policy will specify how far the student-

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<sup>67</sup> *See id.*

<sup>68</sup> *See* Kevin Fixler, *The \$5 Million Question: Should College Athletes Buy Disability Insurance?*, ATLANTIC (Apr. 11, 2013, 4:27 PM), <http://www.theatlantic.com/entertainment/archive/2013/04/the-5-million-question-should-college-athletes-buy-disability-insurance/274915>.

<sup>69</sup> *McGahee Says to Pass on Him Is Big Mistake*, ESPN (Apr. 8, 2003), <http://sports.espn.go.com/nfldraft/story?id=1535705>.

<sup>70</sup> *See id.*

<sup>71</sup> *See id.* Again, had this loss been due to tortious conduct, a student-athlete could recover these lost income damages through civil litigation. *See supra* note 49.

<sup>72</sup> Wong & Deubert, *supra* note 56, at 496.

<sup>73</sup> Shaun H. Crosner, *Loss of Value Insurance Can Help Elite Student-Athletes Protect Their Projected Draft Stock*, POLICYHOLDER INFORMER (July 2, 2013), <http://www.policyholderinformer.com/2013/07/02/loss-of-value-insurance-can-help-elite-student-athletes-protect-their-projected-draft-stock/>; *see also* Andrew Knox, *With the "One and Done" Rule, the NBA and NCAA Benefit While Players Lose*, JEFFREY S.

athlete needs to fall in the draft to trigger coverage; generally, “only a significant drop in [the draft triggers] coverage.”<sup>74</sup> An injury or illness causing the athlete to drop in the draft is more common than the type of permanent paralysis that would trigger total disability insurance.<sup>75</sup> That is why loss-of-value insurance may be “more relevant to today’s college football player.”<sup>76</sup>

Unlike total disability insurance, the NCAA does not offer any type of loss-of-value insurance for elite student-athletes. Thus, if a student is interested in obtaining the coverage, he must go through a private insurer.

Loss-of-value insurance is similar to traditional short-term disability insurance in that the insured’s disability is only temporary.<sup>77</sup> Using McGahee again as an example, there was a time period in which he was disabled and unable to play football. Loss-of-value insurance is unlike short-term disability, though,

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MOORAD SPORTS L.J. BLOG (Feb. 26, 2013), <http://lawweb2009.law.villanova.edu/sportslaw/?p=1821>; Staples, *supra* note 63 (explaining that a loss-of-value policy “will cover the gap between expected guaranteed money and actual guaranteed money should, for example, an offensive tackle tear his ACL during his senior year and fall [from a projected first rounder] into the third round”).

Loss-of-value policies are also popular with professional “athletes approaching free agency.” Wong & Deubert, *supra* note 56, at 495. These policies “allow a player to recoup money the player would have made as a free agent absent an injury.” *Id.* One form of loss-of-value policies for impending free agents is very similar to how the policies work for elite student-athletes. “[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.” *Id.* at 496.

<sup>74</sup> Crosner, *supra* note 73.

<sup>75</sup> See Staples, *supra* note 63. After purchasing his total disability policy, University of Florida quarterback Tim Tebow didn’t “give[] it another thought, because he never intend[ed] to collect. ‘Do you know how often that happens?’ . . . ‘Very rarely.’” *Id.*

<sup>76</sup> Pedro Moura, *Marqise Lee’s Insurance Policy Offers No Guarantees*, ORANGE COUNTY REG. (Apr. 26, 2014, 8:18 PM), <http://www.ocregister.com/usc/insurance-611524-value-loss.html>.

<sup>77</sup> “In the sports context, [a short-term disability policy] is typically only used by a team and not the player.” Wong & Deubert, *supra* note 56, at 493. Because “most contracts are guaranteed in professional sports, teams are still obligated to pay injured players.” *Id.* at 494. The team thus needs short-term disability insurance to cover any player’s wages that the team is still obligated to pay even though the player is injured and unable to play. College teams would not need short-term disability insurance because they do not pay wages to their student-athletes for participating in athletics.

because it does not replace wages that the insured lost during that temporary disability. The student-athlete was not being paid wages by his school for participating in his sport and did not lose any present wages due to the disability.

Instead, the income that loss-of-value insurance replaces is more like what a traditional total disability policy replaces—future lost wages. Loss-of-value insurance replaces the future wages that the insured will lose because of his temporary or short-term disability. Of course, that could be a large sum, possibly millions of dollars depending on where he would have been drafted pre-injury and where he is drafted post-injury. Obviously though, loss-of-value insurance is very much unlike long-term disability insurance because the player is not permanently disabled.

The triggering of loss-of-value insurance differs from traditional disability insurance, both short- and long-term, because it is not based on a disability. To obtain the benefits, the insured need not be unable to play his sport anymore. Instead, the benefits are typically triggered if the insured suffers an injury or illness that requires medical treatment and that negatively affects the student-athlete's skills in a manner that deteriorates his ability to perform as a professional athlete.<sup>78</sup> And really, the injury does not trigger coverage; instead, coverage is triggered only if the student-athlete falls some amount in the draft because of that injury.

Loss-of-value insurance is also unlike traditional short- or long-term disability insurance in that it provides a one-time payment. Because the NCAA does not have a loss-of-value insurance program, it has not set any maximum coverage limits. Instead, to determine the maximum payout under the policy, private insurers “will solicit the opinion of draft experts and will ‘grade’ the insured student-athlete.”<sup>79</sup>

The player's anticipated compensation is determined from by [sic] his expected draft position, with a maximum limit of liability (generally half of the anticipated compensation). For example, if the player anticipated to be drafted at [a] position

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<sup>78</sup> Wong & Deubert, *supra* note 56, at 497.

<sup>79</sup> Crosner, *supra* note 73.

garnering a twelve million dollar contract, the maximum limit of liability for the insurance coverage would be six million dollar [sic]. 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 [sic] of the nine million dollar difference between his expected and actual contracts.<sup>80</sup>

The typical loss-of-value “contract requires that if benefits are paid and the [student-athlete] 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.”<sup>81</sup> Thus, using the same example as above, suppose that after a player collected \$6 million in insurance benefits, he earns \$8 million in compensation during the first six years of his career. That’s a total of \$14 million, requiring him to return \$2 million of the insurance benefit.<sup>82</sup>

Numerous elite student-athletes have reportedly taken out loss-of-value insurance policies. One high profile example is former University of Southern California quarterback Matt Leinart. Despite being projected as the first overall selection in the 2005 draft, Leinart chose to stay at USC for his senior year.<sup>83</sup> He obtained loss-of-value coverage for his senior year that would have triggered if an injury caused him to be drafted at the fifteenth pick or lower.<sup>84</sup> Leinart fell to the tenth pick, meaning he

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<sup>80</sup> Wong & Deubert, *supra* note 56, at 497.

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

<sup>82</sup> *See id.*

<sup>83</sup> Glenn M. Wong, Warren Zola & Chris Deubert, *Going Pro In Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L.J. 553, 565 (2011).

<sup>84</sup> *See* Darren Rovell, *Source: Marqise Lee Insured for \$10M*, ESPN (Aug. 30, 2013, 4:07 PM), [http://espn.go.com/los-angeles/college-football/story/\\_/id/9614189/usc-trojans-marqise-lee-picks-10m-insurance-policy-source-says](http://espn.go.com/los-angeles/college-football/story/_/id/9614189/usc-trojans-marqise-lee-picks-10m-insurance-policy-source-says) [hereinafter Rovell, *Lee*]. Leinart was drafted at the tenth pick. *See id.* Even though his drop cost him as much as ten million dollars in compensation, it was not severe enough to trigger coverage (and there are likely doubts about whether an injury caused that drop). *See id.*; Darren Rovell, *Matt Barkley Had No Insurance*, ESPN (Apr. 30, 2013, 8:36 PM), [http://espn.go.com/nfl/story/\\_/id/9228764/matt-barkley-returned-usc-trojans-insurance-sources](http://espn.go.com/nfl/story/_/id/9228764/matt-barkley-returned-usc-trojans-insurance-sources) [hereinafter Rovell, *Barkley*].

would make as much as ten million dollars less than had he been drafted first overall.<sup>85</sup> That small of a drop, however, would not have triggered coverage.<sup>86</sup>

More recent examples include former University of Louisville quarterback Teddy Bridgewater and current Florida State University quarterback Jameis Winston. Bridgewater purchased his policy when he was projected to be the third overall pick.<sup>87</sup> Reportedly, he could have been eligible for the insurance benefits if he was not selected in the top eleven picks.<sup>88</sup> Bridgewater fell to the thirty-second pick.<sup>89</sup> Florida State University quarterback Jameis Winston reportedly also purchased loss-of-value insurance. He is projected to be drafted within the top ten picks of the 2015 NFL draft.<sup>90</sup> Reportedly, the insurance is triggered if injury or illness causes him to fall out of the first round of the draft.

## II. ELITE STUDENT-ATHLETES' LIMITED ACCESS TO INSURANCE

It is not difficult to understand why elite student-athletes may want to obtain both total disability and loss-of-value insurance. Wanting the coverage, however, is something different from obtaining it. Like traditional disability insurance, student-athlete total disability and loss-of-value insurance is very expensive.

Current NCAA rules can also make it difficult for student-athletes to obtain the coverage. With premiums upwards of \$10,000, a loan is likely necessary. Under current rules, however, student-athletes are not allowed to use their future earning

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<sup>85</sup> See Rovell, *Barkley*, *supra* note 84.

<sup>86</sup> See Rovell, *Lee*, *supra* note 84.

<sup>87</sup> See Darren Rovell, *Bridgewater Has Loss-of-Value Policy*, ESPN (Apr. 28, 2014, 11:27 AM), <http://m.espn.com/nfl/story?storyId=10851039> [hereinafter Rovell, *Bridgewater*].

<sup>88</sup> See *id.*

<sup>89</sup> See Will Brinson, *2014 NFL Draft: Vikings Get B- for Selecting Teddy Bridgewater No. 32*, CBS SPORTS (May 8, 2014, 11:48 PM), <http://www.cbssports.com/nfl/eye-on-football/24555462/nfl-draft-vikings-trade-up-take-qb-teddy-bridgewater-at-no-32>.

<sup>90</sup> See Rand Getlin, *Source: FSU QB Jameis Winston Purchased \$8M-\$10M Insurance Policy*, YAHOO! SPORTS (June 30, 2014, 9:49 PM), <http://sports.yahoo.com/news/source-fsu-qb-jameis-winston-purchased--8m--10m-insurance-coverage-014958801.html>.

capacity, perhaps their greatest asset, as collateral for a loan. The NCAA has made an exception to this rule if a student obtains total disability insurance. It is time for the NCAA to extend that exception to loss-of-value insurance.

*A. Traditional Disability Insurance Is Generally Very Expensive*

Although traditional disability insurance is quite useful given the high chances of becoming disabled—simply meaning unable to work because of illness or injury—most Americans do not have disability insurance.<sup>91</sup> Plainly, individual disability insurance policies are difficult to find, difficult to qualify for, and “notoriously expensive.”<sup>92</sup>

Group disability insurance is significantly less expensive, and employers sometimes offer it as a fringe benefit.<sup>93</sup> But not all employers do. Employers do not readily offer it because insurers do not aggressively market it to employers.<sup>94</sup> This is because insurers are wary of adverse selection—that those most likely to become disabled are the ones most likely to seek insurance against those associated losses, raising “costs for the insurers and policyholders alike.”<sup>95</sup> Insurers are also wary of moral hazard, which “is the tendency of an insured party to exercise less care to minimize losses than she would exercise if she were uninsured,” again raising costs for all.<sup>96</sup> Regardless of why it is not marketed, employers do not always offer disability insurance as a fringe benefit and thus most Americans lack disability insurance and its income replacement during a disabling injury or illness.

Those who can afford the insurance, though, can take advantage of the benefits. And “[b]ecause insurance is designed to minimize deviations from an individual’s expected or average standard of living, those who will, on average, have a higher

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<sup>91</sup> See Allen, *supra* note 34, at 1339-40.

<sup>92</sup> *Id.* at 1343.

<sup>93</sup> See *id.* at 1343-46 (discussing that employers fail to readily offer disability insurance partly because insurers do not actively market it because of adverse selection and moral hazard).

<sup>94</sup> See *id.* at 1345.

<sup>95</sup> *Id.* at 1346.

<sup>96</sup> *Id.*

standard of living will insure a higher minimum standard of living.”<sup>97</sup> Numerous celebrities have reportedly purchased disability-like insurance. For instance, Bruce Springsteen reportedly insured his voice for \$5.7 million.<sup>98</sup> Although reported as “voice insurance,” the policy would be a type of disability insurance. If Springsteen was unable to sing any more, he would lose his ability to make the income he expects to make from his singing voice. As another example, Michael Flatley, the star of the *Lord of the Dance*, insured his legs for \$40 million.<sup>99</sup> Obviously, without those legs, Flatley would not be able to generate income by dancing; his insurance proceeds would replace that lost income. David Beckham also insured his legs (and his good looks) for \$195 million.<sup>100</sup> Reportedly, Beckham would be paid under the policy if he was unable to play soccer or disfigured.<sup>101</sup> Wealthier individuals can afford and thus “purchase more generous policies.”<sup>102</sup>

### *B. Costs for Elite Student-Athletes*

As is traditional disability insurance, both total disability insurance and loss-of-value insurance for elite student-athletes are very expensive.

#### 1. Cost Prohibitive?

Not surprising given the costs of traditional disability insurance, total disability insurance for elite student-athletes is

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<sup>97</sup> Richard M. Hynes, *Non-Procrustean Bankruptcy*, 2004 U. ILL. L. REV. 301, 331.

<sup>98</sup> See Joel Stonington, *The Oddest Insured Things*, BLOOMBERG BUSINESSWEEK (Sept. 1, 2011), <http://images.businessweek.com/slideshows/20110831/the-oddest-insured-things#slide2>.

<sup>99</sup> See Kirsten Acuna, *20 Celebrities Who Insured Their Body Parts for Millions*, BUS. INSIDER (Mar. 5, 2012, 10:12 AM), <http://www.businessinsider.com/20-celebrities-who-insured-their-bodies-for-millions-2012-3?op=1> (also noting that Keith Richards, the lead guitarist for the Rolling Stones, reportedly insured his hand for \$1.6 million).

<sup>100</sup> See Jean Folger, *Weird Insurance Policies*, INVESTOPEDIA (Aug. 31, 2011), <http://www.investopedia.com/financial-edge/0811/weird-insurance-policies.aspx>.

<sup>101</sup> See *id.*

<sup>102</sup> Hynes, *supra* note 97, at 331-32 (“Casual perusal of the newspapers reveals stories of highly compensated athletes or entertainers who purchase disability or life insurance policies worth millions of dollars.”).

also very expensive. The reasons for the expense, though, are a little different.

Adverse selection, the phenomenon that only those who are most likely to need the insurance will purchase the insurance, does not really apply to elite student-athletes. Only elite student-athletes are even eligible for total disability or loss-of-value insurance. They, as a group, may be likely to suffer injury, including a career-ending injury, because they play a possibly dangerous sport. Especially in football, an awkward tackle could mean the end of a football player's life. But really, elite student-athletes are no more likely to suffer injury than are student-athletes not expected to play professionally.

True, some elite student-athletes may be more injury prone than others. If injury prone, the student-athlete has a specific incentive to obtain disability insurance. One example of this is former University of Florida defensive tackle Ed Chester. When he decided against leaving school early to enter the NFL draft in 1998, Chester purchased a total disability policy underwritten by Lloyd's of London.<sup>103</sup> The policy cost Chester \$8000 and provided for \$1 million of coverage.<sup>104</sup> Chester explained: "I knew I needed it because I'm injury prone . . . . So I might as well go ahead and get it. It wasn't that big of a deal to me at first."<sup>105</sup> It turned out to be a very wise decision for Chester. Unfortunately, he tore almost every tendon and ligament in his knee and collected on the policy.<sup>106</sup> But his elite status did not make Ed Chester any more likely to suffer injury than any of his teammates.

Another reason that traditional disability insurance is expensive is moral hazard, which is based on the idea that people who purchase disability insurance will then exercise less care and end up getting injured. This does not seem applicable to the elite student-athlete disability insurance context. An elite student-athlete has a unique incentive to continue to exercise as much care as he did before he was insured. He knows that he is covered by the insurance if totally disabled, but also is aware of his ability

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<sup>103</sup> See Staples, *supra* note 63.

<sup>104</sup> See Isenberg, *supra* note 65.

<sup>105</sup> DiRocco, *supra* note 50.

<sup>106</sup> See *id.*

to make much more if he remains healthy and is able to play professional sports.

Even though some of the reasons that insurers do not aggressively market traditional disability insurance do not apply to student-athlete policies, student-athlete policies are still very expensive. One reason for this is that there is no current concept of a group disability policy, like the type offered by some employers, for elite student-athletes. Some schools may have only one elite student-athlete that needs insurance, precluding the possibility of group coverage. Even if schools have numerous elite student-athletes, however, total disability policies for elite student-athletes currently exist only as individual policies.

The main reason that elite student-athlete policies are expensive though is that “disability insurance policies in sports generally do not have the wealth of statistical information available from which to properly price policies.”<sup>107</sup> With more common insurance policies, “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.”<sup>108</sup> Because so many people purchase policies, insurance companies have data to indicate the likelihood that the benefits will be paid, and can then base those premiums on that likelihood.<sup>109</sup> Further, enough premiums are collected that it makes it easier for the insurer to use those premiums to pay out on a policy.

None of this is true for elite student-athlete disability policies. There is not extensive statistical information to use when pricing policies.<sup>110</sup> “[D]isability insurance premiums in sports are

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<sup>107</sup> Wong & Deubert, *supra* note 56, at 483.

<sup>108</sup> *Id.* at 482.

<sup>109</sup> *See id.* at 483.

<sup>110</sup> *See id.* This is the traditional thought. It may not hold up that well anymore though, given how long the insurance has existed. The NCAA began its total disability insurance program in 1990, and dozens participate in it each year. *See Zach Schonbrun, Injury Raises Questions About Insurance for College Stars*, N.Y. TIMES (Feb. 14, 2013), <http://www.nytimes.com/2013/02/15/sports/ncaabasketball/injury-to-nerlens-noel-raises-questions-about-disability-insurance-for-athletes.html>. This means over twenty years of data exists—to evaluate the premiums paid and how often the insurance has paid out. Especially with the knowledge that total disability insurance has paid out only a couple of times in over twenty years, one would think the premiums

based on experience (i.e. previously collected premiums and payouts on policies) as best as possible, but there can be tremendous variation in prices.”<sup>111</sup> The insurer will also look to the potential insured, the insured’s sport, the insured’s position, and the insured’s injury history.<sup>112</sup>

The premium will also vary depending on the amount of coverage. The amount of coverage is based on the amount the insured would potentially make as a professional athlete. That is easier to determine if the professional sport has a rookie wage scale, as does the NFL and the NBA.<sup>113</sup> The amount of coverage offered can be figured based on use of “contracts of the previous season’s draftees to calculate the amount of guaranteed money a player might expect to receive after taxes.”<sup>114</sup> After considering all the variables, insurers reportedly set premiums around “\$8,000 to \$10,000 per \$1 million insured.”<sup>115</sup>

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could and would decrease. Loss-of-value insurance may not have this same multiple-decade history. Even with a shorter history, very few policies—if any—have paid out, again making one think that premiums could decrease.

<sup>111</sup> Wong & Deubert, *supra* note 56, at 483.

<sup>112</sup> *See id.* at 483-84.

<sup>113</sup> *See* R. Cory Smith, *NFL Rookie Salary Cap 2014: Explaining Pay Scale, Rules and Minimum Contracts*, BLEACHER REP. (May 9, 2014), <http://bleacherreport.com/articles/2056910-nfl-rookie-salary-cap-2014-explaining-pay-scale-rules-and-minimum-contracts> (explaining that “players at the top of the [draft] board earn contracts for four years, estimated at just over \$24 million”); Anthony Riccobono, *NBA Draft 2014: Lottery Pick Pay Scales have Wide Range from Top Pick Compared to Other First Rounders*, INT’L BUS. TIMES (May 21, 2014, 1:52 PM), <http://www.ibtimes.com/nba-draft-2014-lottery-pick-pay-scales-have-wide-range-top-pick-compared-other-first-1587971> (stating that the 2014 scale dictates that the number one overall pick will make “\$4,592,200 in his first season, followed by \$4,798,900 and \$5,005,500 in the next two years. The salaries of each player steadily declines, as the draft moves along. The last six picks in the first round are all estimated to make less than \$1 million in their first NBA season.”).

<sup>114</sup> Staples, *supra* note 63.

<sup>115</sup> Rovell, *Lee*, *supra* note 84; This quote from Rovell’s article explains that total premiums for \$1 million in coverage are between \$8,000 and \$10,000, but it is unclear whether this is specific to total disability, loss-of-value coverage, or both. Based on his description of the coverage that Marqise Lee obtained, it appears that these premiums were for both total disability and loss-of-value coverage. If so, Rovell’s estimation of the costs is close to accurate. The current “going rate” for \$1 million in total disability coverage for a football student-athlete is about \$7,000. *See* E-mail from Eric Chenoweth, Ins. Producer, Parq Advisors to authors (July 29, 2014) (on file with authors). The “going rate” for an additional \$1 million in loss-of-value coverage for the football athlete is about \$4,000. *Id.* The current “going rate” for \$1 million in total

Loss-of-value insurance premiums are also expensive. Former USC linebacker Morgan Breslin purchased a loss-of-value policy providing \$2 to 3 million in benefits if injury caused him to drop in the draft.<sup>116</sup> It is estimated that premiums for a policy that size would likely range from \$30,000 to \$35,000.<sup>117</sup> These estimates may be high, however. A common “misnomer in the industry” is that loss-of-value premiums are more expensive than total disability premiums. Currently, at least, that is not true. For a football student-athlete, the premium may be close to \$7,000 for \$1 million in total disability coverage; the premium for \$1 million in loss-of-value coverage is about \$4,000.<sup>118</sup> Similarly, the premiums for \$1 million in loss-of-value coverage for a basketball student-athlete will cost about \$2,500, but the same amount of total disability coverage will cost about \$4,000.<sup>119</sup>

It is also important to note a consequence of the fact that most elite student-athletes will want to obtain both total disability and loss-of-value insurance. The amount of loss-of-value coverage cannot exceed the amount of total disability coverage; thus, if a student-athlete has \$5 million in total disability insurance, he can also have up to \$5 million in loss-of-value insurance.<sup>120</sup> Buying both types of insurance means paying multiple premiums. University of Southern California wide receiver Marqise Lee had a \$10 million policy including both total disability and loss-of-value coverage.<sup>121</sup> Reportedly, that premium cost about \$100,000.<sup>122</sup>

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disability coverage for a basketball student-athlete is about \$4,000, and the additional \$1 million in loss-of-value coverage would cost about \$2,500 in premiums. Regardless, there is a common “misnomer in the industry” that loss-of-value premiums are more expensive than premiums for total disability insurance, which is inaccurate. *Id.*

<sup>116</sup> See Rand Getlin, *Niners Rookie Morgan Breslin Could Be First College Football Player to Collect Big on Insurance After NFL Draft Fall*, YAHOO! SPORTS (May 12, 2014, 2:22 PM), <https://sports.yahoo.com/news/niners-rookie-morgan-breslin-could-be-first-college-football-player-to-collect-big-on-insurance-after-slipping-out-of-nfl-draft--182229439-nfl.html>.

<sup>117</sup> See *id.*

<sup>118</sup> See E-mail from Eric Chenoweth, *supra* note 115.

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

<sup>121</sup> See Moura, *supra* note 76.

<sup>122</sup> See *id.*

The cost has deterred some elite student-athletes from purchasing the insurance. “The premiums are extremely high,” former Auburn offensive tackle Lee Ziemba said.<sup>123</sup>

## 2. Effect of NCAA Restrictions

There is little doubt that premiums for both total disability and loss-of-value insurance are expensive. Thus, even if elite student-athletes want coverage, how will they pay for it? If they cannot pay out of pocket,<sup>124</sup> a loan might be necessary.<sup>125</sup> Luckily, elite student-athletes have at least one valuable asset they could use as collateral—their likely future earnings as professional athletes.

Except this could violate NCAA amateurism rules. NCAA rules require that a student-athlete maintain his amateur status to be able to participate in college athletics.<sup>126</sup> One way a student-athlete could lose that status is by “[u]s[ing] his or her athletics skill (directly or indirectly) for pay in any form in that sport.”<sup>127</sup> Pay is separately defined to include “[p]referential treatment, benefits or services because of the individual’s athletics reputation or skill or pay-back potential as a professional athlete.”<sup>128</sup>

Using future earnings as collateral for a loan could also violate the NCAA’s prohibition of extra benefits for student-athletes. Generally, a student-athlete may not receive any benefit

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<sup>123</sup> Herndon, *supra* note 61.

<sup>124</sup> “[M]any top college athletes still may not have the resources to foot the bill on premiums that could be close to six figures.” Bruce Feldman, *How Texas A&M Paid Over \$50,000 to Get Cedric Ogbuehi back for 2014*, FOX SPORTS (July 16, 2014, 6:00 PM), <http://www.foxsports.com/college-football/story/texas-am-aggies-paid-nearly-60-grand-top-nfl-prospect-cedric-ogbuehi-071614>.

<sup>125</sup> See Schonbrun, *supra* note 110 (quoting Warren K. Zola, an assistant dean at the business school at Boston College, as asking, “How many of those families have access without loans to pay for one of the premiums of these policies that could be six figures?”).

<sup>126</sup> See MANUAL, *supra* note 17, § 12.01.1 (“Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”). Then-Justice White of the United States Supreme Court described “a viable system of amateur athletics” as “a public good.” *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 122 (1984) (White, J., dissenting).

<sup>127</sup> MANUAL, *supra* note 17, § 12.1.2(a).

<sup>128</sup> *Id.* § 12.1.2.1.6.

that is not generally available to all of the school's students.<sup>129</sup> Within the extra benefit rules, the NCAA also specifically prohibits a student-athlete from receiving a deferred pay-back loan based on the "student-athlete's athletics reputation, skill or pay-back potential as a future professional athlete."<sup>130</sup>

Fortunately, the NCAA has recognized an exception to these rules for a loan for the premiums for total disability insurance.<sup>131</sup> The NCAA should similarly recognize an exception to these rules for the premiums for loss-of-value insurance.<sup>132</sup>

#### *a. Exception for Total Disability Insurance*

The NCAA recognizes a specific exception to its amateurism and extra benefits rules for obtaining a loan to pay the premium for total disability insurance: "An individual may borrow against his or her future earnings potential from an established, accredited commercial lending institution exclusively for the purpose of purchasing insurance (with no cash surrender value) against a disabling injury or illness that would prevent the individual from pursuing a chosen career . . . ."<sup>133</sup> And thus, a student-athlete does not jeopardize his amateur status by

<sup>129</sup> See *id.* § 16.11.1.1.

<sup>130</sup> *Id.* § 16.11.1.2.

<sup>131</sup> See *id.* § 12.1.2.4.4 (exception to amateurism rules); *id.* § 16.11.1.4 (exception to prohibition on extra benefits).

<sup>132</sup> In April 2014, the NCAA Division I Board of Directors Steering Committee on Governance suggested a new governance structure for the NCAA. One of those new structures involves more autonomy to the five largest conferences in college sports—the Big 12, the SEC, the Big Ten, the ACC, and the Pac-12. One specific area of autonomy that would be granted to the conferences is in creating "rules permitting student-athletes flexibility in securing loans to purchase career-related insurance products (e.g., loss-of-value insurance), or to permit institutions to provide these insurance-related expenses for student-athletes." NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: DRAFT PROPOSED GOVERNANCE SYSTEM REDESIGN 29 (2014), available at [www.cbssports.com/images/collegefootball/NCAA-April-2014-Board-agenda.pdf](http://www.cbssports.com/images/collegefootball/NCAA-April-2014-Board-agenda.pdf). In August 2014, the NCAA Division I Board of Directors voted to give the five conferences more autonomy. See Jon Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, CBS Sports (Aug. 7, 2014, 1:41 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24651709/ncaa-adopts-new-division-i-model-giving-power-5-autonomy>.

<sup>133</sup> MANUAL, *supra* note 17, § 12.1.2.4.4 (exception within amateurism rules); *id.* 16.11.1.4 (exception within extra benefits prohibition); see also Schonbrun, *supra* note 110.

obtaining a loan against his future earning potential to obtain total disability insurance.

Additionally, the NCAA also now offers the insurance through its own program. As mentioned above, the NCAA sponsors a permanent total disability insurance program. The program is administered by HCC Specialty Underwriters.<sup>134</sup> Approved student-athletes are automatically eligible for a loan through U.S. Bank.<sup>135</sup> “The interest rate is very competitive and a co-signer is not required.”<sup>136</sup> In fact, not only is the interest rate “very competitive,” it “is slightly below market value.”<sup>137</sup> A participating student-athlete must “repay the loan in full when any of the following occurs: (1) the student-athlete signs a professional contract, (2) the disability benefits become available due to a covered injury or sickness or (3) the coverage is no longer in effect and the loan note matures.”<sup>138</sup> “[B]alances must be repaid regardless of when a player gets drafted—or if drafted at all.”<sup>139</sup> Of course, if the player is not drafted, he is likely no better able to afford to pay back the loan than he was able to afford the premium in the first place.

Regardless, the NCAA specifically included the exception to its amateurism rules to serve three purposes. The first purpose is to provide student-athletes with the option (or incentive?) to return to school insured instead of leaving school early for the professional ranks. “Generally speaking, we wanted to give student athletes who have professional prospects a real choice to stay in school and complete their education,” said Marla Gleason, the NCAA’s Operations and Risk Manager.<sup>140</sup> If the student-athlete left school early, he could have obtained a professional salary. If he stayed and got hurt, the student-athlete would never obtain that professional salary. “We wanted to make it possible for

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<sup>134</sup> See *Student-Athlete Insurance Programs*, *supra* note 51.

<sup>135</sup> See *id.*

<sup>136</sup> *Id.*

<sup>137</sup> DiRocco, *supra* note 50.

<sup>138</sup> *Student-Athlete Insurance Programs*, *supra* note 51.

<sup>139</sup> Herndon, *supra* note 61.

<sup>140</sup> Hayes, *supra* note 59.

them to insure against future loss if they made that choice to stay in school.”<sup>141</sup>

A second purpose pointed to by the NCAA pertains to those student-athletes who participate in a sport where they are not automatically eligible for the professional draft. For instance, an individual may not enter the NBA or NFL draft directly out of high school.<sup>142</sup> An inherent conflict exists for these student-athletes in that they may not *want* to participate in college athletics so as to lessen the likelihood of injury until the day comes when they are eligible for their draft.<sup>143</sup> For example, University of South Carolina defensive end Jadeveon Clowney likely would have been a top pick in the 2013 NFL draft, but he was not eligible.<sup>144</sup> Realizing that an injury could compromise his position in the 2014 draft, Clowney publicly considered sitting out the 2013 season in order to more likely maintain his health and status in the 2014 draft.<sup>145</sup>

Easier access to total disability insurance encourages these student-athletes to play.<sup>146</sup> And Clowney followed this encouragement. Reportedly, he obtained \$5 million in permanent total disability coverage,<sup>147</sup> with a premium cost of approximately \$40,000.<sup>148</sup> How Clowney paid that premium is unknown. But if he needed to, he would have been able to obtain a loan based on his future earning capacity. Clowney’s situation illustrates how easy access to total disability insurance can eliminate the conflict

<sup>141</sup> *Id.*

<sup>142</sup> See Schonbrun, *supra* note 110.

<sup>143</sup> See Wong & Deubert, *supra* note 56, at 475-76 (explaining that John Wall likely would have preferred to skip college and declare himself for the NBA draft right out of high school).

<sup>144</sup> See Mike Florio, *Should Jadeveon Clowney Sit out the 2013 Football Season?*, NBC SPORTS (Feb. 11, 2013, 8:09 AM), <http://profootballtalk.nbcsports.com/2013/02/11/should-jadeveon-clowney-sit-out-the-2013-football-season/>.

<sup>145</sup> See *id.* The lack of an incentive to play and chance of injury are the same reasons there has been a push to eliminate NFL preseason games and college football spring games. Little is gained in these games, and there’s always a chance that players (including the elite players) will be hurt.

<sup>146</sup> Herndon, *supra* note 61.

<sup>147</sup> See Rovell, *Lee*, *supra* note 84.

<sup>148</sup> See Mike Florio, *NCAA Makes \$5 Million in Insurance Available*, NBC SPORTS (Feb. 13, 2013, 3:54 PM), <http://profootballtalk.nbcsports.com/2013/02/13/ncaa-makes-5-million-in-insurance-availabl/>.

inherent to those student-athletes who are not eligible to participate in their sport's professional draft by allowing them to participate in college athletics while insured against permanent total disability.

The NCAA identifies agents as the third main reason for allowing student-athletes easier access to total disability insurance. "The impetus behind it was really to keep student-athletes and their eligibility safe from unscrupulous agents," said Juanita Sheely, the NCAA's associate director for travel and insurance.<sup>149</sup> She further explained: "One of the ways they would entice them is: 'I will get you this insurance coverage if you sign with me.' So (we decided to) provide this service so they don't feel like they have to break the rules to do it."<sup>150</sup>

The NCAA describes its involvement with total disability insurance in altruistic terms. "It's a benefit for the student-athlete," said Sheely, "[i]t's not a profit center for the NCAA."<sup>151</sup> Not only is the program not profitable, "[i]t's not a revenue-generating program for us," Sheely said. "It's something we do to protect student-athletes and allow them to do what they want to do."<sup>152</sup>

#### *b. Extending the Exception to Loss-of-Value Insurance*

The NCAA does not, however, allow an exception to its amateurism rules allowing elite student-athletes to use future earnings potential to obtain a loan to pay the premium for loss-of-value insurance. Thus, a student-athlete may not obtain a loan based on future earnings potential to cover the cost of the premium for loss-of-value insurance and still maintain his amateur status.

If a student-athlete wants to obtain loss-of-value insurance, he has only a few options. He can pay the premium out of pocket,<sup>153</sup> but the premium is very expensive. He could also obtain a loan to pay the premium, but he must use some collateral other

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<sup>149</sup> Herndon, *supra* note 61.

<sup>150</sup> *Id.*

<sup>151</sup> Staples, *supra* note 63.

<sup>152</sup> Herndon, *supra* note 61.

<sup>153</sup> See Schonbrun, *supra* note 110.

than his future earnings potential. Perhaps his parents could take out a second mortgage. But again, the student-athlete may not use what is likely his most valuable asset—his future earning potential.

There is one more notable effect of the NCAA's differentiation of total disability and loss-of-value insurance. Loss-of-value policies are not sold individually; they are paired and sold with total disability. The NCAA program offers total disability insurance only. And because a loss-of-value policy is not sold individually, if the student-athlete wants a total disability policy through the NCAA program and loss-of-value insurance, he will have to purchase: 1) the NCAA total disability insurance, 2) the private insurer's total disability insurance, and 3) the private insurer's loss-of-value insurance.<sup>154</sup> The student-athlete will still be able to obtain a loan based on his future earnings potential for the premiums on the total disability policies, but not for the premium for the loss-of-value policy.

There is no justifiable reason for the NCAA's current differential treatment of total disability and loss-of-value insurance for elite student-athletes. The NCAA's three purposes in allowing an exception to the extra benefits prohibition apply equally as well to loss-of-value insurance.

The first two purposes were to protect student-athletes who wanted to return to school or who had no choice but to return to the school because they are not yet draft eligible. Total disability insurance, and easier access to it, should provide these student-athletes with some peace of mind. But that peace of mind is limited. These student-athletes still may be very worried about the possibility of getting injured—an injury that won't prevent them from playing professional sports, but an injury that could translate into a lower draft position and thus less income. This type of injury is more likely to occur than a career-ending one. The NCAA's current exception does nothing to help protect student-athletes from this loss of income.

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<sup>154</sup> See *Jameis Winston Buys Insurance*, ESPN (July 1, 2014, 12:56 AM), [http://espn.go.com/college-football/story/\\_/id/11160408/jameis-winston-florida-state-seminoles-purchases-disability-loss-value-insurance-policy](http://espn.go.com/college-football/story/_/id/11160408/jameis-winston-florida-state-seminoles-purchases-disability-loss-value-insurance-policy).

The NCAA's third purpose also supports enabling student-athletes' easier access to loans to pay for loss-of-value insurance. That purpose is to protect student-athletes from unscrupulous agents who may promise to obtain coverage for the student-athlete in exchange for future representation. The NCAA's solution, however, does not solve the problem as student-athletes do not have easy access to loss-of-value insurance. With the necessity of coverage and the large cost of premiums, student-athletes may very well be tempted by agents promising loss-of-value coverage. And once a student-athlete makes any type of agreement like this with an agent, he forfeits his eligibility.<sup>155</sup>

The NCAA has never explained its differentiation of total disability and loss-of-value insurance. Perhaps the NCAA sees a distinction based on the situation. If a student-athlete is totally disabled, the student-athlete may have no ability to make income; the insurance proceeds may then be the insured's only income source. In a loss-of-value insurance situation though, the student-athlete will still have an ability to make income.

Another possible delineation is that total disability insurance could be said to be more about the players' health and safety, concerns that are at the forefront of college athletics. Loss-of-value insurance, on the other hand, just supplements income. The problem with this thought though is that total disability insurance is not health insurance—it's disability insurance. It provides income replacement. Loss-of-value also provides income replacement. The only difference is that the total disability insurance is triggered by a career-ending injury and loss-of-value insurance is triggered by a less severe injury.

The NCAA may be beginning to see the lack of distinction between a loan based on future earnings potential for total disability or for loss-of-value insurance. On October 15, 2014, the NCAA granted a waiver allowing one student-athlete "to borrow against his future earnings potential to secure a loan . . . for the

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<sup>155</sup> See MANUAL, *supra* note 17, § 12.1.2(g) (explaining that a student-athlete loses his amateur status if he "[e]nters into an agreement with an agent"); *id.* § 12.3.1.2 (explaining that a student-athlete is ineligible if he accepts benefits from an agent).

purpose of purchasing loss-of-value insurance.”<sup>156</sup> Notably, the NCAA publicly announced the granting of this waiver, something it does not normally do. At the same time, the NCAA has not changed its rules. Within the waiver, the NCAA encourages institutions “to work with their conference offices to propose legislation” on this issue.<sup>157</sup> In the meantime, the NCAA could continue to allow a student to borrow against his future earnings to purchase loss-of-value insurance, but only through the evaluation of individual waivers.

*c. Other Possibilities for Reform*

Another reform possibility for disability and loss-of-value insurance is to remove the burden of paying premiums from student-athletes altogether. The five power conferences in college athletics have mentioned the possibility that schools should be able to pay the premiums for either type of insurance for elite student-athletes.<sup>158</sup> It would likely necessitate some amendment of NCAA bylaws to allow schools to fund the premiums out of their general athletics department budget. As the bylaws currently stand, payment from an athletics department general budget would likely violate at least the extra benefits rule.<sup>159</sup>

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<sup>156</sup> *Academic and Membership Affairs Staff Approves Waiver for NCAA Bylaws 12.1.2. (amateur status) and 16.11 (benefits, gifts and services)*, NCAA, <https://web1.ncaa.org/LSDBi/exec/aRss?aRssSubmit=TextOnly&identifier=2715.0> (last visited Oct. 22, 2014).

<sup>157</sup> *Id.*

<sup>158</sup> NCAA WORKING GROUP, *supra* note 29, at 16. In October 2014, after giving autonomy, the five largest conferences submitted areas they would like to address in a meeting in January 2015. The Atlantic Coast Conference submitted that it would like to discuss “Career-Related Insurance Options for Student-Athletes.” NCAA, TOPICAL AREAS UNDER CONSIDERATION FOR AUTONOMY LEGISLATION 2015 NCAA CONVENTION (2014), available at <http://www.ncaa.org/sites/default/files/Autonomy%20Topical%20Areas%20Under%20Consideration.pdf>.

<sup>159</sup> NCAA Bylaw 16.4 was amended effective August 1, 2013, to allow schools, conferences, or the NCAA to “provide medical and related expenses and services to a student-athlete.” MANUAL, *supra* note 17, § 16.4. In an August 2, 2013, question and answer document, the NCAA provided additional detail on the recently amended Bylaw 16.4, explaining that the legislation does *not* allow a school to pay for disability insurance for a student-athlete. See NCAA WORKING GROUP, *supra* note 29, at 16. The document does not explain what bylaws prohibit it.

Positives and negatives exist if NCAA bylaws were amended to allow schools to pay for premiums out of their athletics budgets. Obtaining the insurance encourages elite student-athletes to stay in school. Giving them that insurance for free (by school payment) would increase retention rates. It would also help the risk of elite student-athletes being swayed by promises of insurance from agents. These are the same reasons the NCAA created its total disability insurance program.<sup>160</sup>

Another positive is that universities may be better able to negotiate insurance premiums and rates. A university may even be able to negotiate some sort of group policy to cover numerous of its elite student-athletes. This would likely make the insurance less expensive just as group traditional disability insurance is less expensive than individual policies. The last positive is that universities paying for the insurance seems fair. There is no doubt that schools profit from college athletics and schools should also thus bear some of the risks of college athletics.

At the same time, this could increase the disparity between schools with expansive athletics budgets versus others. The bigger the budget, the more easily that the school would be able to pay

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Presumably, schools paying disability insurance premiums, whether it be for total disability or loss-of-value coverage, would violate either the NCAA's current amateurism rules or its prohibition on extra benefits. A student-athlete must be an amateur to participate and he loses his amateur status if he "[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport." MANUAL, *supra* note 17, § 12.1.2. The NCAA also clarifies that pay includes a "salary, gratuity or comparable compensation." *Id.* §§ 12.1.2.1, 12.1.2.1.1. A school's payment of a premium seems like it would be a form of compensation for the athlete continuing to play college football.

The NCAA also prohibits a student-athlete from receiving any "extra benefit." *Id.* § 16.01.1. Extra benefit is defined as "any special arrangement by an institutional employee or representative of the institution's athletics interests to provide a student-athlete or the student-athlete family member or friend a benefit not expressly authorized by NCAA legislation." *Id.* § 16.02.3. Payment of the premium seems like an extra benefit; it is essentially a gift of tens of thousands of dollars. No NCAA legislation appears to expressly allow payment of the premiums from the school's general athletics budget. NCAA Bylaw 16.02.3 also clarifies that the arrangement is not an extra benefit if the same benefit is available to students generally. *See id.* Surely schools are not in the business of purchasing disability insurance for non-athletes.

As discussed below, however, some schools have determined an exception to these rules exists if the premium payments are made from something called the Student Assistance Fund. *See infra* notes 163-77 and accompanying text.

<sup>160</sup> *See supra* notes 140-52 and accompanying text.

premiums for its elite student-athletes—possibly for its numerous elite student-athletes. This would also help bigger schools recruit better athletes.<sup>161</sup> When a prospective student-athlete who expects to play professional sports chooses a college, he could consider whether the school will pay insurance premiums. Naturally, schools most likely able to cover insurance premiums will have large athletics budgets.<sup>162</sup>

The idea of schools paying premiums is not new. Despite the current prohibition on extra benefits, some schools have concluded that they may pay for premiums if the payment comes from something called the Student Assistance Fund. The NCAA explains that the purpose of the fund “is to assist student-athletes with special financial needs.”<sup>163</sup> The NCAA also encourages “that preference for the Student Assistance Fund continue to be given to those student-athletes who display a financial need for assistance.”<sup>164</sup> Because the Fund is “designed to provide direct benefits to student-athletes, the fund is not intended to be used to replace existing budget items.”<sup>165</sup> Thus, the fund may not be used to finance salaries or to provide additional scholarship assistance to student-athletes.<sup>166</sup>

Besides the express limitations, the NCAA leaves it to the conferences to define rules for disbursement of the fund.<sup>167</sup>

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<sup>161</sup> LeRoy, *supra* note 14, at 1090 (explaining that offering insurance would be an “inducement[] to new recruits”).

<sup>162</sup> This goes hand in hand with the NCAA deregulation movement that seeks to “protect and enhance the student-athlete experience, shift the regulatory focus from competitive equity to fair competition and allow schools to use the natural advantages of geography, a talented student-athlete or deeper pockets.” *Breakdown of Division I Rule Changes*, NCAA (Jan. 2, 2013, 12:00 AM), <http://www.ncaa.org/about/resources/media-center/news/breakdown-division-i-rules-changes>.

<sup>163</sup> *Student-Athlete Benefits*, NCAA, <http://www.ncaa.org/about/resources/finances/student-athlete-benefits> (last visited Oct. 22, 2014); *see also* NCAA, STUDENT ASSISTANCE FUND GUIDELINES 1 (2013), *available at* <http://www.ncaa.org/sites/default/files/2013%2BStudent%2BAssistance%2BFund.pdf> [hereinafter STUDENT ASSISTANCE FUND]. In this document, the NCAA explains that “the fund shall be used to assist student-athletes in meeting financial needs that arise in conjunction with participation in intercollegiate athletics, enrollment in an academic curriculum or that recognize academic achievement.” *Id.*

<sup>164</sup> STUDENT ASSISTANCE FUND, *supra* note 163, at 1.

<sup>165</sup> *Id.*

<sup>166</sup> *See* MANUAL, *supra* note 17, § 15.01.6.1.

<sup>167</sup> *See* STUDENT ASSISTANCE FUND, *supra* note 163, at 2.

Generally though, the NCAA explains that “[m]ost of this money is used for educational purposes, with some also going for needs such as clothing.”<sup>168</sup> Others have described the Student Assistance Fund as “cover[ing] things such as . . . post-eligibility financial aid, or if a student-athlete can’t afford to travel home in cases of emergency, or if they need a suit to wear to university functions or events like SEC Media Days.”<sup>169</sup>

The use of the Student Assistance Fund for elite student-athletes’ insurance premiums is a recent development and few publicized cases exist. Reportedly, Florida State University used the Student Assistance Fund to pay the premiums for quarterback Jameis Winston, who obtained \$10 million in combined total disability and loss-of-value coverage.<sup>170</sup> Also reportedly, “over the past two seasons, [the University of] Georgia has arranged for more than \$75,000 in insurance premiums to be paid for [running back Todd] Gurley, including a nearly \$40,000 policy this year.”<sup>171</sup>

Texas A&M University recently admitted that it spent close to \$60,000 from its Student Assistance Fund to pay insurance premiums for football offensive lineman Chris Ogbuehi. Ogbuehi had played three years at Texas A&M.<sup>172</sup> When he was evaluating whether to enter the NFL draft after his junior year, he received draft evaluations indicating he would likely be drafted in the first round.<sup>173</sup> In order to induce him to stay at school for his senior year, Texas A&M offered to use Student Assistance Fund resources to pay the premiums for insurance, presumably both

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<sup>168</sup> *Student-Athlete Benefits*, *supra* note 163.

<sup>169</sup> Feldman, *supra* note 124.

<sup>170</sup> See Jared Shanker, *FSU Chips in on Winston’s Insurance*, ESPN (Aug. 5, 2014, 8:18 AM), [http://espn.go.com/college-football/story/\\_id/11310051/jameis-winston-insurance-policy-paid-part-florida-state](http://espn.go.com/college-football/story/_id/11310051/jameis-winston-insurance-policy-paid-part-florida-state).

<sup>171</sup> Darren Rovell, *Georgia Paid to Insure Todd Gurley*, ESPN (Oct. 12, 2014, 11:17 AM), [http://espn.go.com/college-football/story/\\_id/11682691/georgia-bulldogs-paid-more-75000-insurance-todd-gurley](http://espn.go.com/college-football/story/_id/11682691/georgia-bulldogs-paid-more-75000-insurance-todd-gurley). At least fourteen additional schools have been reported as using SAF funds to purchase insurance for elite student-athletes: Stanford, University of Wisconsin, University of Michigan, University of Alabama, Florida State University, University of Oregon, Oregon State University, University of Arizona, University of Kansas, University of Arkansas, University of Texas, Louisiana State University, Texas A&M University, and Ohio State University. *See id.*

<sup>172</sup> Feldman, *supra* note 124.

<sup>173</sup> *See id.*

total disability and loss-of-value insurance.<sup>174</sup> It worked. Ogbuehi explained that the school's paying the premiums "really helped with [his] decision" and provided "great re-assurance knowing that (coming back for one more season) is not as big of a risk-reward."<sup>175</sup> Further, Ogbuehi explained that he didn't think he would have come back for his senior year had Texas A&M not paid the premiums with Student Assistance Fund resources.<sup>176</sup> The lack of response from the NCAA after the publication of this story suggests that the use of the Student Assistance Fund to pay insurance premiums is permissible.<sup>177</sup>

The use of the Student Assistance Fund to pay for the premiums creates negatives though. Each school's Fund is limited. For instance, Southeastern Conference schools each had \$350,000 in its fund in 2013.<sup>178</sup> Assuming Ogbuehi's premiums cost \$60,000, that means that Texas A&M used over one-sixth of its funds for one student-athlete. One student-athlete received that benefit, leaving less money for the hundreds of other student-athletes at the school. This is in stark contrast to other possible uses of the funds that would benefit all student-athletes, like when the University of Maryland bought its student-athletes iPads.<sup>179</sup> "According to the most recent numbers available from the NCAA, 87,000 college athletes used the Student Assistance Fund in the 2011-12 school year."<sup>180</sup> That won't be possible if schools start to use the Fund to pay premiums. If a school had three elite student-athletes each with \$50,000 premiums and the

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<sup>174</sup> *See id.*

<sup>175</sup> *Id.*

<sup>176</sup> *See id.*

<sup>177</sup> The NCAA previously clarified that a school was not allowed to pay disability insurance premiums for student-athletes. *See supra* note 159. Given how the NCAA has not reacted to schools' use of SAF funds to pay disability insurance premiums, that prior clarification must have been limited to schools' inability to use funds out of their general athletics budget to pay the same premiums.

<sup>178</sup> *See* Feldman, *supra* note 124. The University of Minnesota reportedly spent "\$263,000 for 225 student-athletes in 2010-11" and "\$402,000 for 375 student-athletes in 2012-13." David McCoy, *NCAA's Little-Known Student Assistance Fund*, CBS MINN. (Jan. 12, 2014, 11:17 PM), <http://minnesota.cbslocal.com/2014/01/12/ncaas-little-known-student-assistance-fund/>.

<sup>179</sup> *See* McCoy, *supra* note 178.

<sup>180</sup> *Id.*

same \$350,000 in the Fund, it would spend over forty percent of the Fund on three student-athletes.

Another political issue with using the limited funds to pay premiums is that only elite student-athletes will qualify for insurance. Thus, a school using the limited funds to pay premiums will disproportionately spend those funds on elite student-athletes, to the detriment of non-elite student-athletes. Similarly, a disproportionate amount of the funds would likely be paid to benefit male (elite) student-athletes as about eighty percent of the student-athletes who take advantage of the NCAA program are (male) football student-athletes.<sup>181</sup> These issues also arise to some extent if a school were to pay the premiums out of their general athletics department's budgets. At least for that reform possibility, though, the funds are not as limited as the Student Assistance Fund.

Regardless, some reform is needed. From the student-athlete's perspective, loss-of-value insurance may be just as important, if not more important, than total disability. At the very least, the student-athlete should have similar access to the type of insurance he may be more likely to need—loss of value.

### III. BUT IT'S NOT PERFECT PROTECTION

Even if student-athletes are eventually provided easier access to loss-of-value insurance, it is important for them to remember that neither insurance provides perfect protection. Obtaining an insurance policy is not the same as demonstrating coverage and entitlement to benefits. Plus, the insurance benefit may be inadequate as it can only be as good as the projections the insurer relied on in issuing it.

#### *A. Difficulty of Collecting Benefits*

Insurance companies may timely pay any benefits due under a disability policy. If an insurance company refuses, however, the insured could pursue litigation to compel payment of the benefits.

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<sup>181</sup> See Brian Anderson, *NCAA's DI Program Good, but Imperfect*, LIFEHEALTHPRO (Mar. 11, 2013), <http://www.lifehealthpro.com/2013/03/11/ncaas-di-program-good-but-imperfect>.

Within the litigation, the insured will have the burden to establish policy coverage.<sup>182</sup> The common thought is that establishing coverage under either a total disability or loss-of-value policy would be difficult.

### 1. Total Disability

It might be easier for a student-athlete to demonstrate a total disability than for the average insured under a traditional disability policy. This is because there should be less contention over whether the athlete can still perform his occupation. The student-athlete will be eligible for the disability benefit if prevented from ever again participating in his occupation as a professional athlete. Language like this precludes any consideration of whether the insured could still engage in some occupation comparable to his present one. Plus, even if the policy precluded coverage if the insured could engage in some comparable occupation, there is really no comparable occupation to professional athletics.

Still, the insured may have difficulty establishing that he suffered an injury precluding him from ever again participating in his chosen professional sport. Whether a student-athlete suffered a career-ending injury is “[o]ne of the most contentious issues in an athlete disability insurance contract.”<sup>183</sup> If the player is seriously injured, this may not be difficult at all. Obviously, if fully paralyzed, he will be able to collect.<sup>184</sup> Fortunately though, full paralysis is uncommon.

And with almost anything less, “because of advancements in medical coverage and technology, a permanent disability is becoming rarer.”<sup>185</sup> This is one reason that a notable student-athlete declined to purchase coverage. The father of former University of Southern California quarterback Matt Barkley explained that the family was leaning towards forgoing insurance

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<sup>182</sup> See, e.g., *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.*, 108 P.3d 469, 476 (Mont. 2005); *Lewis v. Aetna Ins. Co.*, 505 P.2d 914, 916 (Or. 1973); *Aydin Corp. v. First State Ins. Co.*, 959 P.2d 1213, 1215 (Cal. 1998).

<sup>183</sup> *Wong & Deubert*, *supra* note 56, at 487.

<sup>184</sup> See *Moura*, *supra* note 76.

<sup>185</sup> *Id.*; see also *Fixler*, *supra* note 68.

after “considering the advances in medical science that make true career-ending injuries rare.”<sup>186</sup> Given “the remote possibility” of the insurance “actually paying off,” the father explained that the benefits of the policy may not outweigh the costs.<sup>187</sup>

Advanced medical care could also affect the waiting or elimination period. The insurer will have no obligation to pay benefits until after the expiration of the elimination period—maybe twelve months of being unable to play professional football because of the injury.<sup>188</sup> What if the insured tries to rehabilitate the injury and play again? This is more than a mere possibility: “athletes are typically highly motivated people who will make every effort to continue playing.”<sup>189</sup>

Based on the language of the policy at issue, the Sixth Circuit concluded that “[i]f a claimant can perform even one material duty of his regular occupation during the Elimination Period, he is not totally disabled,” and thus ineligible for benefits.<sup>190</sup> At the same time, the total disability may not actually begin until after a failed attempt to return.<sup>191</sup> That inability to participate after the failed attempt can still be traced back to the original injury, creating the issue of “whether the insured should be penalized because of the extensive, and expensive, steps, which the insured took to avoid the specific loss and which would have inured to the benefit of the company, if successful.”<sup>192</sup>

What is known is that as of 2011, “fewer than 10 policyholders have received payouts in the history of the [NCAA’s

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<sup>186</sup> Gary Klein, *USC’s Matt Barkley Weighs Costs, Benefits of Injury Insurance*, L.A. TIMES (Dec. 23, 2011), <http://articles.latimes.com/2011/dec/23/sports/la-sp-nfl-insurance-20111224>.

<sup>187</sup> *Id.*

<sup>188</sup> See Wong & Deubert, *supra* note 56, at 488.

<sup>189</sup> *Id.* at 489-90; see also *id.* at 488 (“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.”).

<sup>190</sup> Carr v. Reliance Standard Life Ins. Co., 363 F.3d 604, 607 (6th Cir. 2004).

<sup>191</sup> See Kaelin v. Tenet Emp. Benefit Plan, 405 F. Supp. 2d 562, 581 (E.D. Pa. 2005) (finding that the insured’s returning to work after a jet ski incident did not disrupt the elimination period because the first day of total disability, and the starting date of the elimination period, was the date of the later unsuccessful reconstructive knee surgery).

<sup>192</sup> APPLEMAN, *supra* note 11, § 187.02, at 163.

ESDI] program.”<sup>193</sup> This may be because of the difficulty of establishing total disability, but is more likely due to the rarity of totally disabling injuries. This is not to suggest that elite student-athletes should not obtain total disability insurance. But it does suggest that the elite student-athlete will likely never collect on the insurance (which is also good for the student-athlete).

## 2. Loss-of-Value Policy

A temporary injury to an elite student-athlete is, fortunately, much more likely to happen than a totally disabling injury. For this reason alone, “it’s much more likely that loss-of-value is going to pay out.”<sup>194</sup> Also, common perception is that demonstrating coverage for a loss-of-value policy would be difficult. Because of the numerous factual questions, loss-of-value policies will likely result in more litigation than total disability policies.<sup>195</sup> Trial attorneys have recognized this potential for litigation. As one firm advertises on its website:

[I]t is important for injury documentation to be reported right away. The payout is contingent upon whether or not the injury or illness directly caused the loss of value. Therefore, medical and other expert advice must be collected. Insurance companies aren’t keen on paying out such large sums, so strong evidence is needed so that they will honor the contract. An insurer may claim that a drop in draft placement is due to circumstances other than an illness or injury, such as a lackluster performance at a pro day or combine. As with any other type of insurance, your insurance company has a financial incentive to dispute and delay claims, so

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<sup>193</sup> Klein, *supra* note 186; *see also* Moura, *supra* note 76 (“[A]ccording to NCAA director of travel and insurance Juanita Sheely, fewer than a dozen athletes have collected during the program’s 24 years, despite 100 or more annual enrollees . . .”).

<sup>194</sup> Moura, *supra* note 76 (quoting USC’s Director of Compliance Kevin Sergent).

<sup>195</sup> *See* Florio, *supra* note 148. Florio explained that loss-of-value policies “are more expensive and often result in litigation, since there often are multiple potential causes for a drop in draft stock.” *Id.* He is correct that the factual questions in loss-of-value policies might be more complex than in total disability policies. He does not offer any support for his conclusion that the policies will often result in litigation. The authors searched case law and trial documents on both Westlaw and Lexis and were unable to find any such cases.

professional representation is critical for a collegiate athlete with a valid loss in value claim.<sup>196</sup>

Again, the insured will have the burden of establishing coverage. It shouldn't be difficult to show that the student-athlete dropped low enough in the draft to trigger coverage. But the insured will also have to show that the drop was caused by an injury.<sup>197</sup> It is a civil action, so the traditional burdens of proof will apply.<sup>198</sup> Thus, the student-athlete will have to show, by a preponderance of evidence, that the loss of his value was due to an injury.

University of Louisville quarterback Teddy Bridgewater reportedly had a loss-of-value policy covering him if he was not selected within the first eleven picks of the 2014 draft due to injury. Bridgewater was ultimately selected with the thirty-second pick. If he attempts to collect the insurance benefit, he will have to demonstrate that his drop was due to injury. That may be difficult as he did not "publicly reveal[] . . . any injury or illness" during his last season of playing college football.<sup>199</sup> At least one commentator pointed to his "lackluster pro day" as the reason for his drop.<sup>200</sup> If this was the reason, he is likely not entitled to the insurance benefit.

Bridgewater's example helps demonstrate that there could be multiple reasons for a player being drafted later than originally expected. Perhaps teams are concerned about a player's character or work ethic. Or, perhaps teams sour on a player because of a poor performance later in the season. Draft decisions can be based on so many factors—the team's needs, the player's skill, the

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<sup>196</sup> Jeffrey Raizner, *Loss of Value Insurance Important for Collegiate Athletes*, DOYLE RAIZNER LLP (May 13, 2014), <http://www.doyleiraizner.com/blog/loss-of-value-insurance-important-for-collegiate-athletes>.

<sup>197</sup> See Rovell, *Bridgewater*, *supra* note 87 ("Because loss-of-value insurance is connected to an injury policy, the only way an athlete can collect from falling in the draft is if it's as a result of getting hurt or being ill.")

<sup>198</sup> See Ronald J. Allen & Sarah A. Jehl, *Burdens of Persuasion in Civil Cases: Algorithms v. Explanations*, 2003 MICH. ST. L. REV. 893, 900-01 (explaining that both federal and state model jury instructions explain that the burden of proof in a civil case is a "preponderance of the evidence").

<sup>199</sup> Rovell, *Bridgewater*, *supra* note 87.

<sup>200</sup> *Id.*

player's character, the player's "intangibles," just to name a few. How would an insured be able to show that the reason he was drafted later than originally expected was because of an injury or illness?

Although it may appear different, it will likely not be any more difficult than any other causation inquiry in civil litigation. Importantly, the plaintiff will have to show that his injury caused the drop only by a preponderance of evidence, the burden of proof in civil cases.<sup>201</sup> In plain English, the plaintiff will have to show that, more likely than not, his injury caused his drop in the draft.<sup>202</sup> So if there are two possible reasons for the drop, like injury and character, the plaintiff would have to show, more likely than not, that teams passed on him because of injury. If the jury concludes that there was an equal chance that teams passed on him for either injury or character, then the plaintiff failed to meet his burden. Importantly though, the plaintiff does not have to show that his injury was the only reason or the definitive reason for his drop in the draft; instead, he has to prove that, more likely than not, the injury caused the drop in the draft.

The plaintiff could use draft experts. Draft experts will often comment that a specific team is not interested in a particular player. This expertise is usually based on hearsay—what the team has told the draft expert. But a team's comments about a particular player reflect how the team judges that player, which is specifically relevant to why it might draft a player higher or lower in the draft.

Even better evidence that injury caused a drop in draft position would likely come from the NFL teams themselves. If, before the season, a plaintiff wide receiver was projected (by a draft expert) to be drafted in the top five picks, but the wide receiver was actually drafted in the fourth round, representatives of the various NFL teams could testify to why they did not select the wide receiver. For instance, other teams choosing wide receivers in the first three rounds could be asked why they chose their wide receiver over the plaintiff. Teams may not wish to

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<sup>201</sup> See Allen & Jehl, *supra* note 198, at 900.

<sup>202</sup> See *id.*

divulge their draft strategies, but a protective order could be put in place to maintain confidentiality.

Some cases should not be that complex. Before his last year of playing, former University of Southern California linebacker Morgan Breslin purchased a loss-of-value policy.<sup>203</sup> At the time he purchased, he was viewed as one of the premier pass rushers of the 2014 draft.<sup>204</sup> He played in only five games in the 2013 season because of a sports hernia and he eventually underwent hip surgery.<sup>205</sup> Ultimately, Breslin was not drafted and instead signed as a free agent with the San Francisco 49ers.<sup>206</sup>

Importantly, the insurer should be deprived of one argument it may likely want to make—that there was no drop really, meaning that the player was always going to be drafted in the fourth round. This would be true if the original projections were inaccurate. The insurer should be without this argument because the insurer would have never issued the insurance in the first place unless the player was projected to be drafted high. Thus, the insurer believed the projections and both the insured and insurer relied on them. The insurer cannot, years later, go back and then argue that the projections that it relied on were inaccurate as a basis for denying the insured coverage. The insurer approved of those high draft projections at the time it issued the policy; it is stuck with them.<sup>207</sup>

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<sup>203</sup> See Getlin, *supra* note 116.

<sup>204</sup> See *id.*

<sup>205</sup> See *id.*

<sup>206</sup> See *id.*

<sup>207</sup> This argument is somewhat similar to the legal doctrines of waiver and estoppel. Either doctrine precludes an insurer from denying coverage on a particular basis. See *Merrimack Mut. Fire Ins. Co. v. Nonaka*, 606 N.E.2d 904, 906 (Mass. 1993). Generally, waiver is defined as “the intentional relinquishment of a known right.” *Rubinstein v. Jefferson Nat’l Life Ins. Co.*, 302 A.2d 49, 52 (Md. 1973) (quoting *Food Fair Stores, Inc. v. Blumberg*, 200 A.2d 166, 172 (Md. 1964)). Estoppel involves a misrepresentation by the insurer and the insured’s detrimental reliance on that misrepresentation. See *id.* Neither fits perfectly to the situation where an insurer relied on inaccurate projections. The insurer did not know of the inaccuracy of the projections and thus waiver is not applicable. Similarly, the insurer’s lack of knowledge of the inaccuracy of the projections precludes the insurer from having made a misrepresentation, again meaning estoppel is not totally applicable. Still, courts sometimes use waiver and estoppel, although not perfectly applicable, to achieve a fair result. Because the insurer itself believed in the accuracy of the projections, the insured should be precluded from

Even though it is deprived of this one argument, the insurer can argue that one of the exclusions applies. For example, “[i]f 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.”<sup>208</sup> It depends on the state law, but the insurer will likely have the burden to establish that an exclusion applies.<sup>209</sup> The insurer could also seek to void the policy by establishing a false misrepresentation on the insured’s part, likely in the insurance application materials. To do so, the insurer would have to establish “(1) that a misrepresentation exists, (2) that it was material, and (3) that the insured acted intentionally in misrepresenting the material fact in the claim presented to the insurance company.”<sup>210</sup> Thus, just because the insurer should be denied the opportunity to argue that the student-athlete did not actually fall in the draft, the insurer still has other possible arguments.

Even though a temporary injury causing a drop in draft position is more likely to occur than a total disability, loss-of-value policies pay out very infrequently. Maybe it is because the injuries are not that common, or maybe because of the difficulty in establishing coverage. Whatever the reason, “[i]t is believed that no player who has bought loss-of-value insurance for the NFL

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later claiming that the projections were inaccurate when the insured is claiming coverage. The insurer may have a misrepresentation claim against the source of the projections if the preparation of the projections was fraudulent or, more likely, negligent. If so, the source of the projections may need to indemnify the insurer. The fact that the insurer may have a viable claim, however, does not mean benefits are not owed to the insured.

<sup>208</sup> Wong & Deubert, *supra* note 56, at 491.

<sup>209</sup> See, e.g., *Ment Bros. Iron Works Co. v. Interstate Fire & Cas. Co.*, 702 F.3d 118, 121 (2d Cir. 2012) (explaining that the “insurer bears the burden of proving that an exclusion applies” under New York law); *Sciolla v. W. Bend Mut. Ins. Co.*, 987 F. Supp. 2d 594, 599 (E.D. Pa. 2013) (“Where an insurer raises a defense based on a policy exclusion, the burden shifts and the insurer bears the burden of establishing the applicability of that exclusion.”); *Great Am. Ins. Co. v. Calli Homes, Inc.*, 236 F. Supp. 2d 693, 697 (S.D. Tex. 2002) (“If the insurer relies on an exclusion, the burden is on the insurer to prove that one or more of the exclusions apply.”).

<sup>210</sup> *Espedito Realty, LLC v. Nat’l Fire Ins. Co. of Hartford*, 935 F. Supp. 2d 319, 324 (D. Mass. 2013).

draft has actually collected.”<sup>211</sup> If he receives benefits, Marqise Lee, the former USC wide receiver, will be one of the first.<sup>212</sup> One insurance broker explained that he would not sell loss-of-value insurance because “[o]ut of 100 players, maybe two to three will collect.”<sup>213</sup> Again, this is not to suggest that elite student-athletes should not obtain total disability or loss-of-value insurance. But it does suggest that the elite student-athlete will likely never collect on the insurance (which is also good for the student-athlete).

### *B. Possible Inadequacy of the Benefits*

Because total disability and loss-of-value insurance policies are so potentially important,<sup>214</sup> some prospective student-athletes purchase these policies before even entering college.<sup>215</sup> At the same time, elite student-athletes need to make sure that their eyes are wide open. They need to understand the small chance of the insurance paying out. They also need to understand that even if the insurance pays out, inherent uncertainty in the creation of the policies can affect the sufficiency of the coverage. That inherent uncertainty derives from the insurer’s reliance on draft projections.

To review, the issuance of both total disability and loss-of-value insurance starts with draft projections.

Because of the proliferation of coverage of all the major sports, there are many “mock drafts” off of which policy pricing can be based. There are a number of well-respected and nationally known mock drafts from which an initial projected draft position can be determined. Insurers can either rely solely on a single mock draft, or, as various mock drafts show different success rates over the years, could calculate a credibility-weighted average of players’ draft

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<sup>211</sup> Rovell, *Bridgewater*, *supra* note 87.

<sup>212</sup> Carroll, *supra* note 3 (“In fact, Lee, the former USC wide receiver, is in line to become . . . one of the first players to have the policy pay.”).

<sup>213</sup> Moura, *supra* note 76.

<sup>214</sup> See Staples, *supra* note 63.

<sup>215</sup> See *id.* Football student-athletes “used to buy [the] policies prior to preseason practice. Now, they buy them in January or February to cover them[selves] during spring practice.” *Id.*

positions, with credibility weightings equal to the prior success of the analyst developing the mock draft.<sup>216</sup>

Insurers make every attempt to ensure that the projections that they use are accurate. But, projections are not a hard science and players can be both under or overvalued. As an example, before the start of his junior season, Robert Griffin III, who played quarterback at Baylor University, was not perceived as a first-round draft pick.<sup>217</sup> Because he was not projected, he did not

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<sup>216</sup> Michael Henk, *Loss of Value Insurance for Professional Sports*, BUS. RISK (May 16, 2014), <http://thebusinessofrisk.com?p=1578>. An employee of an insurance underwriter explained that “players are valued at the time of underwriting” and that his company talks to scouts and “two or three trusted NFL voices, like Matt Miller.” Carroll, *supra* note 3.

After the draft projections are chosen, the insurer must then determine the price of coverage. The amount of coverage will be greater the higher that the elite student-athlete is expected to be drafted. For loss-of-value insurance, which will be tailored closer to the amount the elite student-athlete is expected to make, the insurer can look at “salary caps and/or signing bonus allotments as mandated by the professional association of the sport in question.” Henk, *supra*. Loss-of-value insurance then involves a third step—determining how far the player must drop to trigger coverage. “It’s unlikely that, for something as unpredictable as a sports draft, this value would be less than 10. It’d likely require a significant drop in draft position to trigger coverage.” *Id.*

Specific to this third step of loss-of-value coverage, former Kansas basketball player Joel Embiid was expected to be the first pick of the 2014 NBA draft. *See* Jeff Goodman, *Joel Embiid Has Fractured Foot*, ESPN (June 20, 2014, 10:32 AM), [http://espn.go.com/nba/draft2014/story/\\_id/11107087/joel-embiid-suffers-foot-injury-prior-nba-draft](http://espn.go.com/nba/draft2014/story/_id/11107087/joel-embiid-suffers-foot-injury-prior-nba-draft). Mere weeks before the draft, it was discovered that he had a stress fracture in his foot. *See id.* He was ultimately selected third by the Philadelphia 76ers. *See Sixers Draft Joel Embiid at No. 3*, ESPN (June 27, 2014, 12:52 PM), [http://espn.go.com/nba/draft2014/story/\\_id/11141687/2014-nba-draft-joel-embiid-drafted-3rd-overall-philadelphia-76ers](http://espn.go.com/nba/draft2014/story/_id/11141687/2014-nba-draft-joel-embiid-drafted-3rd-overall-philadelphia-76ers). There is no doubt that Joel Embiid fell in the draft because of his foot injury. There is also no doubt that he suffered lost future income because of it. But the fall was likely not far enough to trigger any loss-of-value coverage. A similar case is Nerlens Noel, who played basketball for Kentucky. *See* Carroll, *supra* note 3. He suffered a knee injury, but was still drafted high in the first round although not as high as originally expected. *See id.*

<sup>217</sup> *See, e.g.*, Pete Prisco, *Flash Forward: Top 32 Picks for the 2012 NFL Draft*, CBS SPORTS (May 1, 2011), <http://www.cbssports.com/nfl/story/15014424/flash-forward-top-32-picks-for-the-2012-nfl-draft>; Tony Pauline, *Stanford’s Luck Headlines Early Look at Top 2012 Draft Prospects*, SPORTS ILLUSTRATED (May 3, 2011), <http://www.si.com/nfl/2011/05/03/2012-prospects>; Chad Reuter, *2012 Mock Draft: First Look with Luck and Heels*, CBS SPORTS (May 4, 2011), <http://www.cbssports.com/nfl/draft/story/15029593/mock-draft-first-look-with-luck-and-heels>.

qualify for disability insurance. After a strong performance in Baylor University's opening game at Texas Christian University where he threw for 359 yards and five touchdowns,<sup>218</sup> Griffin still did not qualify.<sup>219</sup> Weeks later, he qualified for \$1 million in disability coverage.<sup>220</sup> Given this relatively low level of coverage, Griffin was obviously still not projected to be drafted very high. Months later, the Washington Redskins selected Griffin with the second pick of the first round.<sup>221</sup> Had Griffin been hurt in this junior year at Baylor and unable to ever play football again, he would have received only the \$1 million in insurance coverage. Although a significant sum, it is minimal compared to the four year, \$21.1 million, with a \$13.8 million signing bonus,<sup>222</sup> contract he signed, plus the unknown income from multiple endorsements.

Griffin III is an example of a player undervalued by draft projections, whose potential insurance payout was not proportionate to his ultimate draft position. Inaccurate draft projections can also work to a student-athlete's advantage. For instance, a student-athlete may be projected to be drafted in the first round of the NBA draft based on his high school career. If so, he is eligible for the NCAA permanent total disability program. But suppose that the student-athlete has difficulty adjusting to college basketball and has a lackluster season. By midseason, the player is only projected to be drafted in the second round of the NBA draft. This guarantees the player only a non-guaranteed contract, and the player may very well not end up making the

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<sup>218</sup> See Associated Press, *Baylor Blows 24-Point Lead but Recovers to Edge No. 14 TCU*, ESPN (Sept. 2, 2011, 8:00 PM), <http://scores.espn.go.com/ncf/recap?gameId=312450239>.

<sup>219</sup> This is based on the author's (Joshua Lens) personal knowledge.

<sup>220</sup> This is based on the author's (Joshua Lens) personal knowledge.

<sup>221</sup> See Mark Maske, *NFL Draft 2012: Redskins Make Robert Griffin III Official*, WASH. POST (Apr. 26, 2012), [http://www.washingtonpost.com/sports/redskins/nfl-draft-2012-redskins-make-robert-griffin-iii-official/2012/04/26/gIQAfOZ3jT\\_story.html](http://www.washingtonpost.com/sports/redskins/nfl-draft-2012-redskins-make-robert-griffin-iii-official/2012/04/26/gIQAfOZ3jT_story.html).

<sup>222</sup> See Mike Jones & Mark Maske, *Quarterback Robert Griffin III Signs Four-Year, \$21 Million Contract with Redskins*, WASH. POST (July 18, 2012, 8:32 AM), [http://www.washingtonpost.com/blogs/football-insider/post/quarterback-robert-griffin-iii-signs-four-year-21-million-contract-with-redskins/2012/07/18/gJQA3DbLW\\_blog.html](http://www.washingtonpost.com/blogs/football-insider/post/quarterback-robert-griffin-iii-signs-four-year-21-million-contract-with-redskins/2012/07/18/gJQA3DbLW_blog.html).

team.<sup>223</sup> In that case, if the player is hurt before the draft and unable to play basketball, any million-dollar payout may be more than what the player would have received if drafted.

It is in both the insurers' and the student-athletes' interests to obtain accurate draft projections. If undervalued, the student-athlete is unable to obtain sufficient coverage and the insurer is able to collect premiums smaller than it otherwise could. If overvalued, the student-athlete pays more in premiums than he should, which benefits the insurer, but the insurer may end up paying out a higher benefit than the student-athlete should really receive.

This uncertainty will not be problematic for all elite student-athletes. For example, South Carolina defensive end Jadeveon Clowney was always projected to be drafted highly and ultimately was selected first in the 2014 NFL draft.<sup>224</sup> Had he suffered a disabling injury before the draft, though, he would have received \$5 million from his total disability policy. This payout is commensurate with his accurate draft projections. Even for someone like Clowney, for whom the projections were accurate, elite student-athletes must realize that this insurance does not replace the entire income they could have earned in professional sports. A \$5 million payout is a "drop in the bucket" compared to what Clowney will earn over a full professional career.<sup>225</sup>

None of this means elite student-athletes should not obtain insurance coverage. To the contrary, insurance may be a necessary business expense to help minimize the risks inherent in playing college sports. But student-athletes and their families also need to be aware that the insurance is only a partial substitute. Just like how normal long-term disability will only cover a portion of the insured's wages, student-athlete total disability and loss-of-value insurance compensate the student-athlete for lost future earnings only to an extent. The extent of that coverage likely

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<sup>223</sup> See Riccobono, *supra* note 113 (explaining that NBA "teams are not obligated to give second-rounders a guaranteed deal").

<sup>224</sup> See Sam Farmer, *NFL Draft 2014: Clowney Selected No. 1; Manziel Goes 22nd*, L.A. TIMES (May 8, 2014, 8:45 PM), <http://www.latimes.com/sports/sportsnow/la-sp-sn-nfl-draft-live-20140508-htmstory.html>.

<sup>225</sup> Florio, *supra* note 148.

depends on where the player was projected and where the player is ultimately drafted.

#### CONCLUSION

“Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.”<sup>226</sup> Insurance touches elite student-athletes in the same way that it touches anyone thinking of undertaking a new business activity. One must think of insurability. If insurance were not available for the business, the business would likely not be economically efficient. Similarly, an elite student-athlete must consider whether playing college sports without insurance is economically efficient. There is no doubt that insurability can “vitally affect the . . . economic welfare”<sup>227</sup> of elite student-athletes.

Regardless of whether it is by choice, most professional athletes start their careers as amateur college student-athletes. In addition to receiving an education, they can use that time to develop their athletic skills and demonstrate their ability to play professional sports. But what happens if the elite student-athlete is injured while at school? This is a student-athlete who is set to make millions once he is eligible for the professional sports draft. But if unable to play because of that injury, he will never see those millions. Or, even if still able to play, he will never see some of those millions if he is drafted later due to that injury.

One way to protect himself against that risk, and to improve his economic welfare, is insurance. Both total disability and loss-of-value insurance has become popular with elite student-athletes, and rightly so. Currently though, elite student-athletes have easier access to total disability than to loss-of-value. This is especially nonsensical as a student-athlete may be more likely to need loss-of-value coverage than he is total disability coverage. There is something ironic about recognizing the elite student-

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<sup>226</sup> United States v. S.E. Underwriters Ass'n, 322 U.S. 533, 540 (1948).

<sup>227</sup> Bertram Harnett & John V. Thornton, *Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept*, 48 COLUM. L. REV. 1162, 1162 (1948).

athlete's professional sports future (and thus the need for insurance), but precluding that elite student-athlete from relying on that future in obtaining insurance to protect it. The NCAA rightly recognizes an exception for total disability and should do the same for loss-of-value insurance.

At the same time, it is important to remember that insurance can only do so much. Insurance transfers the risk of injury to the insurer, but it is not a perfect transfer. The insurance rarely pays out. This may be because the risk rarely materializes, or it may be because the insurance is difficult to collect. Also, the transfer is not perfect because the insurance benefit is only a partial substitute for the loss, and it may be an inadequate partial substitute if the elite student-athlete was undervalued when the insurance was issued.

There is no doubt that elite student-athletes have difficult decisions to make with respect to insurance coverage. It is costly and the risk it covers may never materialize. As University of Iowa head football coach Kirk Ferentz explained, career-ending injuries are "so rare . . . [but][i]t's stupid not to take it. It's one of those things you should do."<sup>228</sup> The same holds true for less severe injuries, which are actually more common. Again, it may be stupid to not get the insurance. Regardless, elite student-athletes should have access to whatever disability-like insurance they wish to obtain.

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<sup>228</sup> Marc Morehouse, *Quick Slants: Insurance Is the Best Policy*, GAZETTE (July 29, 2014, 1:49 PM), <http://thegazette.com/subject/sports/quick-slants-insurance-is-the-best-policy-20140729>.

