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Who Is Looking Out For Student-Athletes When Schools Purchase Disability Insurance For Them: A Case Study

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There is an emerging trend in college sports where schools use money received from the NCAA Student Assistance Fund to purchase permanent total disability (PTD) insurance policies, some of which include a loss-of-value rider, for high-profile student-athletes to help protect their future earnings. As an outspoken proponent of any student-athlete who is projected to be a top draft pick taking full advantage of school-purchased insurance, this author has become increasingly concerned about who is—and who should be—helping student-athletes understand the intricacies of disability insurance and navigate the inevitable hurdles insurance companies will construct if the athlete ever needs to file a claim for benefits.

Because the NCAA prohibits student-athletes from hiring a financial advisor or a sports agent while still in school, the question that arises is who is charged with looking out for the athlete and his or her best interests when it comes to disability insurance coverage and claims. Recent developments in a lawsuit filed in May 2018 by one such high-profile student-athlete have brought these concerns and questions into sharp focus. This article will examine these issues through the lens of that lawsuit.

Student-Athletes and Disability Insurance

Imagine being a twenty-year-old sophomore running back at a well-known football powerhouse and the reigning rushing leader in the Southeastern Conference. After your breakout sophomore season, everywhere you look pundits are predicting that you will be a first or second round NFL draft pick if you choose to leave school early after your junior season, so you can live out your dream of playing in the League and sign a multi-million dollar contract to play the game you love professionally. You are competing in spring practice when someone associated with your school's athletic department pulls you aside and suggests that, to protect against the adverse impact a significant injury might have on your future in the NFL, the school will pay the cost of buying a PTD insurance policy for you. How can you pass that up?

Like most twenty-year-olds, you have never purchased insurance before, you have never seen or read an insurance policy in your life, and you have no idea how your school is going to pay for your insurance policy. Before leaving home for college you were covered under your parent's health and auto insurance policies, and they took care of all the details for you. Unbeknownst to you, the school's offer to pay the premium for your disability policy involves using money the school received from the NCAA as part of what is known as the Student Assistance Fund (SAF). You probably had no idea that such a fund existed, and you most likely didn't care from where the school finds the money to pay for your policy.[1]

The SAF arose out of a settlement reached years ago in the *Jason White v. NCAA*[2] antitrust lawsuit, and, according to the NCAA's 2018 Division I Revenue Distribution Plan, the association meted out $66.3 million in SAF money to member institutions during the previous academic year. Under the NCAA SAF Guidelines, the fund is "intended to provide direct benefits to student-athletes or their families as determined by conference offices," including insurance policy premium payments.[3]

Outside the student-athlete setting, a person seeking to secure a disability insurance policy has the option of choosing the insurance broker he would like to work with. However, schools that exclusively work with the same broker again and again do not give the student-athlete the option to choose another broker even if they wanted to. You meet with the broker the school selects, and he helps you fill out an application for the insurance policy, which you sign, and that broker sends it off to someone else. You are told that the policy will pay you $1 million if you suffer an injury that precludes you from ever again playing the game that you love. Neither the school's insurance broker nor anyone at the school ever asks you to do anything else in connection with your insurance policy. Because of this, you reasonably assume that everything has been taken care of concerning the insurance policy, so you turn your attention back to preparing for your junior, and probably your last, college football season, feeling secure in the knowledge that there is a $1 million insurance policy in place protecting you against a career-ending injury.

During the annual spring football game against your teammates, you take a handoff from the quarterback, as you have thousands of times before. You run to the left, see a hole open up in front of you, cut up field, and run into a defensive lineman after a four-yard gain. The defender hits you as you have been hit thousands of times before, but this time you fall flat on your back, and, even though the hit was not a big collision, for some reason you can't move. Paramedics rush onto the field, and, when they reach you and ask what's wrong, you tell them that you can't feel your arms or legs, so they take all the necessary precautions, including placing you on a stretcher and carting you off the field.

That evening, while you are lying in your hospital bed, the school's insurance broker you had worked with weeks earlier calls your dad and leaves a voicemail message reassuring him that there is no need to worry about insurance coverage, because "everything [is] in force, so no issues are on that. I'm just calling to make sure he's all right." Unfortunately, as events later play out, there are a lot of issues with regard to collecting the $1 million PTD insurance policy, and the security you once thought you had no longer exists.

These are the facts underlying the allegations set out in *Rawleigh Williams III v. Underwriters at Lloyd's, London, et al.*, which is currently pending in the Circuit Court of Washington County, Arkansas.[4]

Here is a graphic depiction of the chronology of events surrounding the insurance policy, injury, and PTD claim of former University of Arkansas running back Rawleigh Williams, as alleged in his complaint:

DATE	EVENTS
March 10, 2017	At the schools urging, Williams purchases a $1 million PTD policy from Justin Boeving, the school's exclusive insurance broker.
March 13, 2017	Mr. Boeving assists Mr. Williams with completing the policy application, and Mr. Boeving submits the application to the wholesale insurance broker, International Specialty Insurance Inc. ("ISI").
April 10, 2017	According to the insurance company, Lloyd's, the premium payment of $6,440 was due (31 days after inception of the policy). The University of Arkansas was responsible for making the payment with the NCAA SAF funds, but the premium was not paid within that time frame.
April 29, 2017	Mr. Williams suffers a career-ending neck injury.
May 2, 2017	ISI issues Exclusion No. 3—six weeks after inception of the policy and three days after Mr. William's injury—purportedly excluding coverage for the very injury Williams suffered just days earlier. ISI would not send Exclusion No. 3 to Mr. Williams for another week.
May 4, 2017	The University of Arkansas pays the $6,440 policy premium for Mr. William's policy—six days after the accident and two months after the policy's inception.
May 8, 2017	Mr. Williams announces his retirement from football.
May 9, 2017	Mr. Boeving emails a copy of the policy to Mr. Williams, informing him that the policy had been issued with final wording the day before his retirement. This was the first time Mr. Williams was provided with the policy.
May 17, 2017	Mr. Williams files a claim with Lloyd's for the policy limits.
Sept. 22, 2017	Lloyd's denies Mr. William's claim, based solely on Exclusion No. 3. Lloyd's does not raise the termination or premium payment issues.
May 1, 2018	Mr. Williams files his insurance bad faith complaint in Arkansas state court. The matter is currently pending.

The Insurance Industry Practice of Trying to Minimize Payouts or Deny Outright Athlete Insurance Claims

As an insurance recovery lawyer who has represented policyholders for most of my career, I never cease to be amazed by the lengths to which some insurance companies will go to avoid paying valid claims while simultaneously forcing claimants to hire a lawyer and file a costly lawsuit. Then, after the policyholder files a complaint, insurers often try to ratchet up the litigation costs as another ploy to avoid paying. In short, insurance companies are nothing if not consistent in the many, varied, and constantly shifting hurdles they construct in an attempt to minimize their exposure. Unfortunately for Rawleigh Williams, his case is no different.

Lloyd's initially denied Mr. Williams' claim based solely on an exclusion that had been issued by the wholesale insurance broker (ISI) three days after Williams was injured.[5] In the *Williams* case, ISI has admitted that it issued Exclusion No. 3 "pursuant to authority given to [ISI] by Lloyds," and, as a result, ISI was acting on behalf of the insurance company and not on behalf of Mr. Williams. In fact, the only broker Mr. Williams ever dealt with was Justin Boeving, who, according to the complaint, held himself out as a leading provider of disability insurance for athletes. Mr. Williams most likely had no idea that another broker (ISI) was even involved in the transaction, let alone the identity of that unknown broker. When the absurdity of its original denial took hold, Lloyd's did what many insurers do—it moved the denial target to a potentially even more absurd position.

In September 2018, Lloyd's filed a motion to dismiss the complaint Mr. Williams had been forced to file and, in so doing, changed tack to argue that, because the University of Arkansas did not pay the policy premium on time, there had been a twenty-four-day gap in insurance coverage; a gap that coincidentally happened to include the day on which Mr. Williams severely injured his neck. Lloyd's had never before raised this gap in coverage as a basis upon which it was denying the claim, until it filed its motion to dismiss. Apparently, Mr. Williams was unaware of the fact that his school had not sent the $6,440 premium payment in on time, which created this claimed gap in coverage. Mr. Williams was never notified that the payment had not been timely paid, and he never received any type of cancellation notice.

At first blush, this purported gap in coverage might seem like a legitimate argument, that is, until one realizes it is based entirely on the specific wording of an insurance policy that Lloyd's had not finalized, and a copy of which Lloyd's had not provided to Mr. Williams until *ten days after* he sustained his career-ending neck injury. Under these arguments, Mr. Williams apparently needed to be clairvoyant to be aware of a termination provision in an insurance policy that he did not receive until nearly two months after the policy was purchased. The carrier's argument also requires Mr. Williams to have magically surmised that his school had not timely made the premium payment. On November 14, 2018, the Arkansas court denied the motion to dismiss filed by Lloyd's. Two weeks later, on November 28, 2018, Lloyd's filed a twenty-page answer, which included eleven affirmative defenses.

In addition to emphasizing the lengths to which some insurers are willing to go to avoid coverage, the *Williams* lawsuit also highlights other important issues peculiar to athlete insurance policies and claims. For example, the case highlights the need to have an impartial third party explain to student-athletes that securing a disability policy is not as simple and as easy as it may seem. The student-athlete also needs to appreciate the somewhat tangled web of persons and entities involved in procuring a disability insurance policy on his or her behalf, and how that web becomes even more knotted when their school agrees to pay the policy premium.

The Process of Procuring Athlete Disability Insurance Coverage

Because most athlete insurance policies are placed with the London market, two layers of insurance brokers are involved in obtaining a quote and procuring the policy. The student-athlete works with his or her school's athletic department, and someone there reaches out to a retail insurance broker. Mr. Boeving was the exclusive broker for Arkansas' student-athlete policies, and was acting as the legal representative for Mr. Williams. The retail insurance broker must work with a wholesale insurance broker, like ISI, who serves as the intermediary between Mr. Boeving and Lloyd's. Wholesale brokers generally act as the legal agent for Lloyd's. The wholesale broker then reaches out to its London connections to request a quote, bind coverage, and issue a policy. Finally, if the student-athlete's school is paying the policy premium, the

retail broker must also obtain permission for the purchase of the policy and coordinate with the school to ensure that the premium payment is acceptable and timely made.

When the curtain is pulled back on this cast of characters, one discovers that the only people a student-athlete normally knows about or deals with are someone at the school and the retail broker. The athlete generally has no idea that a wholesale broker is involved, and they usually don't even know (or care about) the identity of the insurance company issuing the policy. And yet, the identity and reputation of these unknown persons and entities can often mean the difference between receiving a payout under a policy and having a valid claim denied.[6]

Similarly, when a school offers to purchase a disability policy for a student-athlete to protect his future earnings, the athlete is justifiably entitled to believe that, just as he relied on his parents to pay his car insurance premiums, he could rely on the school and the retail broker to ensure that the premium payment was timely made. Unfortunately, Mr. Williams is now facing the possibility that he might not be able to collect the $1 million policy limits to which he is otherwise entitled, all because the school failed to timely pay the $6,440 premium and the retail broker failed to protect Mr. Williams' best interests by ensuring timely payment. In the alternative, Mr. Williams could win his lawsuit but net substantially less than the $1 million policy limits, because he has been forced to hire a lawyer and go to battle against the monolith, Lloyd's of London.

Student-athletes also need to be advised that, unlike the case with most other insurance policies, it is common practice in the disability and loss-of-value insurance industry for wholesale brokers, like ISI, to confirm coverage by issuing something called a "Conditional Binder." That binder is not the actual insurance policy, and it does not mean that an actual insurance policy has been issued or is in place, or that a form policy without non-standard exclusions will actually be issued. It also does not mean that the wording of the policy has been approved or finalized. The only thing that a Conditional Binder confirms is that, if the insurance company approves your policy application, coverage under the subsequently issued policy will begin on the date the binder was received.

Because of this practice, it is also not uncommon for some wholesale brokers to fail to provide the athlete with a copy of the policy for an inexplicable and extended period of time (sometimes for months) after the policy takes effect. It is unlikely that anyone ever explained the conditional or tentative nature of this process to Mr. Williams while he was involved with spring practice. Instead, Mr. Williams continued to play under the impression that his policy had been finalized and he had $1 million in disability coverage.

Observations and Recommendations

Regardless of how the *Williams* lawsuit ultimately plays itself out,[7] the underlying facts and circumstances of his case highlight a much broader and more troubling issue concerning who is, and who should be, looking out for the best interests of student-athletes when their school agrees to purchase a disability insurance policy on their behalf. The current landscape of the athlete disability insurance industry calls for having an impartial third party educate student-athletes about the intricacies of procuring disability insurance and help them navigate the process of filing a claim for benefits under the policy. Because NCAA Bylaws prohibit student-athletes from retaining a financial advisor, lawyer, or sports agent while still in school, the athletes are essentially precluded from seeking the advice of the very people who possess extensive experience in procuring disability insurance, to help them better understand the complex processes and the cast of characters involved. This needs to change.

To participate in collegiate athletics, student-athletes must vigilantly maintain their amateur status and strive to avoid engaging in any activities that might run afoul of NCAA rules and regulations. For example, NCAA Bylaw 12.1.2 details the ways in which a student-athlete might lose that status, including, among other things, by entering into an oral or written agreement with an agent.

According to Bylaw 12.02.1, an agent is someone who "represents … an individual for the purpose of marketing his or her athletics ability or reputation for financial gain; or seeks to obtain any type of financial gain or benefit from securing a prospective student-athlete's potential earnings as a professional athlete." The NCAA has also concluded that financial advisors qualify as "agents" under this definition, and, pursuant to Bylaw 12.3.1.2, student-athletes are precluded from accepting any benefits (including transportation) from an agent, financial advisor, or other person associated with such individuals.

So strict are these prohibitions that acceptance of the benefit alone is impermissible, regardless of the benefit's value or whether it is ever used. If the student-athlete accepts any benefits from a sports agent or financial advisor, it could render the athlete ineligible to play and result in a loss of their amateur status. Interestingly, however, according to NCAA Bylaw 12.3.2, it is acceptable for student-athletes to obtain advice from a lawyer concerning a proposed professional sports contract as long as that lawyer is not involved in representing the athlete in those negotiations.

In a recent NCAA presentation, the association pointed out that it is permissible, under that same Bylaw (12.3.2), for a financial advisor to also discuss the merits of a proposed contract with a student-athlete and to provide suggestions about the offer, provided there is no link between the financial advisor and the professional team offering the contract.[8] The only additional limitation is that the lawyer or financial advisor performing such tasks must be compensated at his or her normal rate for their services. However, if the student-athlete decides to seek advice from such professionals, it is unclear whether the school can use SAF money to pay the normal rates of a lawyer or a financial advisor retained to assist the student-athlete so that they might better understand the intricacies of disability insurance and the parties involved in the process.

Conclusion

The colloquialism, "someone needs to be the adult in the room," means that, when making a decision, there must be a person involved in the process with sufficient experience to make a calculated, rational decision based upon available data after weighing the pros and cons. It is unfair to assume that a seventeen-to-twenty-two year-old student-athlete has the experience to appreciate and understand the complexities and intricacies involved with athlete disability insurance policies. And yet, these disability policies are what some athletes depend on when a devastating injury occurs. As a result, someone needs to look out for student-athletes when their schools purchase disability insurance in their name; someone needs to act like the adult in the room by assuming the role of an impartial athlete representative in connection with the procurement of such policies and helping shepherd the athlete through the claims process.

The wholesale broker involved in the process has a pecuniary interest in the placement of the policy and normally has no contact with the student-athlete. The school representative involved in the process generally has very little experience analyzing or interpreting insurance policies, or the peculiar and sometimes arcane language contained in those policies, and, because of potential legal exposure, they are reticent to provide advice or counsel. Retail brokers deal directly with student-athletes, and, although they have a pecuniary interest in the placement of the policy, they usually have the best interests of the student-athlete at heart. However, where, as in the *Williams* case, the student-athlete has no say in the selection of the retail broker representing him, because there is some type of "exclusive" relationship between the broker and the school, the need for impartiality becomes crucial.

Recently, there has been a string of lawsuits filed by athletes seeking to collect on disability insurance policies, including the *Williams* case, and one of the lessons learned from those cases is that the NCAA and individual schools appear to have failed to perform sufficient due diligence regarding the reputation and litigation history of the retail and wholesale insurance brokers involved in the athlete disability insurance industry. In addition to giving student-athletes access to financial advisors or attorneys with experience with athlete insurance issues, another way to ensure that those athletes are treated fairly, both during the procurement process and the claims process under a disability insurance policy, is to make sure that only reputable and skilled insurance brokers and insurance companies are involved.

The NCAA has already determined that member institutions can use SAF money to pay the insurance premiums for student-athlete disability policies. The NCAA Bylaws also seem to allow student-athletes to consult with a financial advisor or an attorney to discuss the merits of a proposed contract with a student-athlete, which would presumably include an insurance contract, as long as two conditions are met: (1) there is no link between the financial advisor and the professional sports team offering the contract; and (2) the financial advisor or attorney is compensated for their time at their normal rate charged for such services.

It would appear that the best solution to the problem is for the school's athletic department (or the athletic

compliance office) to retain either a financial advisor or an attorney with sufficient experience and background in the athlete insurance industry to represent the interests of the athlete at all stages of the process. If a school can utilize SAF money received from the NCAA to pay for the premium, it should also be permissible for schools to use SAF money to pay the normal rates charged by a financial advisor or an attorney to serve as the "adult in the insurance room" to protect the student-athlete.

Endnotes

1 Student-athletes should probably be concerned with how their school pays for their insurance policy, because there may well be some unintended and unknown income tax consequences associated with a third party paying for a disability insurance policy where the student athlete is the policyholder.

2 White v. NCAA, No. 06-999, Docket No. 72, 3 (C.D. Cal. Sept. 20, 2006).

3 Of the $66.3 million in SAF money distributed in 2017-2018, approximately one-quarter of the money covered "Health and Safety Expenses," which included payments to secure disability insurance for student-athletes, and that component was second only to the 48% spent on educational expenses. The remaining SAF expenditures were divided between personal and family expenses (14%), academic enhancements (6%), and unused funds (6%). Several years ago, when the annual SAF distributions totaled $51 million, the SEC received $3.8 million to be distributed among the fourteen schools, and that amount was second only to the amount received by the Big Ten Conference. *See* NCAA 2018 Division I Revenue Distribution Plan, https://www.ncaa.org/sites/default/files/2018DIFIN_DivisionI_RevenueDistributionPlan_20180508.pdf.

4 Rawleigh Williams, III v. Underwriters at Lloyd's London, No. 2018-1225-1 (Ark. Cir. May 1, 2018).

5 Exclusion No. 3, which is dated May 2, 2017, expressly states that it "is effective March 10, 2017"; the inception date of the policy. This confirmation is interesting in light of the arguments staked out by Lloyd's in its motion to dismiss, because Lloyd's contends that the policy terminated on April 10, 2017, and it was not reinstated until May 4, 2017. If that is true, then why did ISI make the May 2, 2017, exclusion effective back to the original inception date for a policy that, according to Lloyd's, was not even in effect at the time the never-before-seen exclusion was drafted and signed?

6 *See* Richard C. Giller, *Lessons From 4 Recent Athlete Insurance Lawsuits*, Sports Law360, Insurance Law360, Insurance UK Law360, May 10, 2018.

7 This author is hopeful that the case will end positively for Mr. Williams.

8 It is unclear whether the link between a school and an "exclusive" retail insurance broker might violate NCAA Bylaw 12.3.2.