



NAME, IMAGE, AND LIKENESS ("NIL") INSTITUTIONAL REPORT

AUGUST-SEPTEMBER 2022

"With NIL comes many new opportunities and challenges for college sports. The LEAD1 NIL Institutional Report helps our members navigate through these changes."

—Tom McMillen, President and Chief Executive Officer of LEAD1 Association

The Need For Student Athletes to Insure Their Current And Future Earnings

By Richard C. Giller, of *Greenspoon Marder*

The landscape of how amateurism in college sports would be defined was forever altered on March 31, 2021, when the United States Supreme Court handed down its unanimous decision in *National Collegiate Athletic Association (NCAA) v. Alston*, striking down NCAA limitations on student-athlete academic benefits such as paying for academic related expenses. To many, the Alston decision provided a clear indication that the NCAA's prohibition against college athletes earning money for playing sports might soon become a thing of the past.

Less than three months after Alston, and just before a number of state "Fair Pay to Play" acts were set to take effect, the NCAA voluntarily adopted an "interim name, image and likeness [NIL] policy" on June 30, 2021, that suspended the prohibition against student-athletes being compensated for their publicity rights. In making the announcement, the NCAA noted: "with this interim solution in place, we will continue to work with Congress to adopt federal legislation to support student-athletes." To date, that has not happened.

Ten months after the interim NIL policy, the NCAA offered additional "guidance" regarding "how current NCAA legislation applied to third parties involved in the recruiting process." The Association published the "Guidance Regarding Third Party Involvement." In it, the Association continued to "maintain rules prohibiting improper recruiting inducements and pay-for-play." The "no pay-for-play" edict is a long-standing theme with the NCAA. However, a closer look at the 2021 NIL policy and the 2022 guidelines reveals an interesting dilemma for the Association.

In offering guidance regarding NIL deals for both prospective and current student

athletes, the NCAA twice states that those agreements "must be based on an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for [1] enrollment decisions ... [2] athletic performance ... [3] achievement ... or [4] membership on a team ..." What the guidelines fail to answer is how can a third party assess the "value that each athlete brings to an NIL agreement" if items (2) through (4) are not taken into account? In other words, what "value" does an athlete who sits on the bench bring to a NIL agreement? A number of NIL deals inked since July 2021, appear to tie compensation to the amount of social media influence or followers a particular student-athlete brings to the table, but then again, how much influence or how many followers can an athlete who sits on the bench bring to a NIL agreement? These are questions left to be answered. The question presented in this article is: how does a student-athlete insure against the contingency of losing his or her loss of current or future earnings because of an injury or illness. The state of college athletics today places the student athlete trapped somewhere between amateur and professional sports.

PROFESSIONAL ENDORSEMENT DEALS – THE NEED FOR INSURANCE

On the morning of February 23, 2021, I was driving to work when I saw an overturned Genesis SUV on the other side of the road. It initially looked as if someone had flipped their vehicle going up the hill which, as I later discovered, was not what happened. Instead, the driver of the SUV had been driving down the hill, lost control, plowed through the center divider, across two lanes of traffic, before coming to rest in the shrubbery. When I later learned that Tiger Woods had been the driver, that he

had survived the crash, and that his injuries, while not life threatening, were significant enough to impact his golfing future, I put on my insurance recovery lawyer hat and thought, "I sure hope Tiger had an insurance policy in place to cover the income he was going to lose."

Like many professional athletes, Tiger Woods earns a significant amount of income through endorsement deals. During the 2019-2020 PGA season, Tiger earned \$2.1 million in prize money but he made \$60 million from endorsements. NBA, NFL, and MLB players also earn a great deal of income through endorsements. For example, last year a number of NBA stars including LeBron James, Kevin Durant, Steph Curry, and Giannis Antetokounmpo, each earned as much, if not more, from endorsement deals than they did from their NBA contracts. LeBron earned \$70 million in endorsements. While NFL and MLB endorsement deals are not as lucrative, the top five NFL endorsement deals range from \$11 to \$45 million per year. The top MLB endorsement deals range from \$2.5 to \$5 million per year with Shohei Ohtani's \$20 million in endorsements being the outlier.

Professional athlete endorsement deals often include a "pay-for-play clause." In a typical NBA deal for example, the sponsor is entitled to reduce the compensation based on the percentage of games in which the athlete plays. The player earns 100% of the deal if he plays in at least one minute of 70% of his regular season games. However, if the player misses 25 and 41 games, the compensation drops to 75% and continues to drop as playing time decreases. To insure against the drop in endorsement compensation because of an injury or illness, a professional athlete can purchase either a temporary total disability insurance policy or a cancellation/non-appearance policy which might pay them between 60% and

95% of the total endorsement deal caused by an injury or illness. That takes us to the current state of endorsement deals in college sports.

NIL DEALS IN COLLEGE SPORTS – NO NEED FOR INSURANCE

Because of the NCAA’s prohibition against “pay-for-play,” NIL endorsement deals are fully guaranteed. Indeed, on August 16, 2022, LSU quarterback Myles Brennan retired from football and, according to sports business analyst Darren Rovell, Brennan became the “first prominent player in the short history [of NIL] to get paid and never step on the field. Brennan, who only played in three games for LSU in 2020, signed at least five NIL deals in 2021 for an undisclosed amount. Brennan gets to keep the NIL money even though the “value” he brought to those NIL agreements now appears to be virtually nothing. Because college NIL endorsement deals cannot contain pay-for-play provisions, student-athletes do not need to purchase insurance to protect those deals.

It is difficult to gauge just how much college NIL deals are worth and, while \$50,000 or \$100,000 a year in NIL money paid to a top prospect or a current player sounds like a lot of money to an 18 to 21 year old athlete, the NIL dollar amounts pale in comparison to what those athletes could make as professionals.

The number one overall pick in the 2022 NFL Draft signed a 4-year, \$37.3 million contract (excluding endorsement deals). The last pick in that draft signed a \$3.7 million contract. As a result, top student-athletes who could be first or second round NFL, NBA, or MLB draft picks should strongly consider purchasing a permanent total disability (PTD) insurance policy with a loss-of-value (LOV) rider to insure against a drop in contract value because of an injury. As noted, the first pick in this year’s NFL draft signed a \$37.3 million contract as compared to the \$15 million contract the 16th pick signed or the \$11.5 million contract signed by the last pick of the first

round. In other words, if an athlete drops from a top five pick to the last pick in the first round, the loss of income could total more than \$20 million and LOV insurance coverage is available with schools footing the premium bills.

PTD, LOV, AND CRITICAL INJURY INSURANCE COVERAGES

PTD insurance covers an athlete who suffers an injury or illness that ends their athletic career while LOV covers against an injury or illness that can be overcome but downgrades an athlete, sometimes temporarily, and can impact the value of his or her first professional contract. In 2014, several schools unilaterally decided to use money they received from the NCAA Student Assistance Fund (SAF) program -- money earmarked to help student-athletes pay for unexpected and extraordinary expenses such as bereavement travel, child care, summer school tuition, a laptop, or utility bills -- to pay the insurance premiums for combined PTD/LOV policies that protected the future earnings of a handful of high-profile student-athletes.

I predicted in an article last year that, under Alston, “schools no longer have a cap on what they can spend on insurance policy premiums for their top student athletes” and that such payments should now come from the school’s general fund rather than from the student assistance fund as it has since 2014. This means that more athletes would have access to appropriate insurance products to protect their future earnings. My prediction recently came true when the NCAA approved the use of general funds to pay for insurance premiums.

Finally, Critical Injury (CI) insurance, while a relatively new product having been introduced in 2019, presents a third insurance option for student-athletes to protect their earnings. Like LOV coverage, CI is a rider to a PTD policy, but CI coverage pays a pre-determined benefit amount for specifically listed injuries. The injuries are broken up into two categories. If an athlete suffers a Category One injury (like a torn

anterior cruciate ligament for example) he will receive a lump sum payment of between \$250,000 and \$500,000. For a lesser, Category Two injury (like, for example, a torn pectoral muscle), the payout is typically between \$100,000 and \$200,000.

CONCLUSION

During oral arguments in Alston, Justice John Roberts posed the following question to counsel for the NCAA: “schools can pay up to \$50,000 for a \$10 million [PTD/LOV] insurance policy to protect student-athletes for future earnings. Now that sounds very much like pay-for-play. You know, you’re – you’re paying the insurance premium so that they will play at college and not in the pros. Doesn’t that undermine the amateur status theory you have?” It is a fair question that remains unanswered and the survival of the NCAA’s prohibition against “pay-for-play” may well be the next domino to fall.



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