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USC Case May Reshape Student-Athlete Insurance Landscape

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Richard C. Giller

In what may be the first lawsuit of its kind, former University of Southern California standout football player and NFL prospect Morgan Breslin recently filed a complaint against the university alleging that the school failed to properly advise him in connection with the procurement and scope of a loss-of-value (LOV) disability insurance policy that Breslin purchased while at USC. The policy, designed to protect against the negative impact a possible injury Breslin might suffer in college could have on the value of his first NFL contract, was issued by a member of the insurance market commonly known as Lloyd's of London.

Breslin suffered a serious injury during his senior season at USC and, as a result, went undrafted in the 2014 NFL Draft. Lloyd's denied Breslin's LOV claim. After being sued by Lloyd's and after filing his own lawsuit against the carrier, Breslin brought his recent suit against USC claiming that the school acted much like an insurance broker in helping him procure his LOV policy but breached certain duties purportedly owed to him while acting in that capacity.[1] As discussed in this article, it may be an uphill battle for student-athletes to establish that the schools for which they once competed should be held liable for the assistance they provided in securing the requested coverage.

As a general proposition, absent the existence of a "special relationship" between an insurance broker and a policyholder, the former only owes the latter the duty to timely obtain the type and amount of insurance protection requested by the policyholder to cover the risks involved. In his complaint, Breslin claims the existence of a special relationship between himself and USC and further claims that, as a result, the school should be held liable beyond the general duty described above for the assistance it provided.

For example, Breslin alleges that USC knew or should have known that the LOV policy "would not provide adequate coverage to Breslin, as among other things these policies [are] rarely paid by the insurer." He also claims that "USC knew or should have known the policy would not afford Breslin adequate coverage compared to the risk Breslin was taking by choosing to play for USC another season. And, more significantly, USC knew or should have known the policy would not pay out if Breslin made a claim." Breslin's Aug. 28, 2015, lawsuit presents novel legal theories arising out of the student-athlete insurance setting that could have far-reaching implications.

Breslin transferred to USC in 2012, after two seasons at a junior college. He started all 12 games at

defensive end during his first year at USC and was among six finalists for the Hendricks Award, given to the nation's top defensive end. Following that season, Breslin was viewed by many as one of the premier pass rushers in the country and, had he declared himself eligible for the 2013 NFL Draft, he was projected to be a late first or early second round draft pick. Breslin, however, decided to stay in school and returned to USC for his senior season. He now claims that he made that decision, at least in part, because of assurances he received regarding the protections afforded by the LOV policy.

Breslin suffered a significant injury during the fifth game of the 2013 season, which ultimately required surgery. Instead of being selected in the first or second round of the 2014 NFL Draft, Breslin went undrafted. He later signed a free-agent deal with the San Francisco 49ers but was released by the team and is currently not playing football professionally. Breslin submitted a $3.6 million policy limits claim to Lloyd's under his LOV policy. The carrier rejected the claim, rescinded the policy, and filed an insurance coverage action against Breslin in federal court in New Jersey seeking a determination that coverage was properly precluded. In January 2015, Breslin filed his own lawsuit against Lloyd's in federal court in Los Angeles and, eight months later, he sued USC in Los Angeles Superior Court.

Breslin's state court complaint includes 13 causes of action against USC, including claims for breach of contract, bad faith, fraud, breach of fiduciary duty and both intentional and negligent interference with economic relations. He claims that university officials improperly guided him in the application and procurement process of securing his LOV policy. Breslin also asserts that USC failed to properly document his injury or timely advise Lloyd's of changes in his health. He further alleges that Lloyd's based its denial of coverage for his claim as a direct result of the alleged failures by USC. The accusations leveled against the school include:

- "USC directed Breslin in every step related to the policy, including completing the application for, providing medical and other documentation to the underwriters, acquisition of the bank note to pay for the policy and other things."

- "USC prohibits the student-athlete from communicating directly with insurers offering athletic insurance policies."

- "USC controls all communication between insurers offering athletic insurance' policies and the student-athlete who will buy the policy … through USC's Compliance Department and the Training and Medical Staff."

- "USC has undertaken the responsibility to educate, assist and guide the student-athletes through the process of acquiring an athletic insurance policy."[2]

According to the complaint, Breslin was prohibited by USC and NCAA regulations from retaining an agent or a financial adviser to help negotiate, understand and comply with the terms of the LOV policy. However, as one court has concluded, "insurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status."[3] Breslin also claims that USC was

"aware that the student-athlete does not have a complete college education when presented with an athletic insurance policy. These student-athletes are only just out of their teens and have not completed their college education. Many of the student-athletes are far from home and have limited ability to seek parental input." This is similar to a position this author has advanced; i.e., "one of the inherent problems with LOV insurance is that the policies are being sold to young men who happen to be star athletes at Division I schools but who also have little to no life experience regarding insurance policies, or securing a loan, or most other financial issues."[4]

As noted above, if a court were to determine that a "special relationship" existed between Breslin and USC with respect to his LOV policy, a court could find that the school owed Breslin duties beyond simply securing the requested insurance coverage. But, the burden of demonstrating the existence of a special relationship tends to be extremely high, and very few cases have found that such a relationship in fact existed.

Some courts hold that a "special relationship" exists only under "exceptional and particularized situations" such as where a broker "through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law."[5] Other courts note that "[i]t is the nature of the relationship, and not merely the number of years associated therewith, that triggers the duty to advise. Some of the factors relevant to developing entrustment between the insured and the insurer include: exercising broad discretion to service the insured's needs; counseling the insured concerning specialized insurance coverage; holding oneself out as a highly-skilled insurance expert, coupled with the insured's reliance upon the expertise; and receiving compensation, above the customary premium paid, for expert advice provided."[6]

As defined by California Insurance Code § 33, an insurance broker is "a person who, for compensation and on behalf of another person, transacts insurance other than life, disability, or health with, but not on behalf of, an insurer." The compensation aspect of this definition could prove to be problematic in the athletic insurance setting involving college compliance offices. Indeed, one court has concluded that a special relationship might arise if "(1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on."[7] Breslin's complaint does not allude to compensation being paid to USC.

The application Breslin completed for his LOV policy included a medical history form that listed a number of broadly worded questions. For example, he was asked if he was currently free of injury, illness or discomfort. This inquiry is made even more expansive when viewed through the prism Breslin's life experience; i.e., a high-profile college athlete with the potential of playing professionally who has probably not been completely free of pain or discomfort for years. In fact, most college athletes would probably have to answer "yes" to most of the questions on a LOV application seeking information about pain and discomfort. However, with only one exception (concerning a 2009 foot surgery), Breslin answered "no" to every question concerning prior injuries, pain or discomfort set out on his LOV application.

Lloyd's denied Breslin's claim on two grounds: (1) he failed to inform Lloyd's, as purportedly "required by the policy," that his health had changed between the date he submitted his application (Sept. 3, 2013)[8] and the date the policy was signed by Lloyd's (Nov. 1, 2013); and (2) he purportedly made "material misrepresentations, and/or concealments" in his application which justified voiding the policy

and returning to Breslin the premium payments.

Breslin was injured on Sept. 28, 2013, nearly a month to the day after the effective date of his policy. The carrier claims that coverage did not attach until the policy was actually signed by the carrier; i.e., months after Breslin submitted his application and after he was injured. If that position is upheld, athletes need to be advised about these timing issues or, at a minimum, understand the significance of a conditional binder of insurance coverage. Breslin contends that, because USC had "undertaken the obligation to provide Breslin's medical information directly" to Lloyd's, the school knew or should have known that the Sept. 28 injury had to be reported to Lloyd's and that the school's failure to advise Lloyd's about the injury resulted in denial of his claim. Interestingly, the carrier admits in its New Jersey lawsuit that if Breslin had advised Lloyd's of his Sept. 28 injury, LOV "coverage would not have been offered" to him and, as a result, would have never existed.

Lloyd's also denied coverage based upon alleged misrepresentations, alluding to undisclosed pre-existing conditions, made by Breslin in his LOV application. The carrier claims that the failure to disclose a pre-existing injury or injuries serves as an independent basis for rescinding the policy. In his complaint against USC, Breslin alleges that the school was "the only source of information to the student-athlete regarding these insurance policies" and, because of that, he argues that USC was duty bound to (1) "explain the risks and benefits of athletic insurance policies to the student-athlete" and (2) "ensure that the student-athletes correctly complete the application and related documents and that all medical information that USC provides is complete and accurate." If a court were to determine that USC was acting as an insurance broker on Breslin's behalf and also determines that a special relationship existed between Breslin and USC in connection with that transaction, a court might find that the school owes duties to Breslin beyond simply securing the requested insurance coverage.

This case of first impression could reshape both the landscape of LOV insurance for student-athletes and the role universities or athletic conferences play in helping to procure such coverage for those athletes. The progress of the Breslin v. USC case will be watched carefully by colleges, universities, athletic conferences and student-athletes alike.

—By Richard C. Giller, Polsinelli PC

Richard Giller is an insurance recovery attorney shareholder in Polsinelli LLP's Los Angeles office.

[1] Most insurance policies are sold to consumers through insurance brokers and, therefore, brokers play an important role those transactions. A broker acts an intermediary between the policyholder and the insurance company and helps facilitate the transaction. As a general rule, brokers represent the policyholder as opposed to insurance agents who are typically employed by a single insurer and act on the carrier's behalf.

[2] Breslin's complaint also hints that USC should have talked him out of purchasing LOV insurance and into leaving for the NFL after his junior campaign but failed to do so because, "[t]he benefit to the school is obvious: another high profile player for another year, improvement of the team as a result of the player staying, better opportunity to compete for bowl game and championship game revenue and a multitude of other benefits. In stark contrast, the student-athlete takes all the risk."

[3] Murphy v. Kuhn, 660 N.Y.S.2d 371, 375 (N.Y. 1997).

[4] When one of Breslin's former USC teammates (Marqise Lee) was asked about purchasing LOV insurance, Lee commented: "I didn't really do much of anything. All I did was just sign the paper and that was it. I mean, it's cool. It's just something I did to protect my body." Orange County Register article, "Marqise Lee's Insurance Policy Offers no Guarantees," by Pedro Moura, April 26, 2014.

[5] Murphy, supra, 660 N.Y.S.2d at 375.

[6] Sadler v. The Loomis Co., 776 A.2d 25, 46 (Md. 2001).

[7] See also, Murphy, supra.

[8] Despite the fact that his application was not signed until September 3, Breslin's policy was conditionally bound for the period August 27, 2013 to August 1, 2014.
