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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Insuring Against A Drop In An Athlete's Draft Position

Law360, New York (May 15, 2014, 4:17 PM ET) -- The 2014 National Football League draft ended on May 10, and as sports pundits filed away their 2014 mock drafts to begin working on their 2015 projections, a new trend emerged — college athletes making insurance claims under policies they secured to guard against drop in their draft status because of an injury or injuries they suffered in college. Several high-profile athletes in this year's draft secured "loss of value" disability insurance policies, which are designed to protect against just such a contingency. These specialized policies provide coverage for the gap between the estimated value of what the athlete's initial professional contract could or should have been but for the injury or injuries they suffered and the actual value of the contract they ultimately sign.

Two University of Southern California football stars, Marqise Lee and Morgan Breslin, each reportedly purchased this type of insurance and may well be submitting claims soon because of their drop in draft position.[1] Their claims, and any payouts on their claims, could well be the first of their kind.

Following his sophomore season at USC in 2012, Marqise Lee was projected to be a high to mid-first round NFL draft pick. In 2013, during Lee's junior year, he suffered a knee injury that caused a drop in his production. That knee injury may well have resulted in Lee dropping out of the first round of this year's draft and into the second round. He was not drafted until the 39th overall pick. The salary difference between what Marqise Lee could have made under his first NFL contract had he been a top 10 draft pick instead of the 39th overall pick is dramatic.

Under the terms of the 2011 collective bargaining agreement between the NFL's Management Council and the NFL Players Association, the salary to be paid to rookies under their initial contract is slotted and pre-established based upon the player's specific draft position.

For example, the first pick in the 2014 NFL draft is expected to sign a four-year deal worth a little more than $22 million. In contrast, the 10th pick will sign a deal worth just over $12 million and the last pick of the first round (the 32nd overall pick) will sign a deal worth just under $7 million. The graduating scale continues to decrease with each round and each draft position. It is estimated that Marqise Lee's first

contract will be worth approximately $5 million. In other words, the lost value of Lee's rookie contract could range anywhere from $2 million to $10 million.

While Lee's drop in draft position was dramatic, it was not nearly as precipitous as the drop experienced by his USC teammate, Morgan Breslin. After the 2012 season, Breslin was named USC's Defensive Lineman of the Year and was viewed by many as one of the premier pass rushers in the country. Had Breslin declared himself eligible for the 2013 NFL draft he was projected to be a mid to late-first round pick or an early second round pick. Instead, Breslin chose to stay at USC for his senior year during which he suffered an ankle injury and a serious hip injury that required surgery.

Instead of being selected on the first or second day of last year's draft, Morgan Breslin went undrafted in the 2014 NFL draft. He recently signed a free-agent deal with the San Francisco 49ers which might be for the league minimum of $420,000. In other words, Breslin may well have lost out on millions of dollars because of the injuries he suffered during his final college season.

According to published reports, both Lee and Breslin had secured loss of value insurance policies through Lloyd's of London before being injured. Lee reportedly purchased a $10 million policy and Breslin reportedly purchased a $2 million or $3 million policy. Many of these policies are underwritten by International Specialty Insurance. The "Professional Athlete's Application" found on the ISI website is eight pages long and includes a number of questions and warranties not found on applications for other types of policies.

For example, athletes applying for a loss of value policy are asked whether they have "consulted with a team physician or any other physician" in the last two years "other than for routine examination or team physical," or whether they have "taken any pain reducing or anti-inflammatory medication" in the last two years, or whether they have "suffered any injury sickness or discomfort" in the last year "for which they did not seek out medical advice." These applicants are also asked if they have ever used marijuana or other drugs at any point in their life. The answers to these questions are critically important if the athlete ever hopes to receive an insurance payout.

Finally, the ISI application also requires the athlete to warrant that they are not taking any "performance enhancing drugs or treatment or taking any substances currently prohibited by the World Anti-Doping Agency, the International Olympic Committee or the governing body of their sport" (such as the NCAA for college athletes). As part of this warranty, the athlete applicant agrees that "in the event that either my warranty above proves to be untrue, or I undertake any prohibited performance enhancing treatment or take any substances … during the period of this policy, then this policy will be cancelled" from its inception date.

Having practiced law in the area of insurance coverage for nearly 30 years, this author is all too familiar with the difficulties of securing payments from insurance companies, especially when specialized coverages are involved. These difficulties are further amplified because claims arising under loss of value disability policies for professional athletes involve payouts that are significantly greater than the premiums obtained and because paying off on a particular claim could create a precedent insurance

companies would rather not establish. Lee and Breslin could soon be seeking to become among the first NFL players to recover under a loss of value policy.

Based upon the size of the potential payouts and the complexities involved in a loss of value policy, it would be naive to think that an affected player could simply submit a claim and the insurance company would issue a check in the amount requested. Insurance companies routinely seek to minimize or eliminate their payments obligations and this type of claim would be no exception. Indeed, it is not difficult to imagine the substantial hurdles that the issuing insurance company may construct before paying out on one of these policies.

The amount of the recoverable loss could well become an issue in this type of claim. While the dollar amount of the contract the insured athlete ultimately signs is readily ascertainable, as are the dollar amounts paid to earlier draft picks, an insurer might seek to minimize its loss by claiming that a player's pre-injury draft position was based on speculation and conjecture, thereby, triggering a battle over the amount recoverable under the policy.

In 1994, the NFL created a Draft Advisory Board, consisting of a panel of general managers and personnel directors from a number of NFL teams along with professional football scouts, to assist college athletes when deciding whether or not they should leave college early. The DAB offers advisory opinions, as to the likely level of demand for the players' services during a particular draft year. For example, the DAB may issue an opinion that a player has the potential to be picked in the first round, or as high as the second round, the third round, after the third round or go undrafted.

This type of an assessment is clearly important when deciding whether to leave college early and it may be helpful in pursuing an insurance claim, but the value of the insurance claim varies by the 32 selection slots within a particular round, not by the number of the round itself. Assuming that Marqise Lee ultimately signs a $5 million rookie contract, a fight may well ensue over whether he can affirmatively establish the exact draft position where he might have been selected had he not suffered the knee injury; i.e., was it closer to the number one overall pick at $22 million or to the last pick of the first round at just under $7 million. The difference is of such significance that it could result in litigation.

Causation is another issue that may crop up. An insurance company could contend that a drop in draft position was not caused by concerns over an injury the athlete suffered in college but, instead, was simply the result of the vagaries of the NFL draft, including the particular needs of the teams drafting before and after the player was selected, the other players available at the time of the selection, whether any off the field issues arose, to name just a few. Insured athletes who purchase a loss of value policy should be prepared to counter these arguments and others.

Finally, in this author's experience, when other avenues for denying a claim under a personal lines policy (life, disability, loss of value) are foreclosed, insurance companies often seek to rescind the policy based upon a claim that the policyholder either concealed a material fact or misrepresented a material fact on the application for such a policy. Indeed, most states acknowledge some version of the rule that, when an applicant conceals or misrepresents a material fact on an insurance application, the insurance

company is entitled to rescind the policy from its inception.

There are three factors in determining whether an insurance company has the right to rescind a policy: (1) whether the insured misrepresented or concealed information in his application; (2) whether the misrepresented or concealed information was material; and (3) whether the insured knew that it had made the material misrepresentation or concealment. Establishing materiality often turns on the subjective question of whether such information would have caused the underwriter to reject the application, charge a higher premium, or amend the policy terms, had the true facts been known.

As noted above, the ISI application is nothing if not thorough. Imagine the fight that might ensue over a "no" answer to the question on the application as to whether the athlete applicant had ever, at any time in his life, used marijuana, and the insurance company later learns that the athlete had been issued a single $100 traffic citation when he was 17 years old arising from possession of less than 15 grams of marijuana which was in the possession of a friend of his while the athlete was driving to his high school prom. Clearly, such a citation has absolutely no bearing on whether a significant football related injury caused a drop in his draft stock, but an insurance carrier could try to use this "misrepresentation" as grounds to rescind the policy and, in so doing, cite to authority for the proposition that the fact the carrier asked the question in its application is, by itself, sufficient to establish materiality.

Submitting a claim under an insurance policy providing coverage for the diminished value of a rookie contract because of a drop in draft position is likely to evoke a negative reaction from the insurance company. This is especially true because the insurer may be asked to pay out millions of dollars on a policy where the carrier only charged tens of thousands of dollars in premiums. In other words, these types of claims could and likely will generate an inevitable battle with the insurers that could result in litigation. The athletes involved, and their representatives, should be prepared to respond to denials from the insurance carriers or the insurers attempts to minimize the alleged damages. It is likely that significant hurdles will be placed in the way of securing a payout and professional assistance may be needed to fight those battles.

—By Richard C. Giller, Polsinelli PC

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

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[1] It has also been reported that current UCLA Bruins football star Myles Jack and Oregon Duck defensive lineman Arik Armstead have each secured a $5 million loss of value insurance policy.
