

Legal Issues in

COLLEGIATE ATHLETICS

A Report of Court Decisions, Legislation and Regulations Affecting Collegiate Athletics

The Curious Insurance Case of Nyeem Wartman-White

By Richard C. Giller, Esq.

On May 17, 2017, former Penn State University linebacker and current undrafted NFL free-agent Nyeem Wartman-White filed a lawsuit against International Specialty Insurance, Inc. in federal court in Pennsylvania seeking a payout under a \$1 million permanent total disability (PTD) insurance policy covering the period August 9, 2016 to August 1, 2017, or until Wartman-White received an offer from and/or signed a contract with an NFL team. As part of his PTD policy, Wartman-White also purchased \$500,000 in loss-of-value (LOV) insurance protection. The two coverages served as a hedge against the possibility that a significant injury sustained by Wartman-White during his fifth and final season at Penn State might either adversely impact the value of his first professional contract (LOV) or preclude him from ever playing professional football (PTD).

A week later, on May 24, 2017, Wartman-White filed a First Amended Complaint deleting International Specialty Insurance, Inc. as the named defendant and inserting, in its place, Certain Underwriters at Lloyd's, London (Lloyd's) subscribing to the insurance policy at issue as the only named defendant. Some news agencies have incorrectly reported that Wartman-White might be entitled to collect the combined insurance policy limits of \$1.5 million but such reports are not accurate because the policy limits for the two types of coverages purchased are mutually exclusive. In other words, Wartman-White might be entitled to receive *either* a \$1 million payout if he is unable to play professional football as a

result of his injury *or* he can recover up to \$500,000 if he receives an offer from an NFL team for less than \$2.8 million over four-years (or \$700,000 per year), but he is not entitled to both limits.

The reason the title of this article includes the word "curious" is three-fold. First, the pre-draft projections for Wartman-White before he purchased his insurance policy forecasted him as a sixth or seventh round draft pick, with a correlating maximum potential 4-year contract ranging from \$2.4 to \$2.6 million so it is peculiar that Lloyd's would agree to provide loss-of-value coverage based upon an anticipated 4-year, \$2.8 million deal which correlates to the maximum contract for a late fourth round draft pick rather than Wartman-White's projection as a sixth or seventh round pick. That insured amount is even more unusual because it equates to 100% of the total contract value of a late fourth-round draft pick and, as a general rule, LOV insurers usually only offer coverage for 60% to 70% of the player's anticipated first or next contract.

Second, in light of his pre-draft predictions, it is curious why Wartman-White chose to purchase \$500,000 in loss-of-value coverage at all when the salary difference between the first pick of the sixth round and the last pick of the entire draft is only \$115,705, and the difference between the last pick of the draft and \$2.8 million is still only \$335,730. In other words, Wartman-White's potential drop in the draft would not appear to justify paying for \$500,000 in LOV coverage. Indeed, he may have been better advised to use his premium money to purchase a

\$2.5 million PTD policy (the full value of his projected draft position) without any LOV coverage, rather than purchasing a \$1 million PTD and \$500,000 LOV policy, the latter coverage appears to have been based upon questionable underwriting.

Finally, it is odd for a litigant, especially in Federal Court, to file a complaint against a specific defendant and to include numerous charging allegations against that named defendant throughout the pleading, just to turn around a week later and switch out the original defendant both in the caption and throughout the pleading for an entirely new entity. It is also somewhat odd to file a breach of contract and insurance bad faith complaint against an insurer that has not yet denied coverage or failed to pay but, instead, is merely alleged to have taken too long to respond to a notice of claim. Paragraph 21 in both versions of the complaint alleges that "[i]t has now been over one hundred and twenty days since Lloyd's received the Notice of Injury from Wartman."

In 2011, Nyeem Wartman was a highly recruited Pennsylvania high school prospect having earned All-America, All-State, All-Region and All-Conference honors as a high school senior. Unfortunately, Wartman-White's career at Penn State was riddled with injuries. He suffered three different season-ending knee injuries during his five-year career with the Nittany Lions and, between 2012 and 2016, Wartman-White was only able to play in 30 of the 64 games the school played during that time period. As a true freshman in 2012, Wartman-White sprained his knee on the opening kickoff of the second game

of the season and missed the remaining 10 games that year. News reports fail to indicate which knee he sprained in 2012 but he was awarded a medical redshirt by the NCAA after the 2012 season which allowed him to retain his freshman status the following year and maintain all four years of eligibility.

He appeared in all 12 games of his redshirt freshman year (2013), making eight starts. The following season (2014), Wartman-White started 12 games, but missed a game against Northwestern because of an injury to his right arm which required both a sling and a cast on his right wrist. He added the hyphenated “White” to his name as a Mother’s Day gift in 2015. During the second quarter of the opening game against Temple on September 4, 2015, Wartman-White tore the anterior cruciate ligament (ACL) in his left knee and missed the rest of the season. He graduated in December 2015 with a degree in telecommunications.

The month before the start of Wartman-White’s fifth and final season at Penn State, he secured the PTD/LOV insurance policy discussed above through Ronnie Kaymore and his company KPM Sports, an insurance producer/retail broker out of Newark, New Jersey. It appears from Wartman-White’s amended complaint that International Specialty Insurance, Inc. (ISI) acted as a wholesale insurance broker in connection with the placement of his PTD/LOV policy with Lloyd’s.

A wholesale broker (ISI here) is a broker who acts as an intermediary between the producer/retail broker (Kaymore and KPM here) and an insurer (Lloyds), but who usually has little to no direct contact with the applicant (Wartman-White). Wholesale insurance brokers are normally used to place business brought to them by producers/retail brokers because the wholesale broker often possess specialized expertise in a particular line of coverage or in a line of coverage that is unusual (like disability and loss-of-value policies

for collegiate and professional athletes) and/or because the wholesale broker has greater access to, or influence with, certain insurance markets.

According to an article that appeared on the website www.pennlive.com on May 1, 2016 — three months before inception of Wartman-White’s PTD/LOV policy and 4½ months before his second ACL tear — “Wartman-White could find a home as a linebacker at the next level; that’s evident by the fact that *some sites have him as a seventh-round pick already*, a pretty good start for a guy that missed the entire 2015 season.” Around the same time, the website www.statecollege.com noted: “CBSSports.com has him listed as the No. 17 inside linebacker in the 2017 draft, while WalterFootball.com ... has Wartman-White as the No. 16 outside linebacker, *slated to go between the sixth round and signing as a free agent.*”

On September 17, 2016, five weeks after inception of his 2016-17 insurance policy, Wartman-White tore the ACL in his other knee (the right knee this time) during the first quarter of the third game of that season which, coincidentally, was also against Temple. He missed the remaining eleven games of the 2016 season. Because of the ACL tears in both knees, Wartman-White was only on the field for two full games (and parts of two others) during the last two seasons of his five-year Penn State career. Following the 2016 season, Wartman-White chose to forego seeking another redshirt medical exemption to allow him to play a sixth season of college football and, instead, declared himself eligible for the 2017 NFL Draft.

In practice, insurers offering loss-of-value coverage usually agree to insure 60% to 70% of the applicant’s anticipated first (or next) professional contract, rather than covering 100% of that projected contract. The contract value insured is sometimes referred to as the “threshold” amount. Here, the threshold amount listed in the subject policy was a 4-year, \$2.8 million

deal which translates to 70% of a 4-year, \$4 million contract. In other words, under normal underwriting criteria for these types of policies, Wartman-White needed to be projected as a late-second or early third round draft pick in order for him to have signed a 4-year, \$4 million deal. The last pick of the second round of the 2017 NFL Draft signed 4-year, \$4,158,152 contract and the first pick of the third round signed a 4-year, \$3,097,264 contract.

According to the NCAA, “Exceptional Student-Athletes” for whom loss-of-value insurance may be well suited, are those athletes who are projected to be drafted in the first round of the NBA, MLB or WNBA drafts, or potential first, second or third round picks in either the NFL or NHL drafts. This is because the purpose of LOV coverage is to insure against a catastrophic drop in a student-athlete’s draft position resulting in a corresponding drop in the value of his/her first professional contract as a result of a significant injury. For example, the contract difference between the 7th overall pick in the first round of the 2017 NFL Draft (a 4-year, \$19.7 million deal) and 27th overall pick also in the first round (\$10 million) or the 70th overall pick in the third round (\$3.7 million) are so significant that LOV coverage could be critically important. Thus, protecting the significant difference between the projected draft slot in the first round of the basketball and baseball drafts

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or the first three rounds of the football and hockey drafts, and the actual draft position of the insured athlete is where LOV coverage works best. However, for student-athletes like Wartman-White who are not projected to fall within these early round parameters, an appropriate level of PTD coverage sufficient to insure the entire value of their potential first contract based upon an accurate projected draft position, without paying an extra premium for LOV coverage, may be the better option.

It does not appear that any draft projections for Wartman-White after his 2015 injury but before his 2016 injury had him going higher than the sixth round; they clearly did not predict him to be drafted in the second or third rounds. These types of valuations, predictions and projections are usually performed by the wholesale insurance broker (ISI here) or, sometimes by the retail broker (Kaymore/KPM Sports). Given the post-2015 and pre-2016 injury sixth round draft projections, the maximum contract that Wartman-White was likely to sign was a 4-year deal worth approximately \$2.6 million assuming he was drafted in the sixth rather than the seventh round. Applying a 70% LOV underwriting rule of thumb to this projection, the maximum threshold amount for Wartman-White should probably have been a 4-year deal worth \$1.82 million and, with such a low threshold, it would have made little to no sense for Wartman-White to have purchased separate LOV coverage.

Prior to the 2017 NFL Draft, which was held in Philadelphia on April 27 through April 29, Wartman-White was still rehabilitating from his 2016 season ending ACL injury and was only able to perform soft running drills for NFL scouts during a pre-draft workout at Penn State.

Wartman-White was not one of the 253 players drafted during the seven rounds of the 2017 NFL Draft. As a result, he fell into the pool of undrafted free agents but as of the writing of this article he had not yet signed a contract with a NFL team. With NFL training camps about to begin, it does not appear that Wartman-White will be on the roster of any NFL team at the start of the upcoming season.

For the past several years, this author has been a consistent and outspoken supporter of exceptional student-athletes securing disability insurance policies (with appropriate and sufficient policy limits) and, where appropriate, purchasing additional LOV coverage protect some of future earning capacity for those athletes. Consistent with that role, I am hopeful that Wartman-White will ultimately receive the insurance benefits to which he is entitled. Further, as one of the few lawyers in the country who has secured payouts for a number of professional athletes under these types of insurance policies, this author is all too familiar with the arguments proffered by insurance companies seeking to deny or limit those payouts based on two primary claims; *i.e.*, there were misrepresentations or omissions relating to the applicant's medical history in the insurance application and/or the insurer was provided with false or fraudulent information during the underwriting process to support the proposed LOV threshold amount.

In this author's opinion, student-athletes like Wartman-White are not well served in the selection of insurance coverages and limits if, after suffering a significant injury during the policy period that results in a precipitous drop in their draft position, they are then forced to defend against either or both of the standard insurance company arguments as a means of trying avoid paying the ap-

propriate policy limits. As a way to combat these arguments, what is needed during the procurement and placement process in this insurance space appears to be open, honest, disinterested, impartial and dispassionate communication between and among all of the participants involved, including the student-athlete, members of the athletic and compliance offices at the schools, the insurance producers and retail brokers, the wholesale insurance brokers and, ultimately, the insurance companies writing these types of policies. The young men and women student-athletes who are named insureds under PTD/LOV policies, and who believe that they are properly protected against the adverse impact a significant injury during their final collegiate season might have on their first professional contract, are entitled to the peace of mind that they are actually and adequately protected against such contingencies. They should not continue to participate in their respective sports under a false sense of security they are protected when, all too often, such protection turns into a pitched battle or litigation to obtain the policy benefits they are entitled to receive. ■



Richard Giller, Esq. is an insurance recovery shareholder in the L.A. Office of the Polsinelli law firm, with over 30-years of experience in insurance disputes. Contact him at RGiller@polsinelli.com