

EVEN I CAN'T COVER ME: EXAMINING THE NCAA'S EFFECTIVE PROHIBITION ON "LOSS OF VALUE" INSURANCE FOR ITS STUDENT-ATHLETES

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This Note analyzes the NCAA's effective prohibition on student-athletes exploring outside insurance to cover the loss of value of their athletic talents. Currently, the vast majority of collegiate athletes are only permitted to obtain insurance for career-ending injuries. Existing NCAA Bylaws serve to effectively prevent these individuals from protecting themselves against value or earnings potential-reducing injuries. This situation is of particular concern because of the importance and prevalence of intercollegiate athletics as a (sometimes mandatory) step toward a career in professional sports. This Note examines the NCAA's current insurance structure and the rationales for this system, which includes an effective prohibition against obtaining loss of value insurance to guard against losses in earnings. It then explores why this bar should be lifted and how current student-athletes could mount a challenge, as well as possible remedies and the implications of a successful challenge. Finally, it discusses how the NCAA and its member institutions could go about implementing a loss of value insurance program, should they choose or be required to do so, and what concerns would arise.

I. INTRODUCTION

The debate over the exploitation of college athletes has carried on for decades. Athletes, administrators, school presidents, parents, and countless other invested parties have wrestled over whether athletes are adequately compensated for their financial contributions to their schools. Supporters of compensating athletes contend that these young men and women put their bodies (and future livelihoods) at risk to earn millions of dollars for their institutions. Opponents contend that these athletes are

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already compensated with a “free ride” in the form of an athletic scholarship and the opportunity to showcase their talents on a national stage.

While there may soon be a legal conclusion to this debate,¹ athletes are further harmed when they are denied the opportunity to protect themselves against future losses. Though the National Collegiate Athletic Association (hereinafter “NCAA”) currently provides medical and disability insurance to all of its athletes, coaches, managers, trainers, and cheerleaders,² it does not provide loss-of-value-insurance.³ Though there is an extra coverage policy available to a select portion of athletes,⁴ it too only covers permanent total disability. Thereby, the vast majority of individuals do not have access to benefits that would protect them should they suffer an injury that only impairs their athletic ability.

Many of the arguments that apply in the student-athlete compensation debate are also pertinent to a discussion of loss of value benefits. Since many American professional sports leagues require athletes to wait anywhere from one⁵ to three years⁶ after completing their high

¹ See generally *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955 (N.D. Cal. Aug. 8, 2014), *appeals filed*, No. 14-16601 (9th Cir. Aug. 21, 2014), No. 14-17068 (Oct. 21, 2014).

² See *Student-Athlete Insurance Programs*, NCAA, <http://www.ncaa.org/about/resources/insurance/student-athlete-insurance-programs> (last visited May 20, 2015) [hereinafter “NCAA Insurance Programs”].

³ Zach Schonbrun, *Injury Raises Questions About Insurance for College Stars*, N.Y. TIMES, Feb. 14, 2013, http://www.nytimes.com/2013/02/15/sports/ncaa-basketball/injury-to-nerlens-noel-raises-questions-about-disability-insurance-for-athletes.html?_r=0.

⁴ See NCAA Insurance Programs, *supra* note 2.

⁵ Per a rule instituted in 2005, in order for an individual to be eligible for the National Basketball Association (hereinafter “NBA”) draft, he must be at least 19 years old “during the calendar year in which the Draft is held” and, if the player is not an international player, “at least one (1) NBA Season has elapsed since the player’s graduation from high school.” NBA COLLECTIVE BARGAINING AGREEMENT art. X, § 1(b)(i) (2011), available at <http://nbpa.com/cba/>; see also *O’Bannon*, 7 F. Supp. 3d at 967–68 (discussing how basketball recruits are effectively forced to play for NCAA programs because they cannot enter the NBA out of high school).

⁶ There are similar rules concerning athletes’ eligibility for the National Football League (herein after “NFL”) and Major League Baseball (hereinafter “MLB”) drafts which, in certain circumstances, require athletes to wait at least three years after completing their high school degree in order to become draft-

school degree before they are eligible to turn pro, these individuals, depending on their sport, are automatically deprived of potential earning capacity. The lack of comparable alternative options to college athletics effectively forces these individuals to play collegiate sports if they have any hopes of pursuing a professional career.⁷ Should an athlete choose to forego playing his sport after high school until he is draft-eligible, he would presumably see his draft position reduced due to a perceived loss in ability, potential, talent, and missed opportunities for growth and development in the eyes of the professional teams he is hoping to join.⁸ This process has

eligible. The rule instituted by the NFL mandates that athletes wait at least three years after high school before they may enter the draft. NFL COLLECTIVE BARGAINING AGREEMENT art. 6, § 2(b) (2011), *available at* http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CB_A_Searchable_Bookmarked.pdf. The MLB rule provides athletes with a choice: they may either declare themselves eligible for the draft immediately out of high school, or, if they decide to attend college, they must then complete, in order to become draft-eligible, either their junior year if attending a four-year college or at least one year if attending junior college. *First-Year Player Draft*, MLB.COM <http://www.mlb.com/mlb/draftday/rules.jsp> (last visited May 20, 2015); *see also O'Bannon*, 7 F. Supp. 3d at 967–68 (discussing how football recruits are effectively forced to play for NCAA programs because they cannot enter the NFL out of high school).

⁷ Basketball and football recruits who are skilled enough to play NCAA Division I athletics “do not typically pursue other options for continuing their education and athletic careers beyond high school”, such as other college or professional leagues, because “[n]one of these other divisions, associations, or professional leagues . . . provide the same combinations of goods or services offered by FBS football and Division I basketball schools.” *O'Bannon*, 7 F. Supp. 3d at 967; *see also* Scott Kacsmar, *Where Does NFL Talent Come From?*, BLEACHER REPORT (May 16, 2013), <http://bleacherreport.com/articles/1641528-where-does-nfl-talent-come-from> (explaining that only two of the 1,947 players who played at least one game in the NFL in 2012 did not play in college); Jay Schalin, *SCHALIN: Time for Universities to Punt Football*, WASH. TIMES, Sept. 1, 2011, <http://www.washingtontimes.com/news/2011/sep/1/time-for-universities-to-punt-football/> (discussing the success of MLB subsidizing its own minor league system and the academic success of college baseball players versus their football counterparts).

⁸ For example, each of the 254 players taken in the 2013 NFL Draft and each of the 256 players taken in the 2014 NFL Draft played football collegiately. *2013 NFL Draft Pick List and Results*, ESPN, http://espn.go.com/nfl/draft/rounds/_/year/2013 (last visited May 20, 2015); *2014 NFL Draft Pick List and Results*, ESPN, http://espn.go.com/nfl/draft/rounds/_/year/2014 (last visited May 14, 2015).

created a reality in which collegiate athletic teams effectively function as “feeder” programs for professional leagues.⁹ Essentially, regardless of whether an athlete is ready to turn pro out of high school, he is forced to wait, and if he wants to have a chance to realize the professional dream at the end of that waiting period, he must play somewhere in the interim. His best (and effectively only) option is to seek a spot on a collegiate team where he will be barred from earning any direct income as a result of athletic performance while remaining exposed to the same injury risks that would be present if he were playing for a professional team.

However, this Note does not address the issues relating to student-athlete compensation as a whole. Rather, it specifically focuses on whether or not these athletes should be provided, or at least entitled to obtain, loss of value insurance for their future earnings. The college athlete, stuck between wanting to ensure his health and well-being in hopes of a professional career and wanting to do everything possible to bolster his chances of making it, is left unable to fully protect his livelihood. He remains protected should disaster strike in college, but only if his career is completely ended.¹⁰ If he were projected as a first-round draft pick, thereby enabling him to earn perhaps tens of millions of dollars,¹¹ and then suffered a debilitating injury during his collegiate career which did not render him completely unable to play but still deprived him of some skill, ability, and athleticism, he would stand only to earn a fraction of what he previously could and without a means of financial redress.¹²

⁹ 2013 NFL Draft Pick List and Results, *supra* note 8; 2014 NFL Draft Pick List and Results, *supra* note 8.

¹⁰ See NCAA Insurance Programs, *supra* note 2.

¹¹ For example, the first overall pick of the 2013 NFL Draft signed for \$22.19 million, while the last pick of the first round signed for \$6.767 million. 2013 NFL Draft First-Round Picks' Signing Status, NFL (July 30, 2013), <http://www.nfl.com/draft/story/0ap1000000168476/article/2013-nfl-draft-firstround-picks-signing-status>. The 2013–2014 NBA Rookie Contract Scale, which is used to determine the range of potential dollar amounts draft picks can sign for, capped the value of a three-year contract for the number one overall pick at roughly \$16.69 million (120% of the maximum value) while limiting the amount for a contract of the same length for the last pick of the first round to \$2.21 million (80% of the minimum value). 2013 First Round Draft Picks Cap Holds, SHAMSPORTS, <http://data.shamsports.com/content/pages/data/salaries/draftpickcapholds.jsp> (last visited May 20, 2015).

¹² Several student-athletes, originally projected as first overall or otherwise high draft picks, have seen their draft stock (and their earnings) fall substantially

This Note addresses where student-athletes *are not* protected by looking at why athletes who lose everything can protect themselves while those who lose *nearly* everything cannot. First, the Note starts with a general discussion of sports loss of value insurance. Second, the Note then provides an overview of the current NCAA Catastrophic Injury Insurance Program, as well as an explanation of the specialized Exceptional Student-Athlete Disability Insurance program available to select college athletes. Third, the discussion includes a brief explanation of what the NCAA deems to be “impermissible benefits” and examines the specific NCAA Bylaws that work in conjunction to effectively bar student-athletes from purchasing loss of value insurance. Fourth, the Note lays the groundwork as to how student-athletes could successfully challenge for the right to obtain loss of value insurance free from restriction and the legal and policy arguments that could be made in their favor. Fifth, possible remedies and suggestions for how the NCAA and its member institutions could effectively implement a loss of value program, should they choose or be forced to do so, are explained. Sixth, the Note examines the likely impact that the creation of a loss of value insurance program (or a private equivalent) could have for NCAA athletes, its member institutions, and the insurance industry. Finally, the Note addresses the possible concerns arising from the implementation of such a program.

after suffering an injury in college. Former Kentucky center Nerlens Noel, projected as the number one pick in the 2013 NBA Draft, suffered a torn ACL during his 2012–13 freshman season and ended up being drafted at number six overall, a slide that cost him nearly \$5,622,100 of guaranteed money in his first two seasons alone. Neal J. Leitereg, *How Much Money Did Nerlens Noel's Draft-Night Slide Cost Him?*, EXAMINER.COM (June 29, 2013), <http://www.examiner.com/article/how-much-money-did-nerlens-noel-s-draft-night-slide-cost-him>. Former South Carolina football player Marcus Lattimore, projected by most analysts to be a late first-round pick and the first running back taken in the 2013 NFL Draft, tore his left ACL in 2011 and then his right ACL the following season and fell to the fourth round, securing a \$2.4 million contract, only \$300,584 of which was guaranteed, rather than the contract in the \$7.5 million range typically given to late first-round picks. Darryl Slater, *Marcus Lattimore Will Get to Play with Another Comeback Running Back, Frank Gore, in San Francisco*, POST & COURIER, Apr. 28, 2013, <http://www.postandcourier.com/article/20130428/PC20/130429278/1037/marcus-lattimore-will-get-to-play-with-another-comeback-running-back-frank-gore-in-san-francisco&source=RSS>.

II. BACKGROUND

A. ATHLETIC LOSS OF VALUE INSURANCE

While there are different types of sports loss of value policies,¹³ student-athletes typically pursue a specific type of coverage commonly referred to as a “loss of draft position” provision.¹⁴ For purposes of this Note, “loss of value” shall only refer generally to loss of draft position coverage, as this form of protection is the only one relevant to collegiate athletes. This coverage is aimed at protecting athletes who are drafted lower than they likely would have been had they not suffered some sort of injury or illness that affected their athletic ability.¹⁵ To obtain loss of value coverage, it must be combined with a disability policy.¹⁶ Despite the appeal of such protection, the prevalence of these policies has decreased in recent years, due in large part to the current economic situation in the United States.¹⁷

In order for the student-athlete to collect on the loss of value policy, the suffered injury “must be serious and lasting.”¹⁸ In order for an injury to be considered serious, it must “negatively affect the player’s skills in a manner that causes substantial and material deterioration in his or her

¹³ Glenn M. Wong & Chris Deubert, *The Legal & Business Aspects of Career-Ending Disability Insurance Policies in Professional and College Sports*, 17 VILL. SPORTS & ENT. L.J. 473, 495–96 (2010). There are two other common types of sports loss of value policies available only to professional athletes, mostly due to the fact that they turn on contractual earnings and free agency, two concepts which are unique to professional sports leagues. The first type of professional loss of value coverage protects a player who is nearing free agency by setting a “threshold amount of value lost based on the player’s most recent contract offer.” *Id.* The policy requires that the player miss a certain amount of games and that the next contract offer subsequent to the injury or illness is less than the threshold amount. *Id.* The second type of coverage involves agreeing to a maximum benefit amount, whereby if the player ends up receiving less than that amount because of injury or illness, the insurer pays the difference. *Id.* The premiums for these policies can be substantial, and are often in the \$100,000 range. *Id.*

¹⁴ *Id.* at 496–97.

¹⁵ *Id.* at 496.

¹⁶ Darren Rovell, *Matt Barkley Had No Insurance*, ESPN (Apr. 30, 2013), http://espn.go.com/nfl/story/_id/9228764/matt-barkley-returned-usc-trojans-insurance-sources.

¹⁷ Wong & Deubert, *supra* note 13, at 496.

¹⁸ *Id.* at 496–97.

ability to perform.”¹⁹ If the student-athlete aims to collect as a result of a sickness, the illness “must negatively affect his or her skills permanently.”²⁰ In other words, the injury suffered must be the cause for the player’s drop in the draft.

The loss of value provision usually kicks in when the insured enters the draft and loses a predetermined amount of value (often 40%) from his predetermined draft value.²¹ The insurer initially determines compensation based on the student-athlete’s anticipated draft position, generally capping the maximum liability limit at 50% of the expected compensation²² or a flat number, typically \$5 million, regardless of the amount of actual financial harm suffered. If the insured is shown to have lost \$5 million or more as a result of his fall in the draft, he is able to collect the full amount.²³ These contracts typically contain a clause that protects the insurer should the insured athlete end up earning more than the anticipated compensation amount during a specified number of years over the course of his professional career.²⁴ If it turns out that the student-athlete, through income and the loss of draft position policy, ends up earning more than the amount he was originally covered for, he is required to return the difference to the insurer.²⁵ It appears that other specific terms of the policy, such as whether the coverage period includes one or two collegiate seasons, are negotiated with each athlete individually.

The process to obtain loss of value coverage for a college athlete projected as a top pick is as follows: the athlete, widely projected to be a

¹⁹ *Id.* at 497.

²⁰ *Id.* There is no threshold requirement that a player must miss a certain amount of games as a professional in order to be indemnified. *Id.* at 496.

²¹ Rovell, *supra* note 16.

²² Wong & Deubert, *supra* note 13, at 497. For example, if the player was expected to be drafted in the top three picks of the upcoming draft and the expected guaranteed income from such a draft spot was \$20 million, the limit on the policy would be \$10 million. Should the player only receive a \$5 million contract due to the injury or illness, the policy would pay the full \$10 million, leaving the player with a total of \$15 million.

²³ Rovell, *supra* note 16.

²⁴ Wong & Deubert, *supra* note 13, at 497.

²⁵ *Id.* Continuing from the example in note 22, *supra*, if the specified term was five years, and the player ended up earning \$12 million in income, this amount, combined with the \$10 million insurance payout, would leave the player with \$22 million in total earnings, or \$2 million more than the original expected amount. Therefore, the player would be required to refund \$2 million to the insurer.

high pick in the draft of his sport's professional league, approaches an independent insurer seeking coverage. The insurer then assesses the athlete's draft stock and assigns him a projected spot.²⁶ Based on the typical guaranteed earnings from the projected draft spot, the insurer then creates a policy that includes both total disability coverage, as required, and a loss of value provision.²⁷ The amount of coverage is limited to a percentage or a maximum (typically \$5 million) and subject to the requirement that the insured loses a percentage of value in the draft.²⁸

For example, a star quarterback who is a consensus top draft pick in the upcoming National Football League Draft would likely be able to secure a total disability policy with a loss of value provision for the significant premium of \$52,000.²⁹ The payout would be either a percentage of lost earnings or a capped total (e.g., \$5 million) depending on the wishes of the insured and the insurer.³⁰ In this hypothetical, based on the projections of his draft position, the quarterback is evaluated to be likely taken fourth overall, which typically nets an estimated \$20 million in guaranteed earnings.³¹ If the quarterback then suffered an injury during that collegiate football season and subsequently fell in the draft, he could collect on the difference between his projected \$20 million and whatever his actual guaranteed earnings are, up to the percentage limit³² or the \$5 million maximum included in the policy.³³

One notable example of an athlete who purchased loss of draft position insurance is former University of Southern California quarterback Matt Leinart. Leinart passed on the 2005 National Football League Draft after his junior year and returned to school, at which point he purchased a

²⁶ Rovell, *supra* note 16.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Chris Larcheveque, Senior Vice President of Sports and Entertainment at Hanleigh Insurance, estimated this premium, as well as the other amounts contained in this example, based on former University of Southern California quarterback Matt Barkley. The estimates are hypothetical, as Barkley did not obtain insurance of any kind for his senior season. *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Wong & Deubert, *supra* note 13, at 497.

³³ Rovell, *supra* note 16.

loss of value policy for himself, presumably with private funds.³⁴ The coverage only kicked in if Leinart, who was slated to go in the top five picks had he come out as a junior, fell past the fifteenth pick in the 2006 draft.³⁵ Leinart fell, but not far enough to trigger the policy, and was taken tenth overall.³⁶

B. CURRENT AVAILABILITY OF ATHLETIC LOSS OF VALUE INSURANCE

Athletic loss of value protection, particularly with loss of draft value coverage, is not widely available.³⁷ Very few insurance companies offer policies to cover an athlete's draft status, and those that do often do so for substantial premiums.³⁸ There is not much available information about the amount of underwriters offering these types of policies or who these underwriters are.³⁹

The limited availability is due to the high risk to the insurers and the lack of profitability.⁴⁰ This results in a limited market because coverage is only aimed at a very select subset of athletes for whom the protection would be viable given the high premiums.⁴¹ The NCAA prohibition presumably has a substantial impact on this, as its requirement that outside financing not be used to secure the coverage⁴² substantially reduces the

³⁴ Darren Rovell, *Source: Marquise Lee insured for \$10M*, ESPN (Aug. 30, 2013), http://espn.go.com/los-angeles/college-football/story/_/id/9614189/usc-trojans-marquise-lee-picks-10m-insurance-policy-source-says.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Shaun H. Crosner, *Elite Student-Athletes Should Take Stock of Their Disability Insurance Needs as They Head into the Summer*, POLICYHOLDER INFORMER (June 27, 2013), <http://www.policyholderinformer.com/2013/06/27/elite-student-athletes-should-take-stock-of-their-disability-insurance-needs-as-they-head-into-the-summer/>.

³⁸ *Id.*; Warren K. Zola, *Does Lack of Real Insurance Drive Players to NFL?*, SPORTS LAW BLOG (Jan. 20, 2011), <http://sports-law.blogspot.com/2011/01/does-lack-of-real-insurance-drive.html>.

³⁹ One known underwriter for these policies is Hanleigh Insurance. Rovell, *supra* note 16.

⁴⁰ Crosner, *supra* note 37.

⁴¹ Zola, *supra* note 38.

⁴² *Id.*

pool of eligible purchasers.⁴³ The result is a vicious cycle where the limited customer base and high risk of the coverage creates high premiums, and these high premiums serve to limit the potential purchasers of such insurance.

C. THE BASIC NCAA STUDENT-ATHLETE DISABILITY INSURANCE POLICY

The NCAA requires each of its member institutions and their respective athletes to maintain medical insurance as a prerequisite for athletic participation and offers its own coverage known as the Group Basic Accident Medical Program (hereinafter “G.B.A.M.P.”).⁴⁴ Students can always be covered through their own family insurance plans, but in the event they are not, institutions must cover their athletes up to the \$90,000 deductible on the Catastrophic Injury Insurance program,⁴⁵ which can be \$75,000 or \$90,000, depending on the source of the basic accident coverage.⁴⁶ The NCAA offers coverage to satisfy the requirement through its G.B.A.M.P., which the schools then offer to their athletes.⁴⁷ Additional coverage is also provided during NCAA championships, insuring student-athletes for up to \$90,000 in medical expenses, which effectively doubles the coverage provided by either the school or the student’s family insurance.⁴⁸ After this level, the Catastrophic Injury Insurance coverage kicks in.⁴⁹

⁴³ The majority of insurers generally do not offer policies for which there is not a large market, as it would likely be cost-prohibitive. The NCAA’s restriction effectively reduces the possible eligible pool for loss of value coverage (college athletes) to zero.

⁴⁴ See *Student-Athlete Insurance Certification Legislation: Overview*, NCAA, <http://www.ncaa.org/about/resources/insurance/student-athlete-insurance-certification-legislation> (last visited May 20, 2015).

⁴⁵ NCAA Insurance Programs, *supra* note 2; *NCAA Catastrophic Injury Insurance Program Frequently Asked Questions*, NCAA, <http://www.ncaa.org/sites/default/files/Cat%2BFAQs%2B8.12.pdf> (last visited Jan. 14, 2015) [hereinafter “Catastrophic Injury Insurance FAQ”].

⁴⁶ *Id.*

⁴⁷ NCAA Insurance Programs, *supra* note 2.

⁴⁸ *Insurance Coverage for Student-Athletes*, NCAA, <http://www.ncaa.org/about/resources/insurance/insurance-coverage-student-athletes> (last visited May 20, 2015).

⁴⁹ *Id.*

The NCAA provides a form of disability insurance to all its athletes, referred to as the Catastrophic Injury Insurance program.⁵⁰ The current program, underwritten by Mutual of Omaha Insurance Company,⁵¹ “covers the student-athlete who is catastrophically injured while participating in a covered intercollegiate athletic activity.”⁵² It contains two different deductible limits: the first is \$75,000 and pertains to schools that participate in the G.B.A.M.P.; the second is \$90,000 and concerns all other eligible institutions.⁵³ The policy automatically covers every active member institution, and the NCAA pays all premiums,⁵⁴ which typically amount to a total of \$10 million annually.⁵⁵

D. THE NCAA’S EXCEPTIONAL STUDENT-ATHLETE DISABILITY INSURANCE PROGRAM

1. Exceptional Student-Athlete Disability Insurance: An Overview

In addition to its Catastrophic Injury Insurance program, the NCAA offers extra insurance coverage to a select subset of college athletes. The permanent total disability policy, known as the “Exceptional Student-Athlete Disability Insurance” program (hereinafter “E.S.D.I.”), was instituted in 1990 but originally only covered football and men’s basketball.⁵⁶ The program was then expanded, first in 1991 to include baseball,⁵⁷ again in 1993 to include men’s ice hockey,⁵⁸ and then a third time in 1998 to include women’s basketball.⁵⁹ The NCAA created the program in an effort to help protect its student-athletes from both injury concerns and attempts by agents to lure the student-athletes away from

⁵⁰ NCAA Insurance Programs, *supra* note 2.

⁵¹ Catastrophic Injury Insurance FAQ, *supra* note 45.

⁵² NCAA Insurance Programs, *supra* note 2.

⁵³ Catastrophic Injury Insurance FAQ, *supra* note 45.

⁵⁴ *Id.*

⁵⁵ Wong & Deubert, *supra* note 13, at 508 (discussing the NCAA’s contribution to its E.S.D.I. policy).

⁵⁶ NCAA Insurance Programs, *supra* note 2.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

school and into the professional leagues.⁶⁰

In order to be eligible for coverage, the athlete first must have “remaining eligibility” at an NCAA institution in “intercollegiate football, men’s or women’s basketball, baseball, or men’s ice hockey”⁶¹ The athlete then must demonstrate that he or she has “professional potential to be selected in the first three rounds of the upcoming National Football League or National Hockey League draft or the first round of the upcoming draft of the National Basketball Association, Major League Baseball, or Women’s National Basketball Association. . . .”⁶² The policy does not explicitly list what criteria is used to determine whether a student-athlete demonstrates “professional potential,”⁶³ but the NCAA often uses professional scouting services to assist in their evaluations, which can be an inexact science.⁶⁴ A look at the list of athletes who have obtained E.S.D.I. coverage in the past appears to show that it requires the display of exceptional talent, high opinions from scouts and a significant level of pre-draft hype.⁶⁵

Athletes can play their way into E.S.D.I. eligibility. If an athlete is evaluated before the start of a collegiate season and found to be ineligible under the E.S.D.I. program, but his play during that season subsequently elevates his status and scouts’ projections to the level necessary for eligibility, he can apply for and obtain coverage in-season.⁶⁶ The policies are written in a way that incentivizes players to want to continue playing their sport, as they will be able to earn more as a professional than they

⁶⁰ Wong & Deubert, *supra* note 13, at 506 (discussing the NCAA’s motivations for instituting the program, which also include a possible desire to increase public opinion by demonstrating a desire to “more closely look[] out for the best interests of the young men and women participating as opposed to their own financial coffers”).

⁶¹ NCAA Insurance Programs, *supra* note 2.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Gary Klein, *Premium Players*, L.A. TIMES, Feb. 20, 2005, <http://articles.latimes.com/2005/feb/20/sports/sp-leinart20>.

⁶⁵ See Wong & Deubert, *supra* note 13, at 507 n.202, for a list of several notable college athletes across each of the covered sports who purchased E.S.D.I. coverage. The vast majority of athletes listed were high profile, extremely successful as a collegian, and evaluated strongly by scouts.

⁶⁶ Klein, *supra* note 64.

would be collecting on a policy.⁶⁷

The policy carries a twenty-four month maximum term and pays out a lump sum after a twelve month “elimination period,”⁶⁸ which commences on the date the injury resulting in total disability occurred.⁶⁹ The maximum amount of the payout varies by sport. The amount of coverage each student receives is determined by the program administrator,⁷⁰ who bases his decision on the athlete’s prospective status in the upcoming draft.⁷¹ The rate is calculated per thousand dollars of coverage and is “based on the market at the time individual applications are reviewed by the program administrator.”⁷²

The policy typically only pays out for a permanent total disability, which requires that the student-athlete’s “disability results from an injury or sickness,”⁷³ that the “injury or sickness occurs while the policy is in force,”⁷⁴ and that the athlete “is under the regular care of a qualified physician . . . [and] is unable to engage in sporting activity at the professional level.”⁷⁵ In addition, the “applicable elimination period” must have elapsed⁷⁶ and the total disability must “prevent him or her from signing any employment contract with any professional team as a professional athlete in his or her sporting activity.”⁷⁷ A permanent total disability typically requires that the student-athlete be completely incapable of performing his sport for a twelve-month period following the initial injury.⁷⁸

⁶⁷ Mike Herndon, *NCAA Insurance Program Protects Elite Athletes, Future Earnings Against Injury*, AL.COM (Aug. 1, 2010), http://www.al.com/sports/index.ssf/2010/08/are_you_in_good_hands.html.

⁶⁸ NCAA Insurance Programs, *supra* note 2.

⁶⁹ *Id.* (explaining that the purpose of the delay is to provide time for the insurer to evaluate the nature of the injury or sickness and that no benefits are paid to the student-athlete during this period).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ NCAA Insurance Programs, *supra* note 2.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Warren K. Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rule Changes*, 3 HARV. J. SPORTS & ENT. L. 159, 185 (2012).

The only other means of payout under the policy is a presumptive disability benefit. In order to collect, the student-athlete's disability must be "medically determined to be the result of (a) an entire and irrecoverable loss of sight of both eyes or hearing in both ears, or (b) total and irrecoverable loss of use of one hand or one foot, or (c) quadriplegia, or (d) paraplegia,"⁷⁹ all of which would serve to prevent the athlete from "ever participating in his or her sporting activity at the professional level."⁸⁰ The presumptive disability benefit includes essentially an acceleration clause that allows the injured insured to avoid having to wait for the twelve-month elimination period to pass. After ninety consecutive days from the date of injury, at the insured student-athlete's choosing, together with the approval of the insurer, the "outstanding benefits may be commuted to present value lump sum at a rate agreed upon" by the two parties.⁸¹

One of the most appealing parts of the program is its relative affordability. Because E.S.D.I. is a group program, the insurer can share administrative costs and spread risk among the participating NCAA member institutions.⁸² The result is that these premiums are almost always cheaper than alternative policies through private insurers.⁸³ While the premiums for the policy can be as much as ten thousand to twelve thousand per one million insured,⁸⁴ it contains a provision that assists student-athletes with obtaining financing, if necessary, to pay these premiums.⁸⁵ The interest rate for the pre-approved loan is "very competitive"⁸⁶ and is often better than what the student-athlete could obtain on the open market,⁸⁷ typically at 1.5% above prime.⁸⁸ To expedite the process, the

⁷⁹ NCAA Insurance Programs, *supra* note 2.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Wong & Deubert, *supra* note 13, at 510.

⁸³ *Id.*

⁸⁴ *Id.* at 507 (explaining typical premiums for the E.S.D.I. policy). A typical \$5 million policy will often cost between \$45,000 and \$65,000. Jason Cole, *Even \$5M Insurance Policy for Jadeveon Clowney Isn't Enough to Cover NCAA's Short-Sighted Ways*, YAHOO! SPORTS (Feb. 13, 2013), <http://sports.yahoo.com/news/nfl--even--5m-insurance-policy-for-jadeveon-clowney-isn-t-enough-to-cover-ncaa-s-short-sighted-ways-223714245.html>.

⁸⁵ The loan is provided through U.S. Bank, N.A., Sports Division. NCAA Insurance Programs, *supra* note 2.

⁸⁶ *Id.*

⁸⁷ Kevin Fixler, *The \$5 Million Question: Should College Athletes Buy Disability Insurance?*, THE ATLANTIC, Apr. 11, 2013, <http://www.theatlantic.com/>

lender pays the borrowed funds directly to the insurer.⁸⁹ The purchaser is not responsible for making any payments on the loan until one of three things occurs: “(1) the student-athlete signs a professional contract, (2) the disability benefits become available due to a covered injury or sickness or (3) the coverage is no longer in effect and the loan note matures.”⁹⁰

2. Participation in E.S.D.I.

According to the NCAA, between 100 and 120 athletes participate in E.S.D.I. per season, a figure that tends to remain constant.⁹¹ A 2005 article reported that “approximately seventy-five to eighty percent of those [enrolled] are college football players.”⁹² Within those figures, it is estimated that 75% of first-round NFL and NBA draft picks are enrolled in E.S.D.I.⁹³ Potential MLB and NHL first-round picks have a much lower enrollment rate, typically falling in the 10% range.⁹⁴ Women’s basketball players hardly participate in the program, usually enrolling only one or two student-athletes per year.⁹⁵

Notable examples of recent high-profile collegiate athletes to purchase policies include former University of Stanford quarterback Andrew Luck, former University of Southern California players Reggie Bush, quarterback Matt Leinart and quarterback Carson Palmer, and former University of Florida quarterback Tim Tebow.⁹⁶ University of Texas A&M quarterback Johnny Manziel, the 2012 Heisman Trophy winner, and University of South Carolina defensive end Jadeveon Clowney, projected

entertainment/archive/2013/04/the-5-million-question-should-college-athletes-buy-disability-insurance/274915/.

⁸⁸ Herndon, *supra* note 67.

⁸⁹ Cole, *supra* note 84.

⁹⁰ *Id.*

⁹¹ Fixler, *supra* note 87.

⁹² Wong & Deubert, *supra* note 13, at 507 (quoting Gary Klein, *Premium Players: Insurance Policies Are Becoming Standard for Elite College Athletes*, L.A. TIMES (Feb. 20, 2005), at D1.).

⁹³ *Id.* at 508.

⁹⁴ *Id.*

⁹⁵ *Id.* (explaining that the low participation rate for women’s basketball players is likely because even the modestly-priced premiums are cost-prohibitive or the insurance is unnecessary given the relatively low salaries of professional women’s basketball players).

⁹⁶ Fixler, *supra* note 87.

to be a top-five pick in the 2014 National Football League Draft, both sought insurance policies prior to the start of their 2013 collegiate football seasons, though it is not clear whether they took part in the E.S.D.I. program or sought private insurance.⁹⁷

Not all high-profile college athletes have taken part in the program. The premiums are extremely high even with the NCAA's group rate, and because the program only pays out in the event of a career-ending injury, many players forego coverage.⁹⁸ Former University of Southern California quarterback Matt Barkley did not follow in his predecessors' footsteps, opting to forego any insurance coverage, including E.S.D.I., when returning for his senior season.⁹⁹

The NCAA's program is not the only option for student-athletes. The private market for this insurance is limited, but the need for it developed in the mid-1990s when professional athlete salaries began to rise substantially.¹⁰⁰ Private underwriters provide coverage for athletes who either do not qualify for E.S.D.I. or who want more coverage than the NCAA offers.¹⁰¹ Student-athletes can secure their own policies, as well as accompanying loans, with other insurers and for amounts that exceed that NCAA's \$5 million in coverage, provided that no third party is involved in the process of securing the loans.¹⁰² Former University of Kentucky center Nerlens Noel obtained private disability insurance similar to the NCAA's, reportedly paying between \$40,000 and \$60,000 to privately secure a \$10 million policy from Lloyd's of London for coverage during his freshman basketball season.¹⁰³

⁹⁷ *Id.*

⁹⁸ Herndon, *supra* note 67 (quoting former University of Auburn player Lee Ziemba in citing the policy's failure to cover loss of value injuries as a reason for not opting to purchase it).

⁹⁹ Barkley, projected as a top-10 pick had he entered the 2012 National Football League Draft after his junior season, likely would have earned upwards of \$20 million in guaranteed money. After returning for his senior season, he suffered a shoulder injury and fell to the fourth round in the 2013 draft. Darren Rovell, *Matt Barkley Dad No Insurance*, ESPN (Apr. 30, 2013), http://espn.go.com/nfl/story/_/id/9228764/matt-barkley-returned-usc-trojans-insurance-sources.

¹⁰⁰ Herndon, *supra* note 67.

¹⁰¹ *Id.*

¹⁰² Crosner, *supra* note 37.

¹⁰³ Fixler, *supra* note 87.

3. Rarity of Collecting on the Policy

Despite the availability of and consistent participation in the NCAA program, there are very few instances of successful collection by student-athletes over the past fifteen years.¹⁰⁴ The NCAA has acknowledged that fewer than half a dozen claims have been made under this policy,¹⁰⁵ but it has generally been reluctant to provide information regarding the actual number of claims and payouts made, citing confidentially concerns with the insurance providers.¹⁰⁶

There is only one widely-publicized instance of an athlete benefitting from permanent total disability coverage, either through E.S.D.I. or private insurance.¹⁰⁷ Former University of Florida defensive tackle Ed Chester opted to forego the 1998 NFL draft and return to school for his senior year.¹⁰⁸ Projected as a potential first-round pick had he come out as a junior, he was slated to be drafted in the first round.¹⁰⁹ During his senior year, Chester blew out his knee and never played again, and subsequently successfully collected \$1 million from a private policy he purchased for \$8,000.¹¹⁰

The lack of claims made on the policy is not surprising given the state of modern sports medicine and technological innovations.¹¹¹ With today's medical advances, college athletes are less likely than they have ever been to suffer a career-ending injury, which in turn makes it more unlikely that they will be able to collect on an E.S.D.I. policy. Juanita Sheely, the NCAA's Director of Travel and Insurance, acknowledged the rarity of collecting on the policy, citing that, "[a]s medical technology has advanced, there's [sic] a lot of good rehab facilities and procedures [available] that, except for the most dire of injuries, most of the time

¹⁰⁴ *Id.* (estimating the lack of successful claims through permanent total disability policies as "probably less than a dozen").

¹⁰⁵ Marc Isenberg, *The "Student-Athlete Disability Insurance Program" Isn't What the NCAA Cracks It up to Be*, COACHGEORGERAVELING.COM (Mar. 20, 2013), <http://coachgeorgeraveling.com/the-student-athlete-disability-insurance-program-isnt-what-the-ncaa-cracks-it-up-to-be/>.

¹⁰⁶ Fixler, *supra* note 87.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

[athletes] can come back from it.”¹¹² However, despite the low rate of payouts and potentially hefty price tag, student-athletes continue to purchase these policies.¹¹³

4. Legal Challenges to E.S.D.I. Policies

There has been surprisingly little litigation stemming from the E.S.D.I. program. One notable challenge came from former University of Georgia football player Decory Bryant.¹¹⁴ On October 21, 2003, Bryant, then a student-athlete at Georgia, informed an assistant athletic director (hereinafter “AAD”) that he wanted E.S.D.I. coverage.¹¹⁵ The AAD told Bryant that he would prepare the paperwork for him and then proceeded to contact Lloyd’s of London, the E.S.D.I. provider.¹¹⁶ On October 24, 2003, the AAD confirmed in a letter sent to Lloyd’s that the school sought to purchase E.S.D.I. coverage for Bryant.¹¹⁷ The AAD did not include a coverage request form signed by Bryant as required by Lloyd’s.¹¹⁸ The next day, October 25, 2003, Bryant suffered a career-ending spinal injury while playing for his football team, which left him disabled.¹¹⁹ The University of Georgia athletic department then had Bryant sign the coverage request form October 29, 2003.¹²⁰ The AAD submitted the form that same day, but Lloyd’s subsequently informed the school that it would not backdate its coverage.¹²¹ Bryant then sued the school for its failure to effectuate his E.S.D.I. coverage.¹²² After more than five years of litigation, the two sides settled for \$400,000 in 2010.¹²³

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Fireman’s Fund Ins. Co. v. Univ. of Ga. Athletic Ass’n, Inc.*, 654 S.E.2d 207 (Ga. Ct. App. 2007).

¹¹⁵ *Id.* at 210.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Bryant Reaches Insurance Settlement*, ESPN (Feb. 24, 2010), <http://sports.espn.go.com/ncf/news/story?id=4941527>.

E. NCAA'S RESTRICTIONS ON THE PURCHASE OF LOSS OF VALUE INSURANCE

There is no specific NCAA bylaw that expressly prohibits obtaining loss of value insurance.¹²⁴ Prior to 2010, the NCAA did not allow its student-athletes to obtain any form of “loss of value” insurance.¹²⁵ Following significant debate, it changed its stance that year, eventually permitting players to obtain such coverage without violating NCAA rules.¹²⁶ There are only two ways athletes can obtain loss of value insurance without committing a violation – either the student (or his immediate family) must purchase it without any outside financing¹²⁷ or the school can pay for it through its Student Assistance Fund, as Florida State University did prior to the 2014 season for Heisman Trophy winner Jameis Winston and Texas A&M University did in an attempt to keep its star offensive tackle Cedric Ogbuehi in school for one more year.¹²⁸ Since the NCAA does not offer this type of plan itself or through a partner insurer, as it does with the E.S.D.I. program, student-athletes and their families are forced to go to outside insurers. The premiums for these types of policies are significant, potentially reaching into the six-figure range.¹²⁹ The effective result is that virtually every athlete is priced out from protecting himself in

¹²⁴ See 2014–15 NCAA DIVISION I MANUAL, available at <http://www.ncaa.com/publications/productdownloads/D115.pdf> [hereinafter “NCAA Bylaws”].

¹²⁵ Zola, *supra* note 38.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Nick Bromberg, *Florida State Paying for Jameis Winston's Loss of Value and Disability Insurance*, YAHOO! SPORTS (Aug. 5, 2014), <https://sports.yahoo.com/blogs/ncaaf-dr-saturday/florida-state-is-paying-for-jameis-winston-s-loss-of-value-and-disability-insurance-134352246.html>; Graham Watson, *Texas A&M Buys OL Cedric Ogbuehi an Insurance Policy to Keep Him in School One More Year*, YAHOO! SPORTS (July 17, 2014), <https://sports.yahoo.com/blogs/ncaaf-dr-saturday/texas-a-m-buys-ol-cedric-ogbuehi-an-insurance-policy-to-keep-him-in-school-one-more-year-142313025.html>. The “Student Assistance Fund” is designed to “assist student-athletes in meeting financial needs that arise in conjunction with participation in intercollegiate athletics, enrollment in academic curriculum or that recognize academic achievement.” *Student Athlete Benefits*, NCAA, <http://www.ncaa.org/about/resources/finances/student-athlete-benefits> (last visited May 20, 2015).

¹²⁹ Schonbrun, *supra* note 3.

this way.¹³⁰

The NCAA classifies obtaining this insurance as an impermissible or “extra” benefit, as defined below, and therefore prohibits it. The rationale is that the athlete, by virtue of having this protection, is trading on his future earnings and his status as a collegiate athlete.¹³¹ By the NCAA’s definition, this behavior constitutes an “extra benefit” expressly forbidden by NCAA rules,¹³² and compromises his amateur status as a collegiate athlete.

F. “EXTRA BENEFITS” ACCORDING TO THE NCAA

According to NCAA Bylaw 16.11.2.1, student-athletes shall not accept any extra benefits.¹³³ It goes on to define an “extra benefit” as “any special arrangement by an institutional employee or representative of the institution’s athletics interest to provide a student-athlete or the student-athlete family member or friend a benefit not expressly authorized by NCAA legislation.”¹³⁴ Bylaw 16.02.3, which contains the same definition of “extra benefit” as Bylaw 16.11.2.1, further stipulates that the athlete is not in violation of this rule if he can demonstrate that “the same benefit is generally available to the institution’s students or their family members or friends or to a particular segment of the student-body . . . *determined on a basis unrelated to athletics ability.*”¹³⁵ The rules essentially prohibit any form of pay for athletes.¹³⁶

Particularly relevant to the loss of value insurance context is NCAA Bylaw 12.1.2.1.6, which prohibits “[p]referential treatment, benefits or services because of the individual’s athletics reputation or skill or pay-back potential as a professional athlete, unless such treatment, benefits or services are specifically permitted” by the NCAA.¹³⁷ Read plainly, the rule generally prohibits an athlete from “trading on” their future earning

¹³⁰ Zola, *supra* note 41.

¹³¹ Schonbrun, *supra* note 3.

¹³² *Id.*

¹³³ See NCAA Bylaws, *supra* note 124, at art. 16.11.2.1.

¹³⁴ *Id.*

¹³⁵ *Id.* at art. 16.02.3 (emphasis added).

¹³⁶ See *id.* at art. 12.1.2 for an explanation of the numerous forms of compensation and benefits that are prohibited under NCAA rules, including, but not limited to, salary, educational expenses not otherwise permitted, awards and sponsorships.

¹³⁷ See *id.* at art. 12.1.2.1.6.

potential as a professional athlete, subject to a few exceptions. Securing loans to pay for loss of value insurance is not one of these exceptions.¹³⁸ Therefore obtaining loans to pay for loss of value insurance is a form of “trading on” an athlete’s “pay-back potential”¹³⁹ and is within the scope of the rule, making it a prohibited activity. In sum, NCAA Bylaws 16.11.2.1, 16.02.3 and 12.1.2.1.6 work in conjunction to prevent the purchase of loss of value coverage.

G. COURTS’ WILLINGNESS TO REVIEW NCAA BYLAWS AND RULES

Students have standing to sue the NCAA when they have suffered “actual injury to a legally protected interest.”¹⁴⁰ While the individual athletes may not be a party to the contract between the NCAA and its member institutions, they are entitled to bring an action based on the agreement if the parties “intended to benefit the nonparty, provided that the benefit claimed is a direct and not merely incidental benefit of the contract.”¹⁴¹ The intent to benefit the third party need not be explicit in the agreement, but rather must be apparent in the terms of the agreement, its surrounding circumstances, or both.¹⁴² The Colorado Court of Appeals reasoned that the importance of the NCAA’s function to benefit its student-athletes, coupled with its role in determining their eligibility, enabled the assumption that student-athletes were likely to succeed in establishing third-party beneficiary standing regarding the contract between the NCAA and its member institutions.¹⁴³ The Colorado Court of Appeals held that the “NCAA’s constitution, bylaws, and regulations evidence a clear intent to benefit student-athletes.”¹⁴⁴

Courts typically adopt the administrative law standard of “arbitrary and capricious” when examining NCAA rules and regulations.¹⁴⁵ Although the basis for its determination is not clear, the Kentucky Supreme Court

¹³⁸ *See id.*

¹³⁹ *Id.*

¹⁴⁰ Bloom v. Nat’l Collegiate Athletic Ass’n, 93 P.3d 621, 623 (Colo. App. 2004).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See, e.g., id.*; Nat’l Collegiate Athletic Ass’n v. Lasege, 53 S.W.3d 77 (Ky. 2001).

stated in *National Collegiate Athletic Association v. Lasege* that “relief from [the] judicial system should be available if voluntary athletic associations act arbitrarily and capriciously toward student-athletes.”¹⁴⁶ The court in *Lasege* hinted at the possibility of judicial review being justified “because the NCAA occupied the role of a quasi-state actor with respect to individual student-athletes.”¹⁴⁷ However, the United States Supreme Court held that the NCAA is not itself a state actor and its member institutions’ adherence to state rules does not constitute the state action required to invoke a civil rights claim.¹⁴⁸

Traditionally, courts have been reluctant to intervene in the internal affairs of voluntary associations, such as the NCAA, except on the most limited grounds.¹⁴⁹ When they do, it appears that an allegation of the violation or invasion of a civil or property right must be made in order to maintain standing.¹⁵⁰ The court in *Bloom v. National Collegiate Athletic Association* concluded that Bloom had third-party beneficiary standing to sue the NCAA,¹⁵¹ despite his status as a nonmember and his failure to assert a property right,¹⁵² because his claim of arbitrary and capricious action on the part of the NCAA asserted a “violation of the duty of good faith and fair dealing” implied in the contract between the NCAA and its member institutions.¹⁵³

III. LEGAL GROUNDS FOR CHALLENGING THE PROHIBITION – THE “ARBITRARY AND CAPRICIOUS” STANDARD

Based on the NCAA’s current bylaws, its current insurance policies and justifications, and economic stakes for its student-athletes, the NCAA should provide its student-athletes with loss of value insurance, or, in the alternative, allow them the opportunity to obtain it.

One path a potential challenger to the NCAA’s current policy could take would be through a direct challenge of the rule. The student-athlete would need to go outside NCAA rules and secure a private loan to

¹⁴⁶ See *Lasege*, 53 S.W.3d at 83.

¹⁴⁷ *Bloom*, 93 P.3d at 624.

¹⁴⁸ Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 194–95 (1988).

¹⁴⁹ *Bloom*, 93 P.3d at 624.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

purchase loss of value insurance. The NCAA would then presumably declare the student ineligible for having received an extra benefit. With his ability to participate in his sport denied, the student would then bring suit to challenge the NCAA bylaw on the grounds that it is arbitrary and capricious, similar to the path taken in *Bloom*.¹⁵⁴ In the alternative, a student could seek to protect his eligibility by obtaining a preliminary injunction against the NCAA's enforcement of its rules either before or after he purchases the insurance. Each of these tracks is discussed below.

A. THE "ARBITRARY AND CAPRICIOUS" STANDARD

When reviewing the NCAA's decisions or rules, courts will apply the "arbitrary and capricious" standard that is prevalent in administrative law.¹⁵⁵ In doing so, the court employs a narrow standard of review and is not to substitute its own judgment for that of the organization whose decisions it is reviewing.¹⁵⁶ The organization, in defending its decision, "must examine the relevant data and articulate a satisfactory explanation for its action[s]."¹⁵⁷ This examination must produce a "rational connection between the facts found and the choice made."¹⁵⁸ When reviewing the organization's decision, the court must determine whether the organization took into account the relevant factors and whether a clear error in judgment has occurred.¹⁵⁹ Examples of "arbitrary and capricious" decision-making include where the organization has failed entirely to consider a key element of the problem, offered an explanation of its decision that does not follow from the evidence before it or espouses a justification that is so implausible that it cannot possibly be "ascribed to a difference in view or the product of [organizational] expertise."¹⁶⁰

Courts are typically very deferential to the NCAA in their review

¹⁵⁴ *See id.*

¹⁵⁵ Mike Salerno, *Traveling Violation: A Legal Analysis of the Restrictions on the International Mobility of Athletes*, 25 N.Y. INT'L L. REV. 1, 25 (2012); *see, e.g., Bloom*, 93 P.3d 621; *Lasege*, 53 S.W.3d 77.

¹⁵⁶ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁵⁷ *Id.*

¹⁵⁸ *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

¹⁵⁹ *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

¹⁶⁰ *Id.*

of its rules and regulations.¹⁶¹ In order for a rule or regulation to not be arbitrary or capricious, it must be “reasonably related to [its] intended purpose.”¹⁶² If the NCAA arbitrarily and capriciously applies rules that are otherwise reasonable, judicial intrusion into the affairs of the private, voluntary organization is warranted.¹⁶³ The adoption of such a standard is indicative of “judicial reluctance to micromanage the manner in which private associations or dedication institutions apply their policies.”¹⁶⁴ The Kentucky Supreme Court noted in *National Collegiate Athletic Association v. Lasege* that “relief from [the] judicial system should be available if voluntary athletic associations act arbitrarily and capriciously toward student-athletes.”¹⁶⁵ A private organization, such as the NCAA, is acting arbitrarily and capriciously only “where it is ‘clearly erroneous,’ and by ‘clearly erroneous’ [courts] mean ‘unsupported by substantial evidence.’”¹⁶⁶ The Supreme Court of Indiana, in analyzing a claim against a private athletic organization, defined an act as arbitrary and capricious where “it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion.”¹⁶⁷

B. STANDING

Before any challenge could be brought against the NCAA and its bylaws, which exist by virtue of a contract between the NCAA and its

¹⁶¹ See Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 266–73 (2010).

¹⁶² Salerno, *supra* note 155, at 25 (citing *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711–12 (2011)).

¹⁶³ *Id.* at 25–26.

¹⁶⁴ Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 130 (2008).

¹⁶⁵ *Nat'l Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77, 83 (Ky. 2001).

¹⁶⁶ *Id.* at 85 (citing *Thurman v. Meridian Mut. Ins. Co.*, 345 S.W.2d 635, 639 (Ky. 1961)).

¹⁶⁷ *Ind. High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 233 (Ind. 1997).

member institutions,¹⁶⁸ the student-athlete must establish third-party standing. The question of whether a third party to a contract has standing to bring an action upon it is a matter of state law.¹⁶⁹ The Colorado Supreme Court in *Bloom v. National Collegiate Athletic Association* noted that a “party has standing to seek relief when he or she has suffered actual injury to a legally protected interest.”¹⁷⁰ Although an individual is not an express party to a contract, he may institute an action on the contract “if the parties to the agreement intended to benefit the nonparty”¹⁷¹ so long as “the benefit claimed is a direct, and not merely incidental, benefit of the contract.”¹⁷² The intent to benefit the third party does not need to be explicitly laid out in the contract, but it must be apparent from its terms, surrounding circumstances, or both.¹⁷³ The NCAA’s constitution, bylaws, and regulations were held to “evidence a clear intent to benefit student-athletes.”¹⁷⁴ As a third-party beneficiary, the challenger would have rights that are no greater than those possessed by the original parties to the contract, which would be the NCAA and its member institutions in this context.¹⁷⁵

C. APPLYING THE STANDARD

1. Same Issue, Different Application

The first step in challenging the NCAA’s prohibition on loss of value insurance would be to attack it on the ground of disparate application of similar rules. As discussed earlier, the NCAA permits athletes to obtain outside financing to purchase total disability policies, but it places extreme

¹⁶⁸ See Potuto, *supra* note 161, at 267 (discussing the structure of the relationship between the NCAA and its member institutions as a “multi-subject contract entered into by more than a thousand members”).

¹⁶⁹ *Miree v. DeKalb Cnty.*, 433 U.S. 25, 29–34 (1977).

¹⁷⁰ *Bloom v. Nat’l Collegiate Athletic Ass’n.*, 93 P.3d 621, 623 (Colo. App. 2004).

¹⁷¹ *Id.*; see, e.g., *Bochese v. Ponce Inlet*, 405 F.3d 964, 981 (11th Cir. 2005) (applying Florida law); *Sovereign Bank v. BJ’s Wholesale Club, Inc.*, 533 F.3d 162, 172 (3d Cir. 2008) (applying Pennsylvania law).

¹⁷² *Bloom*, 93 P.3d at 623.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 361, 363 (1990).

restrictions on financing loss of value insurance. The same right is at stake in both cases – protecting future earnings against harm. However, the NCAA arbitrarily prevents one while allowing another with no clear reason for the distinction.

The strongest argument to demonstrate the arbitrary nature of the prohibition is to attack the NCAA's rationale. It justifies the rule on the grounds that athletes should not be able to trade off their future earnings as athletes if they wish to maintain amateur status.¹⁷⁶ The "trade off" is in the form of the loan secured in order to pay for the loss of value policy. The belief, presumably, is that the lender is only willing to pay out such a substantial sum to a person with no current income because it is confident in the student's ability to earn enough money as a professional athlete to repay the loan. Therefore, in the eyes of the NCAA, this act constitutes trading on an individual's status as a collegiate athlete.¹⁷⁷

Where the NCAA's argument is vulnerable is that it already allows NCAA athletes to trade off their status in exactly this way but in a slightly different context. As discussed above, the NCAA has an exception, contained in its Exceptional Student-Athlete Disability Insurance Program, which allows student-athletes and their families to secure a third-party loan to pay premiums for a special insurance program.¹⁷⁸ In doing so, they are obtaining this loan purely by way of their status as a collegiate athlete. This situation is directly analogous to obtaining loss of value insurance. In both cases, student-athletes are seeking to protect their future interests regarding their earning capacity as athletes. In order to obtain this protection, they have to secure a loan that is likely only available to them because of their future earning potential as professional athletes. However, the NCAA allows one (permanent disability insurance) while denying the other (loss of value coverage). There is no readily apparent reason for this distinction, particularly in light of the NCAA's justification for why it instituted its E.S.D.I. program in the first place – to protect its student-athletes against injury and the pressures of agents to make the jump to the pros too early.¹⁷⁹

The thrust of the NCAA's argument for its right to regulate its student-athletes in this way is the emphasis it places on amateurism,

¹⁷⁶ Zola, *supra* note 38.

¹⁷⁷ It makes no difference, under NCAA rules, whether the student-athlete himself or a member of family is the one who secures the loan. *Id.*

¹⁷⁸ NCAA Insurance Programs, *supra* note 2.

¹⁷⁹ Wong & Deubert, *supra* note 13, at 506.

thereby enabling it to prohibit what it views as economic gain by its student-athletes by virtue of their athletic ability.¹⁸⁰ The NCAA considers amateurism to be its most important “core principle” and the reason that fans are drawn to college sports.¹⁸¹ By using “amateur” athletes, the NCAA distinguishes its brand from those of professional sports leagues.¹⁸² However, this stubborn adherence to amateurism is simply an excuse for the NCAA to profit from its athletes’ athletic talent without having to compensate them financially, and instead the athletes should be able to enjoy the economic benefits of their skills and abilities. The NCAA’s shifting and inconsistent definition of what it means to be an “amateur” further undermines its argument. The NCAA has changed its own definition of what it means to be an amateur numerous times since it released its first definition in 1906.¹⁸³ The NCAA Bylaws allow for different treatment of athletes depending on sport. For example, a tennis recruit can receive up to \$10,000 in prize money before he enters college and still be considered an “amateur” under NCAA rules, while a track and field recruit who receives the same would be determined to be ineligible.¹⁸⁴ A football player receiving a Pell grant that raises his total financial aid above the cost of attendance does not compromise his amateurism, but if he were to decline the grant and accept an equal amount sum as part of an endorsement deal, he would be ineligible.¹⁸⁵ Finally, it is becoming increasingly clear that amateurism has not contributed significantly to college sports’ popularity.¹⁸⁶ School loyalty and identity with a region of

¹⁸⁰ “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” NCAA Bylaws, *supra* note 124, at art. 2.9.

¹⁸¹ Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984); O’Bannon v. Nat’l Collegiate Athletic Ass’n, 7 F. Supp. 3d 955, 999–1000 (N.D. Cal. 2014), *appeals filed*, No. 14-16601 (9th Cir. Aug. 21, 2014), No. 14-17068 (Oct. 21, 2014).

¹⁸² O’Bannon, 7 F. Supp. 3d at 999–1000.

¹⁸³ *Id.* at 973–74, 1000.

¹⁸⁴ *Id.* at 1000.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 977. O’Bannon addresses the Supreme Court’s suggestion in *Board of Regents* that amateurism is necessary to preserve college sports, concluding that the suggestion is “not based on any factual findings in the trial record and did not

the country have been found to be much stronger reasons.¹⁸⁷ In essence, while NCAA steadfastly asserts it needs amateurism in order to distinguish itself, the evidence, some of which comes from the NCAA itself, shows that consumers are in large part indifferent to it.

Ultimately, the NCAA's distinction between the purchase of loss of value and disability insurance is arbitrary and capricious. While there is no particular NCAA bylaw which serves to effectuate this difference,¹⁸⁸ a court would likely find that the functional effect of the bylaws with regards to purchasing loss of value insurance is arbitrary and capricious as it relates to the purpose of promoting amateurism and preventing gains on the basis of athletic ability, particularly in light of allowing the purchase of extra disability insurance. The NCAA would likely have a difficult time showing a rational connection between its ban on loss of value coverage and the justification for it when it simultaneously allows student-athletes to use the same basis (future earning capacity as a professional athlete) to obtain another form of additional insurance. Producing a satisfactory explanation for the vastly different treatment of two very similar issues would be a challenge for the NCAA.

2. Protects One Economic Class of Athlete and Not Another

On their face, the NCAA's rules serve to effectively prevent a large, substantial class of athletes from protecting themselves from loss of value in any way. The bylaws function such that they prohibit outside loans from being secured to pay the policy's premiums ensuring that only athletes whose families possess significant wealth can insure themselves. Therefore, student-athletes who, through no fault of their own, do not have

serve to resolve any disputed issue of law" and is actually "counter to the assertions of the NCAA's own counsel in the case, who stated . . . that the NCAA . . . might be able to get more viewers and so on if it had semi-professional clubs rather than amateur clubs." *Id.* at 999 (internal quotation marks omitted).

¹⁸⁷ *Id.* at 977-78, 1001.

¹⁸⁸ See NCAA Bylaws, *supra* note 124. The NCAA's prohibition is the function of three bylaws (16.11.2.1, 16.02.3 and 12.1.2.1.6) working in conjunction. Independently, these bylaws serve to justifiably govern and prohibit certain activity by student-athletes. Striking down or enjoining these two bylaws outright could have wide-sweeping effects in other unrelated areas of college athlete regulation. To avoid this problem, a narrowly-tailored injunction would be necessary, as discussed further below.

the financial capacity to purchase the insurance and likely would benefit most are unable to protect their future careers. A subset of college athletes, chosen by way of certain criteria, is eligible for an extra benefit while a majority of players must go unprotected. The NCAA provides an extra benefit to a portion of its athletes, based solely in familial wealth, out of concern for their future earnings and well-being. The question then becomes why is that acceptable but allowing a wider base of athletes to protect themselves is unacceptable? There is no discernible reason why an athlete's eligibility for financial security should be tied to his family's economic situation.

3. Non-Athletes Can Obtain it Freely, but Student-Athletes Cannot

One of the NCAA Bylaws which works to effectuate the ban on loss of value insurance, Bylaw 16.02.3, concerns "extra benefits" received by student-athletes. As part of the definition of what constitutes an "extra benefit," Bylaw 16.02.3 includes an exception that says something is not deemed to be an extra benefit if "the same benefit is generally available to the institution's students or their family members or friends or to a particular segment of the student-body . . . *determined on a basis unrelated to athletics ability.*"¹⁸⁹ An argument against the NCAA's prohibition would be that loss of value insurance is readily available to the rest of student body or to others outside the NCAA for reasons unrelated to athletic ability.

While arguing that loss of value coverage is available in general, such as in the context of automobile insurance, is likely a losing argument, a challenger could narrow the comparison to other physical skill-related fields. For example, assuming they could find a willing insurer, loss of value insurance could be obtainable by surgeons, musicians, or other skill-related professions. This insurance, which provides the same protection as athletic loss of value insurance, is not obtainable by virtue of any athletic ability. Therefore, it would stand to reason that purchasing loss of value insurance is not an extra benefit as defined by the NCAA and purchasing it does not violate the NCAA Bylaws.

The counterargument to this position is that the other types of loss of value coverage, while similar on their faces, are in no way analogous. This promotes a narrow reading of Bylaw 16.02.3's interpretation of the

¹⁸⁹ See *id.* at art. 16.02.3 (emphasis added).

definition of “loss of value insurance” as it applies to student-athletes. A court would have to determine that the policies purchased are sports-specific and therefore not available to the general public or other students because they are presumably not elite athletes with professional potential. Inherent in this interpretation is the determination that “loss of value insurance” in this context pertains exclusively to loss of draft position coverage, and not the principle of loss of value insurance generally.

In sum, it can be argued that the NCAA’s restrictions prevent athletes from doing something that their families, other students, and the general population are free to do. It is prohibiting an activity in contravention of its own bylaws. This argument, however, is tenuous at best, given the likelihood that a court will narrowly interpret the benefit as sports-related loss of value insurance and not loss of value coverage generally, particularly in light of its deference to the NCAA Bylaws and their interpretation.¹⁹⁰

D. SUMMARY

It is difficult to predict whether a challenge to the NCAA’s prohibition on the purchase of loss of value insurance would be successful. The prohibition itself is likely arbitrary and capricious, given that athletes can already purchase very similar insurance while securing loans based on their earning capacity as athletes. Alternatively, the bylaw itself seems to be contradictory, as loss of value insurance is available to other students and non-students in various forms, though the scope of “loss of value insurance” would need to be determined. A student-athlete would appear to have a reasonable likelihood of success on either of these two legal arguments, and has a chance to earn the right to secure loans to purchase loss of value insurance.

However, overshadowing this entire process is the specter of the NCAA’s prominence and courts’ deference to their rulemaking and interpretations. This factor is the wild card in the analysis of any legal challenge, as it appears that courts are reluctant to overturn NCAA rules except in the most limited circumstances.¹⁹¹ A student-athlete can only

¹⁹⁰ See Mitten & Davis, *supra* note 164, at 119–28 (discussing courts’ general deference to the NCAA and other private athletic bodies when it comes to reviewing these organizations’ actions and rules).

¹⁹¹ See *Bloom v. Nat’l Collegiate Athletic Ass’n*, 93 P.3d 621, 624 (Colo. App. 2004).

hope that the deprivation of his ability to protect himself against the loss of millions of dollars is one such circumstance.

IV. POLICY CONCERNS

In addition to the legal grounds noted above, student-athletes could advance a number of public policy arguments to support their contention that they deserve the opportunity to obtain loss of value coverage. The strength of these arguments in many ways exceeds any legal bases they may have in seeking relief.

A. ALLOWING PEOPLE TO PROTECT THEMSELVES

In general, individuals should be allowed to protect themselves if they have the means and desire to. If a person wishes to secure some form of protection and said protection is available, he should be free to do so. People's desire to protect themselves against financial ruin and the benefits to society of allowing insurance are evidenced by the importance placed on making health coverage widely available and how most states require auto liability coverage as a requirement for driving.¹⁹² Additionally, restricting an individual's ability to purchase insurance cuts against the values of a free market and of an individual's right to contract. The decision to incur debt in order to secure this coverage – in essence, leveraging current protection against future earnings – is the right and province of the individual student-athlete and not for the NCAA to regulate. It is generally bad public policy to prevent individuals from freely securing protection for themselves if they are willing and able.

B. STUDENTS ARE, IN ESSENCE, FORCED TO PLAY IN COLLEGE, SO THEY SHOULD BE ABLE TO PROTECT THEMSELVES

The coercive elements of professional sports leagues' entry rules effectively force athletes to participate in collegiate athletics if they wish to

¹⁹² See W.C. Crais III, Annotation, *Automobile Liability Insurance: Operator's Policies*, 88 A.L.R.2d 995 (1963); see also *Motor Vehicle Insurance – Financial Responsibility and Required Minimums*, 0110 SURVEYS 68 (Thomson Reuters 2014).

pursue a professional career.¹⁹³ Unable, in many cases, to enter the professional ranks immediately after high school and with no viable alternative, athletes have nowhere to turn except to NCAA sports. In light of this, it is unfair to then prohibit these athletes from protecting themselves. They are forced to put the earning of any income on hold in order to participate in college athletics while simultaneously physically putting their bodies (and future earning capacity) at risk. It is then good policy to allow these individuals who, by virtue of rules outside of their control, cannot enter the field in which they hope to make a career to obtain protection. Athletes typically have a limited window in which they can earn a living¹⁹⁴ and forcing them to spend some of this time playing in college while also putting their future at risk is unfair and bad public policy.

C. IF STUDENT-ATHLETES CANNOT BE COMPENSATED WITH A SALARY, THEY SHOULD BE PROTECTED AGAINST LOSING FUTURE EARNINGS

Student-athletes are unable to be compensated in any way for their contributions to their schools and the NCAA other than by virtue of an athletic scholarship. The rules adopted to ensure this result are fueled by the NCAA's focus on preserving amateurism among its athletes.¹⁹⁵ Even if

¹⁹³ Athletes in many sports must wait at least one to three years after high school before being able to turn pro. NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 5; NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 6. The lack of comparable alternatives to NCAA athletics in terms of competitiveness, talent level and exposure means that student-athletes who cannot immediately enter the professional ranks must turn to the NCAA.

¹⁹⁴ See Dashiell Bennett, *The NFL's Official Spin On Average Career Length Is A Joke*, BUSINESS INSIDER (Apr. 18, 2011), <http://www.businessinsider.com/nfls-spin-average-career-length-2011-4> (citing the average length of an NFL career as 3.2 years and discussing the NFL's contention that the average length is actually 6 years); Sam Roberts, *Just How Long Does the Average Baseball Career Last?*, N.Y. TIMES, July 15, 2007, <http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html> (citing the average length of a career in MLB to be 5.6 years); Dave Berri, *Why the NBA Players Keep Losing to the Owners*, FREAKONOMICS (Dec. 6, 2011), <http://freakonomics.com/2011/12/06/why-the-nba-players-keep-losing-to-the-owners/> (citing the average length of a career in the NBA to be 4.8 years).

¹⁹⁵ See NCAA Bylaws, *supra* note 124, at art. 2.9.

one concedes that the preservation of amateurism is a reasonable purpose and that athletes should not be financially compensated while in school, it still stands to reason that they should not be hindered in their post-collegiate lives. The effective ban on obtaining financing for loss of value insurance essentially prevents athletes from protecting themselves in an event – the draft – that occurs post-graduation, or, at the very least, post-college athletics.

It could be argued that it is generally bad public policy to prevent college athletes from insuring their future economic interests in their own athletic ability by purchasing loss of value insurance because unlike issues surrounding athlete compensation *during* their collegiate careers, loss of value insurance concerns his compensation *after* leaving college. The NCAA's argument that the ability to obtain a loan to pay for such coverage is only possible by virtue of their status as an NCAA athlete with professional potential is unconvincing, as it is premised on the idea that the NCAA owns an athlete's talent, not the athlete himself. If an athlete is the owner of his own talent and potential, it is unfair to permit an organization with no cognizable interest in his future earnings to prevent him from protecting himself. The NCAA has an interest – the preservation of the amateurism ideal – in the student-athlete's talent and potential only while he is in college, but not beyond. Therefore, it is bad public policy to prevent a private organization from limiting one of its member's rights to earnings in the future.

D. THE VIABILITY OF E.S.D.I. AND SIMILAR POLICIES IS VERY MUCH IN QUESTION

A final public policy argument advanced in favor of permitting the obtaining of loss of value insurance is the ineffectiveness of the NCAA's current insurance programs. As noted above, there have been very few payouts under either E.S.D.I., Catastrophic Injury Insurance, or any similar private policies.¹⁹⁶ The goal of these total disability policies – to protect an athlete's future economic interests – is thwarted by the fact that the coverage is becoming somewhat obsolete. Advances in medical technology and procedures have meant that what were once career-ending injuries are now just career-postponing ones.¹⁹⁷ A torn ACL or rotator cuff

¹⁹⁶ Fixler, *supra* note 87 (estimating the lack of successful claims through permanent total disability policies as “probably less than a dozen”).

¹⁹⁷ *Id.*

in college used to mean that an athlete's professional career was over. Now it simply means surgery, rigorous rehabilitation, and a drop in the draft.

With this new medical reality, total disability policies are unlikely to improve their payout rates, thereby frustrating the purposes for which they were instituted. While the recent rise in awareness over head injuries in college and professional sports may result in a new wave of career-ending injuries,¹⁹⁸ any increase in this area is unlikely to justify the limited scope of total disability coverage.

Therefore, in order to effectively protect vulnerable student-athletes, it is good public policy to allow them to procure loss of value insurance. It would provide a more viable alternative because athletes would be able to more accurately and efficiently insure themselves against financial loss. The limited conditions under which they can collect on total disability policies coupled with their enormous price tags make them cost ineffective. Loss of value coverage allows athletes to guard against a harm that, particularly in today's reality, is more likely to occur than a career-ending injury. No other measure can better guard their future interests.

V. REMEDIES

A. MONETARY DAMAGES

Student-athletes could first seek monetary relief from the NCAA or its member institutions as compensation. These damages would only be available in cases where the athlete was able to show an actual, already-suffered injury. The argument for monetary damages would be that if not for the NCAA Bylaws, the athlete could have properly protected himself against depreciation in his value. Therefore, due to the NCAA's arbitrary and capricious adoption of these rules, the athlete was unable to protect

¹⁹⁸ See, e.g., *David Piland's Career Ends Due to Concussions: Houston QB Decides To Stop Playing Football*, HUFFINGTON POST (Oct. 8 2013), http://www.huffingtonpost.com/2013/10/08/david-piland-concussions-career-ends-houston_n_4065436.html; Chris Carlson, *Concussions Bring Premature Close to Career of Syracuse DE Tyler Marona*, SYRACUSE.COM (Oct. 25, 2013), http://www.syracuse.com/orangefootball/index.ssf/2013/10/concussions_bring_premature_cl.html; Pete Volk, *Utah QB Travis Wilson Out for Season with Possible Career-ending Concussion*, SB NATION (Nov. 18, 2013), <http://www.sbnation.com/college-football/2013/11/18/5118864/travis-wilson-injury-utah-concussion>.

himself and suffered significant financial injury.

Such a remedy would not be without its issues. First, there would likely be disputes over whether the student-athlete planned on or could have afforded the loss of value insurance in the first place. There will undoubtedly be disputes over where the athlete would have been drafted. Further, the source of the drop in the draft would surely be contested, as the NCAA and the schools could argue that a player fell for any number of reasons unrelated to the injury. Or, in the event that an injury accompanied some other potential reason for the drop, there would at least be a debate over how much of the fall was attributable to the injury and how much was the result of the other event or circumstance. Regardless, in the event of an actual injury, provided he can prove that he intended and could have afforded loss of value insurance, courts could award monetary damages to student-athletes in amounts consistent with what was lost as a result of not having a loss of value insurance policy either through loss of value calculation or actuarial analysis.

B. PRELIMINARY INJUNCTIONS

In the alternative, student-athletes could seek a preliminary injunction to prevent the NCAA Bylaws that effectively ban obtaining loans to pay for loss of value insurance from being enforced in this context. Ultimately, the student-athlete would want to seek a narrowly-tailored injunction allowing him to take out loans to purchase loss of value insurance and not a blanket injunction against the NCAA Bylaws at issue, as the latter could have significant effects beyond the scope of this problem.¹⁹⁹

In order to obtain a preliminary injunction, a plaintiff must establish: (1) “that he is likely to succeed on the merits”;²⁰⁰ (2) “that he is likely to suffer irreparable harm in the absence of preliminary relief”;²⁰¹ (3) “that the balance of equities tips in his favor”;²⁰² and (4) “that an injunction

¹⁹⁹ Enjoining the NCAA Bylaws at issue from being enforced could result in substantial impacts in other areas for schools and student athletes, as the intended purpose of these rules – to prevent students from obtaining illicit benefits and financial gains that jeopardize their amateur status by virtue of their status as athletes – is a legitimate one as it applies to most other actions.

²⁰⁰ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

²⁰¹ *Id.*

²⁰² *Id.*

is in the public interest.”²⁰³ An injunction should only be issued when essential to protect property rights against injuries that can otherwise not be remedied.²⁰⁴ The basis for injunctive relief in federal courts has consistently been “irreparable injury and the inadequacy of legal remedies.”²⁰⁵

1. Success on the Merits

The challenging student-athlete would need to demonstrate that his claim that the NCAA Bylaws are arbitrary and capricious, with respect to the prohibition on loss of value insurance, is likely to succeed on the merits. While it is unclear whether he would successfully be able to prove his claim, he could most likely establish a likelihood of success. The NCAA prohibition is possibly arbitrary on its face, particularly in light of the exception the NCAA carved out for similar insurance coverage (E.S.D.I.), that the prohibition appears to contradict the NCAA’s own rules, and that it deprives the student-athletes of a protective measure that is of significant impact to their livelihoods. A court could reasonably find for the challenging student-athlete, and therefore his claim is likely to succeed on its merits.

2. Irreparable Harm

The challenging student-athlete should be able to demonstrate that irreparable harm is likely to occur in the absence of an injunction against the NCAA Bylaws. Because litigation can take several months and years while a career-altering injury can occur at any moment, there is a chance the athlete’s claim becomes moot before he has a chance to have his day in court. He could suffer the injury, lose millions, and never have an opportunity to protect himself. Furthermore, the athlete cannot abstain from playing his sport pending his legal challenge, as that would thwart his intentions of entering the professional ranks as pro teams prefer that athletes play and develop rather than sit out. Therefore, because time is of great importance in these situations, the student-athlete would be likely to suffer irreparable harm should the injunction not be granted.

²⁰³ *Id.*

²⁰⁴ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

²⁰⁵ *Id.*

3. Balance of Equities

In balancing the equities, a court would likely come down in favor of the athletes. The impact on the NCAA if the injunction is granted is only that they must now monitor the purchase of new insurance by its member institutions' athletes. The NCAA will likely claim that prohibition furthers its interest in preserving amateurism, but the question then becomes whether the NCAA's interest in an ideal trumps the athletes' real need to protect themselves. For the athletes, the impact of denying the injunction is substantial. They could lose millions of dollars in potential earnings while putting themselves at risk for the benefit of the NCAA and while unable to play their trade anywhere else. In weighing the consequences for both sides, it is likely that the harm to the student-athletes if the injunction is denied far outweighs the harm to the NCAA if it is granted.

4. Public Interest

The public interest would likely be served by granting this injunction. It is generally good public policy to allow individuals to, if they so choose, take responsibility and protect themselves for the benefit of society. An additional policy concern specifically affecting athletes is the fact that they have a limited window in which they can earn a living from their athletic talent and it is in the public interest to allow an individual to protect their ability to earn a living. The NCAA draws no readily apparent benefit from preventing these individuals from protecting themselves. Therefore, in light of these circumstances, it appears to be sound public policy that absent a justifiable reason, college athletes should be able to protect themselves and contract with whomever they choose to achieve this goal. For these reasons, the public interest is likely served by granting a preliminary injunction.

C. PERMANENT INJUNCTION

Once the student-athlete's challenge proceeds to court, he could seek remedy in the form of a permanent injunction. Each of the four elements required for a preliminary injunction would apply, as would the same arguments and rationales, except for a few slight differences.²⁰⁶ The

²⁰⁶ *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544 n.12 (1987).

first element of a preliminary injunction, a likelihood of success on the merits, is replaced by actual success on the merits, which would be demonstrated by the outcome of the trial.²⁰⁷ Just like the preliminary injunction, any permanent injunction would need to be narrowly tailored to achieve the student-athletes' goal of being able to obtain loans to purchase loss of value insurance without violating NCAA rules. A blanket injunction against the bylaws in question could have a significant impact beyond just insurance concerns.²⁰⁸

VI. POTENTIAL SOLUTIONS

Addressed in this section are several suggestions for how the NCAA could go about implementing loss of value coverage for its student-athletes. While no one solution is perfect, each is a step in the right direction toward protecting the athletes. If any proposal is adopted, the NCAA could always revise it after some time to better meet the goals of providing the coverage.

A. INCORPORATE LOSS OF VALUE INTO THE CURRENTLY-EXISTING E.S.D.I. STRUCTURE

The first proposed solution for implementing a loss of value program is to automatically include it under E.S.D.I. coverage. Obviously this would require that the NCAA renegotiate its deals with Bank of America, N.A., and HCC Insurance Holdings, Inc. regarding the provision of the already-existing E.S.D.I. coverage, changing it from strictly a permanent total disability policy to one that includes a loss of value provision. The resulting premiums would be higher, as there is now an additional provision for a coverage that is more likely to be paid out, but the added benefit would be worth it. The presumption here would be that most athletes willing to obtain expensive E.S.D.I. coverage would be interested in spending a little extra in order to protect against diminished earnings.

²⁰⁷ *Id.*

²⁰⁸ *See* NCAA Bylaws, *supra* 124. The NCAA Bylaws at issue affect activities and actions that are far beyond the scope of loss of value insurance. For this reason, it is crucial that any injunctive relief be narrowly tailored to avoid enjoining any legitimate effects of the rules.

The problem with this solution is that it does not provide loss of value insurance to all athletes with professional potential who may want it. Because E.S.D.I. is offered to a limited pool of student-athletes, access to loss of value coverage would also be limited. To remedy this, E.S.D.I. would need to broaden its eligibility requirements.²⁰⁹ While going this route may prove to be a bigger overhaul than the NCAA and its partners are interested in performing, relaxed requirements for E.S.D.I. eligibility, combined with the automatic inclusion of a loss of value provision, would be an effective solution to the current problem.

B. EXPAND E.S.D.I. AND PROVIDE AN OPTION TO PURCHASE
ADDITIONAL COVERAGE

A slight variation on the previous suggestion is to provide loss of value coverage as an option, rather than as included, in E.S.D.I. coverage. This route also requires the relaxing of the eligibility requirements for E.S.D.I. in order to ensure that all or most who want coverage would have access to it. It would also, like the first option, require that HCC Insurance Holdings, Inc., be amenable to creating loss of value coverage. Implicit in the adoption of this option would be an express permission to obtain outside financing to secure loss of value coverage, which the NCAA currently does not permit,²¹⁰ because if athletes need loans to pay for expensive E.S.D.I. coverage, they will also need it for loss of value coverage.

Provided both of these conditions are met, the NCAA could then give student-athletes the choice to obtain additional loss of value coverage should they want it. Athletes could presumably obtain the policy at a rate lower than the market average, just as the NCAA and its partners can provide E.S.D.I. coverage more cheaply than private insurers.²¹¹ The result would be freedom on the part of the student-athletes to choose for themselves whether they want to take on additional debt in order to adequately protect themselves. If adopted, this proposal would perhaps be

²⁰⁹ See generally Joseph Stuart Knight, *Blown Coverage: Tackling Problems with the NCAA's Exceptional Student-Athlete Disability Insurance Program*, 1 MISS. SPORTS L. REV. 157 (2012) (discussing why the NCAA should make changes to its E.S.D.I. program, including providing for greater coverage for more athletes, and how it could go about doing so).

²¹⁰ Zola, *supra* note 38.

²¹¹ Wong & Deubert, *supra* note 13, at 510.

the most complete solution to the issue.

C. CREATE A LESSER ADDITIONAL TOTAL DISABILITY
COVERAGE THAT INCORPORATES A LOSS OF VALUE
PROVISION

A second proposed solution is an even larger overhaul of the current system, and may prove to be the most difficult to implement. If accomplished, however, it would address the concerns with the first and second solutions regarding the lack of access to the coverage for most student-athletes with professional prospects. Here, the NCAA would need to negotiate with its current insurer, HCC Insurance Holdings, Inc., or another insurer to provide a lesser version of E.S.D.I. The new plan would provide less financial coverage at the cost of more affordable premiums and would contain a loss of value provision. The creation of a lesser disability policy is necessary because loss of value policies usually require that a total disability policy also be obtained.²¹² The offer of a less inclusive and cheaper disability policy would fulfill this requirement, while also being affordable to those student-athletes who are less certain of their professional prospects.

The obvious hurdle facing this solution is finding an insurer willing to offer the program. More research would need to be done on the viability of this solution, but if it were offered, it could be of significant benefit to those student-athletes not quite eligible for E.S.D.I. coverage that wish to protect their professional financial interests.

D. CREATE AN EXCEPTION TO THE NCAA BYLAWS THAT
ALLOWS ATHLETES TO SECURE LOANS TO PAY FOR THEIR
OWN LOSS OF VALUE POLICIES

A final proposed solution is to simply create an explicit exception in the NCAA Bylaws that permits student-athletes to obtain outside financing to privately purchase insurance. Since the NCAA Bylaws state that any benefit not expressly authorized is forbidden,²¹³ the NCAA would need to establish an exception for this purpose. They have already done so through their development of the E.S.D.I. program itself, going so far as to help secure the loans themselves through a deal with Bank of America,

²¹² Rovell, *supra* note 16.

²¹³ See NCAA Bylaws, *supra* note 124, at art. 12.1.2.1.6.

N.A.²¹⁴

The ultimate effect of this proposal, however, would likely drive student-athletes away from the NCAA-offered E.S.D.I. program altogether and toward private insurers, where they would likely face much higher premiums.²¹⁵ The reason for this is that loss of value provisions are not typically offered independently and usually must be part of a total disability policy.²¹⁶ Therefore, if a student-athlete purchases E.S.D.I., he will not be able to independently purchase loss of value insurance from another insurer without also obtaining disability coverage from that insurer. Unless the student-athlete seeks double coverage and is willing to pay two premiums, he would be best suited to simply go with the outside insurer.

VII. IMPACT OF IMPLEMENTING LOSS OF VALUE INSURANCE

A. IMPACT FOR THE NCAA

The impact on the NCAA, should loss of value policies be allowed, is likely to be minimal. The most direct cost to the organization would be that associated with monitoring and keeping track of the purchase of these policies. It may lead to an increased need for oversight of boosters, agents and other third parties as they relate to the student-athletes. Overall, however, it should not cost the NCAA much in terms of time or money, particularly if it is wound into its already existing insurance programs.

The implementation of a loss of value policy may actually benefit the NCAA in two ways. First, it could increase athletes' incentives to stay in school and complete their degrees rather than force them to seek to cash in as early as possible.²¹⁷ Many athletes look to turn pro as soon as they become eligible due to the need for financial stability and concerns over injuries.²¹⁸ Having available protection may alleviate some students' fears and allow them to stay in school longer, thereby allowing the NCAA to benefit from their athletic success while strengthening the notion that the importance of education is paramount.

The second benefit to the NCAA could come in the form of reducing some of the vitriol over its failure to adequately compensate its

²¹⁴ See NCAA Insurance Programs, *supra* note 2.

²¹⁵ Wong & Deubert, *supra* note 13, at 510.

²¹⁶ Rovell, *supra* note 16.

²¹⁷ Zola, *supra* note 38.

²¹⁸ *Id.*

student-athletes for the financial contributions their athletic ability makes to the NCAA and its member institutions. The NCAA might not be willing to pay its players, but granting them increased freedom in the ways in which they can protect themselves during their collegiate careers would be a step in the right direction toward showing they care about their players' well-being. While creating some form of loss of value insurance is unlikely to completely quiet those criticisms, it would have some positive effect.

B. IMPACT FOR NCAA STUDENT-ATHLETES

The most substantial impact on the athletes is obvious – they would be able to effectively protect themselves, or, at the very least, have the option of doing so. Those students who leave school early in order to capitalize on and maximize the economic benefits of their athletic talents may feel less pressure to do so.²¹⁹ Students who wish to return to school for their junior or senior year in order to complete their degrees can do so knowing they are protected in the event of a serious but not career-ending injury.

An ancillary effect would be new concerns over the proper path to choose in securing loss of value coverage. It would become another factor for student-athletes to weigh, as decisions about the amount of coverage, the size of the loans and whether to purchase it at all would need to be considered.

C. IMPACT FOR THE INSURANCE INDUSTRY

The consequences for the insurance industry would likely be significant in this area, as dramatically expanding the market, which is currently very limited,²²⁰ would create incentive for more insurers to offer these policies. The pool of potential insureds would grow exponentially overnight, allowing companies already featuring these policies to offer more of them and other underwriters currently not in the market to enter the market. Lower premiums would likely result because insurers could better spread the risks of these policies and purchasers would have more options available to them. Furthermore, the increased frequency of the issuance would allow insurers to better tailor the policies to effectively protect the athletes while providing maximum value to the insurers.

²¹⁹ *Id.*

²²⁰ Crosner, *supra* note 37.

VIII. CONCERNS REGARDING THE IMPLEMENTATION OF LOSS OF VALUE POLICIES

A. THE MORAL HAZARD PROBLEM

The largest concern regarding the student-athletes and the implementation of loss of value coverage is the moral hazard problem. The belief here would be that athletes, if covered by a loss of value policy, would be free to take more chances as collegiate players because the insurance coverage protects them if anything goes wrong. While the concern may be legitimate, it is unlikely that athletes will suddenly become more reckless as a result of having a policy. For many of these athletes, professional sports are their meal ticket, and they already take risks and routinely put their bodies on the line while playing for their college teams. This approach stems from a belief at the core of sports – the concept of “team” – which encourages giving full effort in order to help your team succeed. The motivation behind going full bore can also be personal – to impress professional scouts. Either way, athletes already take chances with their bodies by virtue of being on the field. The presence of a loss of value policy is unlikely to increase their risk taking.

There will always be exceptions, but the vast majority of athletes see their bodies as the means through which they will earn a living. It would be incredibly shortsighted for them to risk their long-term health in hopes of a quick cash out. Furthermore, the policies themselves work to prevent these kinds of issues. The fact that the policies usually do not pay out full value lost in a draft fall, but only a percentage of it, works to ensure that realizing full draft potential is the more lucrative option for the athlete.

B. INCREASED LITIGATION STEMMING FROM THE POLICIES

Because athletes would be far more likely to collect on these policies as opposed to catastrophic or total disability coverage,²²¹ there is likely to be an increase in litigation. It may be difficult in some circumstances to discern whether an athlete’s drop in the draft was based

²²¹ Fixler, *supra* note 87. There have been very few instances of collection under both Catastrophic Injury Insurance and E.S.D.I. This is due in large part to medical advances that turn many would-be career-ending injuries into simply limiting ones, thereby preventing payouts under those policies. *Id.*

on an injury suffered during the collegiate season or an off-the-field issue. For example, an insurer may claim it was a student-athlete's legal troubles that caused teams to choose him later, while the athlete will claim it was the injury. There is also the problem of proof, as both sides' contentions would be nearly impossible to prove either way, absent a poll of each professional team as to exactly why they passed on that specific player. It is easy to see how this process could spiral out of control.

C. LACK OF PARTICIPATION IN THE PROGRAM

One concern is that even if loss of value coverage were offered, there is no real demand for this type of protection. In other words, this is a solution without a problem. While this contention may have some merit, it may be too difficult to tell whether or not this demand exists, due in large part to the fact that it is currently prohibited. It is impossible to know what the interest would be in an environment in which student-athletes were free to pursue this type of coverage.

While it is very likely that a select few athletes would purchase these types of policies, this does not mean that there is no desire for them. E.S.D.I. coverage was instituted despite the same concern. E.S.D.I. is targeted to a very specific subset of collegiate athletes, yet it remains viable and enrollment is consistent, despite its low payout totals.²²² Loss of value policies would presumably pay out substantially more often than total disability ones, thereby increasing their attractiveness among players. Even with a relatively low enrollment, the importance of the coverage is still substantial, given that the losses being insured are often in the eight-figure range.

D. FINANCIAL BURDEN

One legitimate concern would be that the high cost of these policies and their appeal may cause athletes for whom the price of the coverage may be outside their means to pursue them. It is easy to imagine an athlete, projected in the mid-to-low rounds of his sport's professional draft, securing an expensive policy through a costly loan, and then subsequently failing to be selected in that draft due to circumstances other than injury (i.e., off-the-field issues). The athlete would still be on the hook to repay the expensive loan, but would not be able to collect on the

²²² *Id.*

policy, thereby incurring a potentially crippling amount of debt. While the concern here is certainly foreseeable, the NCAA should not use it as a rationale for denying availability. It is the province of each individual to decide for himself as to whether he wants to risk incurring substantial debt to protect his future interests.

IX. CONCLUSION

In conclusion, the NCAA's prohibition on loss of value insurance leaves its student-athletes unable to cover themselves. The organization's current bylaws and rules as they pertain to insurance are flawed. Although the NCAA provides viable insurance options, it fails to allow its student-athletes to protect themselves in an area in which there is an increasing need for protection – loss of monetary value due to lower draft position. Advances in medical technology and procedures have substantially decreased the rate of occurrence for career-ending injuries, thereby decreasing the viability of the NCAA's current total disability insurance programs. Further, it is a general principle that individuals should be allowed to protect themselves if they have the means and desire to do so, yet the NCAA disallows this. If student-athletes, by virtue of current professional draft rules, are essentially forced to play one to three years of collegiate sports and risk their physical and financial livelihood, they should be permitted to protect themselves. Whatever the outcome of the ongoing debate over paying college athletes,²²³ it is clear that even if student-athletes should not be allowed to gain something from their participation in collegiate sports, they should, at the very least, be allowed to avoid losing anything from it.

A legal challenge to the NCAA over this prohibition will likely be successful, provided the challenger can overcome the traditional high level of deference courts give to the NCAA. Monetary damages would be difficult to obtain, as they would require an athlete to suffer an injury beforehand. Student-athletes would be better served seeking injunctive

²²³ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *appeals filed*, No. 14-16601 (9th Cir. Aug. 21, 2014), No. 14-17068 (Oct. 21, 2014); see also Patrick Hruby, *The End of Amateurism?*, SPORTS ON EARTH (July 2, 2013), <http://www.sportsonearth.com/article/52416070/> (discussing the potential impact of *O'Bannon* on the NCAA landscape). An in-depth examination of the merits of these arguments is beyond the scope of this Note and warrants further analysis.

relief that permits them to obtain financing to purchase expensive loss of value policies.

The NCAA could implement this coverage in a number of ways, either as the result of a court decree or as a result of its own determination, ranging from providing it themselves to simply creating a rule that allows student-athletes to seek it privately. Such a move by the NCAA would not be without its consequences and concerns but is ultimately necessary given the substantial risks for student-athletes in its absence. While the market for such coverage is somewhat limited, it remains necessary due to the fact that there are millions of dollars at stake for hundreds of young men and women. For now, though, when it comes to securing their future earnings, student-athletes are finding that they cannot cover themselves.