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Article

DRAFT PROTECTION INSURANCE: ELITE ATHLETE LOSS-OF-VALUE POLICIES AND THE EMERGING WAVE OF COVERAGE LITIGATION

DANIEL J. KAIN, C. SCOTT TOOMEY & ROBERT L. JOYCE*

I. INTRODUCTION

From its humble 1936 origin at the Ritz-Carlton Hotel in Philadelphia, the National Football League (“NFL”) Draft has developed into one of the most anticipated events of the sports calendar year.¹ The NFL Draft will return to its birthplace in 2017.² The city of Philadelphia expects the event to attract more than 200,000 visitors and generate revenue in excess of \$86 million.³ While the NFL Draft began as a closed door business meeting for NFL owners, it now serves as a week-long festival for player prospects, fans, agents and business partners to celebrate the sport of football.⁴

The same product that fuels the incredible success of the NFL’s regular season drives the intrigue and popularity of the NFL Draft, specifically, world class athletes. NFL teams and their fans aim to construct championship caliber rosters through a seven (7) round Draft held by the NFL each spring.

The big business that is the NFL Draft directly and indirectly impacts multiple industries, including insurance.⁵ A specialty insur-

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1. See ROBERT W. PETERSON, PIGSKIN: THE EARLY YEARS OF PRO FOOTBALL 119 (1997) (discussing the origin of the NFL Draft); PETE WILLIAMS, THE DRAFT: A YEAR INSIDE THE NFL’S SEARCH FOR TALENT 41–42 (2006).

2. See, e.g., Dan McQuade, *The 2017 NFL Draft Will Be in Philadelphia*, PHILA. MAG. (Sep. 1, 2016, 12:22 PM), <http://www.phillymag.com/news/2016/09/01/2017-nfl-draft-philadelphia/> [https://perma.cc/A4MS-M6DR].

3. *Id.*

4. See Thomas Barrabi, *Is the NFL Draft a Touchdown for Chicago’s Economy?*, FOX BUS. (Apr. 26, 2016), <http://www.foxbusiness.com/features/2016/04/26/is-nfl-draft-touchdown-for-chicagos-economy.html> [https://perma.cc/3JMN-USVH].

5. See *id.* (stating that NFL Draft provides another vehicle for League’s business partners such as Visa, Bud Light and Pepsi to capitalize on their investment with onsite presence at “Draft Town”). The 2015 NFL Draft “created more than

ance policy has emerged in recent years to protect the draft value of elite athletes projected for selection at the top of the NFL Draft's "big board."⁶ Under the NFL Collective Bargaining Agreement ("CBA"), rookie contracts are essentially pre-determined based upon a player's draft position.⁷ Thus, if a player projected as a top five (5) NFL Draft selection sustains an injury in the season preceding the Draft and consequently drops outside of first round consideration, the resulting loss in draft value amounts to millions of dollars.⁸

To guard against the risk of injury induced loss in draft value, private insurers such as Lloyd's of London ("Lloyd's") offer a product known as "draft protection" or "loss-of-value" ("LOV") insurance to qualifying athletes.⁹ LOV policies aim to protect an elite athlete's future contract value from decreasing below a predetermined threshold due to a significant injury or illness sustained during the policy's coverage period.¹⁰

2,000 temporary jobs and more than 800 permanent jobs" in industries such as construction and labor. *Id.*

6. The term "big board" originates from the earliest NFL Drafts wherein teams would write approximately ninety (90) names on a blackboard ("big board") in the draft selection meeting room. See ROBERT S. LYONS, *ON ANY GIVEN SUNDAY: A LIFE OF BERT BELL*, 60 (2010); CHRIS WILLIS, *THE MAN WHO BUILT THE NATIONAL FOOTBALL LEAGUE*; JOE F. CARR 341-43 (2010); Ty Schalter, *History of the NFL Draft: How Has the Process Evolved Over Time*, BLEACHER REP. (Feb. 24, 2012), <http://bleacherreport.com/articles/1077925-history-of-the-nfl-draft-how-has-the-process-evolved-over-time> [<https://perma.cc/2RW7-5RDL>].

7. See NFL COLLECTIVE BARGAINING AGREEMENT, art. 7 (2011) [hereinafter NFL CBA]; see also Richard R. Meyer, *Finally, The 1st Real Test to Loss-of-Value Insurance?*, LAW360 (Feb. 24, 2016), <https://www.law360.com/articles/763390/finally-the-1st-real-test-to-loss-of-value-insurance> [<https://perma.cc/23WE-TBL2>].

8. By way of illustration, the projected contract value for the first pick in the 2016 NFL Draft amounted to \$28.65 million whereas the projected contract value for the final pick of the 2016 first round amounted to \$9.49 million. See Anthony Riccobono, *NFL Draft 2016 Contracts: Projected Salaries for All First-Round Picks*, INT. BUS. TIMES (Apr. 28, 2016, 2:09 PM), <http://www.ibtimes.com/nfl-draft-2016-contracts-projected-salaries-all-first-round-picks-2361279> [<https://perma.cc/2ULH-FH85>].

9. See *Loss-of-Value White Paper*, NCAA, <http://www.ncaa.org/about/resources/insurance/loss-value-white-paper> [<https://perma.cc/SG6J-QNU8>] (last visited Jan. 29, 2017). See also *NCAA Loss-of-Value*, NCAA (webinar Feb. 11, 2016), available at <http://www.ncaa.org/about/resources/insurance/loss-value-insurance-information> (click "WATCH: Loss of value webinar") [hereinafter *NCAA Loss-of-Value Webinar*] (last visited Jan. 29, 2017). Multiple Lloyd's wholesalers offer LOV products such as International Specialty Insurance, Exceptional Risk Advisors, Hanleigh Insurance and Petersen International. *Id.*

10. *Loss-of-Value White Paper*, *supra* note 9; *NCAA Webinar*, *supra* note 9. See also Meyer, *supra* note 7.

Before issuing a policy, underwriters will first determine an athlete's eligibility based on his projected draft position.¹¹ The underwriters will then set an LOV threshold, which typically covers approximately 50–60% of the athlete's projected rookie contract.¹² If the contract the athlete ultimately signs falls below that threshold *solely* and *directly* due to the injury suffered during the coverage period, the insurer pays the difference between the actual contract's value and the policy's predetermined value.¹³

At first blush, both college players and their respective collegiate programs stand to benefit from LOV policies. For players, LOV policies provide the security required to perform at an exceptional level during their last season of collegiate play. For collegiate football programs, LOV policies provide a useful tool to incentivize elite players to return to school after they become draft eligible. However, very few players have successfully collected on an LOV policy after submitting a claim.¹⁴ Successful recovery under an LOV policy hinges on a number of factors, including, without limitation, whether the player sustained a material injury as defined by the policy, whether the player's drop in draft status resulted *solely* and *directly* as a result of his injury and whether the player and his collegiate program disclosed all relevant medical information to the insurer when applying for the LOV policy.¹⁵

11. Meyer, *supra* note 7. According to the NCAA, only players projected for selection within the top fifteen (15) picks in the NFL Draft should consider purchasing an LOV policy. See *Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9.

12. *Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9.

13. *Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9.

14. Former University of Oregon cornerback Ifo Ekpre-Olomu stands as one of the only athletes that has successfully collected on an LOV policy. See Meyer, *supra* note 7. After receiving a first round draft projection, Ekpre-Olomu took out an LOV policy with a \$40,000 premium. See Gregg E. Clifton, *Is 'Loss of Value' Insurance Worth the Price for Student-Athletes, Universities?*, COLLEGIATE & PROF. SPORTS L. BLOG (May 8, 2015), <http://www.collegeandprosportslaw.com/uncategorized/is-loss-of-value-insurance-worth-the-price-for-student-athletes-universities/>. As a result of an injury sustained during his final collegiate playing season, Ekpre-Olomu fell to the seventh round of the 2015 NFL Draft. See Meyer, *supra* note 7. Ekpre-Olomu collected a \$3 million payout under his LOV policy without the need to resort litigation. See Jeff Sistrunk, *3 Insurance Policies That Should Be in Athletes' Playbooks*, LAW360 (Jan. 29, 2016, 3:05 PM), <https://www.law360.com/articles/751596/3-insurance-policies-that-should-be-in-athletes-playbooks> [<https://perma.cc/MC6S-Y4YX>].

15. See, e.g., Marc Tracy, *Insurance Doesn't Eliminate Risk for Top College Athletes Who Forgo Draft*, N.Y. TIMES (May 8, 2015), https://www.nytimes.com/2015/05/09/sports/ncaafootball/insurance-doesnt-eliminate-risk-for-top-college-athletes-who-forgo-draft.html?_r=0.

A set of insurance coverage litigation has arisen out of elite athlete LOV policies.¹⁶ The cases involve a pattern factual backdrop. Specifically, an elite college football player procures an LOV policy during the year before he becomes draft eligible.¹⁷ The player receives assistance from his university in completing the application process, submitting medical information to the insurer and facilitating payment of the LOV policy premium.¹⁸ During the policy period, the player sustains an injury and his projected draft position drops.¹⁹ Following the NFL Draft, the player submits a claim to his insurer to collect under the terms of the LOV policy.²⁰ The insurer denies the player's claim, citing a number of defenses.²¹ The player initiates a coverage lawsuit against his insurer and/or school asserting various causes of action relative to the insurer's non-payment of the policy.²²

Part I of this Note will address LOV policy eligibility requirements, threshold determinations, premium funding, defenses and exclusions. Part II will review the claims and defenses raised in the emerging set of LOV insurance coverage litigation. Part III will explore the National Collegiate Athletic Association's ("NCAA") position on LOV policies. Finally, Part IV will discuss an emerging trend involving the decision of multiple elite prospects to forego the final Bowl game of their collegiate careers in order to mitigate the risk of injury and the resulting loss in draft value.

16. See generally, e.g., *Lee v. Certain Underwriters at Lloyd's London*, 2:15-cv-01614-ODW-JC (C.D. Cal. Mar. 4, 2015); *Breslin v. Amtrust at Lloyd's Ltd.*, 2:15-cv-00330-R-AS (C.D. Cal. Jan. 15, 2015); *Breslin v. Univ. of S. Cal.*, No. BC592870 (Cal. Super. Ct. Aug. 28, 2015).

17. See, e.g., Complaint at para. 3, *Lee v. Lloyd's*, No. 2:15-cv-01614-ODW-JC [hereinafter *Lee Complaint*]; Complaint at para. 2, *Breslin v. Lloyd's*, No. 2:15-cv-00326 (C.D. Cal. Jan. 15, 2015) (2:15-cv-00330-R-AS) [hereinafter *Breslin v. Lloyd's Complaint*]; Complaint at para. 21, *Breslin v. Univ. of S. Cal.*, No. BC592870, (Cal. Super. Ct. Aug. 28, 2015), (No. BC592870) [hereinafter *Breslin v. USC Complaint*].

18. See *Lee Complaint*, *supra* note 17, at para. 13; *Breslin v. Lloyd's Complaint*, *supra* note 17, at para. 18; *Breslin v. USC Complaint*, *supra* note 17, at para. 19.

19. See *Lee Complaint*, *supra* note 17, at paras. 17–19; *Breslin v. Lloyd's Complaint*, *supra* note 17, at para. 21; *Breslin v. USC Complaint*, *supra* note 17, at paras. 21, 23.

20. See *Lee Complaint*, *supra* note 17, at para. 20; *Breslin v. Lloyd's Complaint*, *supra* note 17, at para. 22; *Breslin v. USC Complaint*, *supra* note 17, at para. 23.

21. See *Lee Complaint*, *supra* note 17, at para. 23; *Breslin v. Lloyd's Complaint*, *supra* note 17, at para. 22; *Breslin v. USC Complaint*, *supra* note 17, at para. 29.

22. See *Lee Complaint*, *supra* note 17, at paras. 24–33; *Breslin v. Lloyd's Complaint*, *supra* note 17, at paras. 31–33; *Breslin v. USC Complaint*, *supra* note 17, at paras. 64–73.

II. LOSS-OF-VALUE POLICY BACKGROUND

The process of applying for and comprehending the definitions, terms and exclusions of LOV policies presents a unique challenge to elite collegiate football athletes. The complexity of LOV policies prompted the NCAA to hold a Webinar in February, 2016 to educate representatives of member institutions and power conferences.²³ The questions raised by senior collegiate executives during this Webinar demonstrate that LOV policies exceed the general knowledge of industry professionals, much less collegiate athletes lacking any agent or attorney representation.²⁴

A. Eligibility Determination and Thresholds

According to the NCAA, only those players projected for selection at the apex of the NFL Draft (e.g., top fifteen [15]) should consider purchasing LOV coverage.²⁵ The NCAA reasons that players projected below top 15 consideration will face nearly insurmountable challenges in attempting to collect under an LOV claim.²⁶

In order to determine an applicant's eligibility for a LOV policy, the insurance company will closely evaluate the player's projected draft status.²⁷ Here, the insurance company will consult with a number of sources including NFL team scouts and other NFL Draft experts.²⁸ If an insurance company refuses to disclose its draft projection sources to the player applicant, the NCAA cautions the LOV applicant against doing business with that company.²⁹

23. See *NCAA Loss-of-Value Webinar*, *supra* note 9.

24. *Id.* See also Darren Rovell, *College Football Insurance Policies Are Big—But Complex—Business*, ESPN (Aug. 17, 2016), http://www.espn.com/college-football/story/_/id/17328541/college-football-insurance-policies-big-complicated-business [<https://perma.cc/FQH8-G9KM>].

25. Rovell, *supra* note 24. See also *NCAA Loss-of-Value White Paper*, *supra* note 9.

26. See *Loss-of-Value White Paper*, *supra* note 9.

27. See *NCAA Loss-of-Value Webinar*, *supra* note 9.

28. *Id.* In addition to team scouts, insurers might consult with football media experts such as Mel Kiper, Jr. In 1984, ESPN hired Kiper as an independent football scout to provide draft analysis. See Schalter, *supra* note 6. Kiper's signing provided ESPN and NFL fans with a taste of the data team scouts use to evaluate college players. *Id.* Kiper's evaluation of NFL prospects brought NFL scouting to the mainstream and directly contributed to the growth and popularity of the NFL Draft. LOV insurers might also reference publicly available scouting sources that provide draft projections for prospects anticipated to declare eligibility during each of the ensuing two (2) seasons. See, e.g., *WalterFootball.com Updates*, WALTER FOOTBALL, <http://walterfootball.com/index.php> [<https://perma.cc/5B2U-GSUG>] (last visited Apr. 13, 2017).

29. See *NCAA Loss-of-Value Webinar*, *supra* note 9.

After the insurance company determines that a student athlete projects as an elite first round selection in the NFL Draft, the insurer will set a loss-of-value threshold, which typically amounts to 50–60% of the projected rookie contract.³⁰ By way of example, where the player’s projected rookie contract projects to \$10 million over four (4) years, an insurance company might set the LOV threshold at 60% of the rookie contract, resulting in a \$6 million LOV threshold.³¹

B. Premium Funding

Premiums for LOV policies range anywhere from \$10,000 to \$95,000.³² Collegiate football players and programs obtain LOV policies through two (2) methods of funding: (i) the player takes a loan out against his future earnings or (ii) the collegiate football program applies funds obtained from the school’s Student Assistance Fund (“SAF”). A discussion of collegiate athlete loans and SAF fund allocation follows below.

1. Player Loans

The NCAA requires that a student-athlete maintain his or her amateur status in order to participate in college athletics.³³ A collegiate football player could lose his amateur status by using his or her athletics skill (directly or indirectly) for pay in any form in that sport.³⁴ The NCAA defines “Pay” separately to include preferential treatment, benefits or services because of the individual’s athletics reputation, skill or pay-back potential as a professional athlete.³⁵

Without an applicable exception to the NCAA’s basic amateurism rule, use of future earnings as collateral for an LOV policy loan would violate the NCAA’s prohibition of extra benefits for student-athletes. Generally, a student-athlete may not receive any benefit

30. See *id.*; *NCAA Loss-of-Value White Paper*, *supra* note 9.

31. *Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9. Note that the LOV policy holder only receives a benefit under the policy if the rookie contract is less than the LOV threshold. *Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9. If the rookie contract exceeds the threshold, the player does not recover under the policy. *Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9.

32. See *Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9. See also Lee Complaint, *supra* note 17, at para. 15 (stating that Lee paid Lloyd’s a \$94,600 premium to obtain his LOV policy).

33. See NAT’L COLLEGIATE ATHLETIC ASS’N, 2016–17 NCAA DIVISION I MANUAL, Bylaw 12.01.1 (2016) [hereinafter NCAA MANUAL] (“[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”).

34. *Id.* at Bylaw 12.1.2(a).

35. *Id.* at Bylaw 12.1.2.1.6.

that is not generally available to all of the school's students.³⁶ Within the extra benefit rules, the NCAA also specifically prohibits a student-athlete from receiving a deferred pay-back loan based on the student-athlete's athletics reputation, skill or pay-back potential as a future professional athlete.³⁷

In order to provide student athletes with the option and incentive to return to collegiate play after they become draft eligible, the NCAA carved out an exception to its amateurism rule such that student athletes can fund insurance policies through a loan against future earnings.³⁸ Under this exception, a collegiate football player can borrow against his future earnings potential for the purpose of purchasing insurance against a disabling injury or illness.³⁹ As explained by Maria Gleason, an NCAA Operations and Risk Manager: "we wanted to give student athletes who have professional prospects a real choice to stay in school We wanted to make it possible for them to insure against future loss if they made that choice to stay in school."⁴⁰

2. *Student Assistance Fund*

Subject to conference policies and procedures, the NCAA permits member institutions to use money from the SAF to purchase LOV policy premiums.⁴¹ According to the NCAA, schools may use their SAF to assist student-athletes in meeting financial needs that arise in conjunction with participation in intercollegiate athletics.⁴² Schools possess approximately \$300,000–\$350,000 in their SAF.⁴³

36. *Id.* at Bylaw 16.11.1.1.

37. *Id.* at Bylaw 16.11.1.2.

38. *See, e.g.*, Jill Wieber Lens & Joshua Lens, *Insurance Coverage for Elite Student Athletes*, 84 Miss. L.J. 127, 153–57 (2014) (providing extensive analysis of policy reasons underlying NCAA's amateurism exception).

39. *See* NCAA MANUAL, *supra* note 33, at Bylaws 12.1.2.4.4, 16.11.1.4. Member institutions may designate staff members to assist athletes with arrangements for securing the loan and insurance. *Id.* The institution shall retain copies of all documents related to loan transactions and insurance policies, regardless of whether the institution is involved in the arrangements. *Id.*

40. Wieber Lens & Lens, *supra* note 38, at 154–55.

41. *See Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9.

42. *See Student Assistance Fund Guidelines*, NCAA, <http://www.ncaa.org/sites/default/files/2013+Student+Assistance+Fund.pdf> (last visited Feb. 20, 2017). *See also* Wieber Lens & Lens, *supra* note 38, at 161 n.163.

43. Wieber Lens and Lens, *supra* note 38, at p. 163–64. *See also* Dennis Dodd, *Leonard Fournette's \$10M Policies and the Unregulated World of Player Protection*, CBSSPORTS (May 12, 2016), <http://www.cbssports.com/college-football/news/leonard-fournettes-10m-policies-and-the-unregulated-world-of-player-protection/> [<https://perma.cc/DV6V-22TR>]. *See also* David McCoy, *NCAA's Little-Known Student Assistance Fund*, CBS MINN. (Jan. 12, 2014, 11:17 PM) <http://minnesota.cbslocal.com/>

Collegiate executives like the Commissioner of the Big 12 and Chairman of the NCAA Football Oversight Committee have expressed discomfort in member institutions using SAF money to fund LOV premiums: “I’m not comfortable having the Student Assistance Fund used for those things. . . . It’s a very large premium, typically, and it takes away from other kids.”⁴⁴

No question exists that schools will use every competitive tool at their disposal to (i) recruit the highest rated football athletes out of high school and (ii) retain them once the players become draft eligible. Subsidizing elite players’ LOV policies presents one arrow in a school’s recruiting/retention quiver. As explained by Kevin Sumlin, the head coach of Texas A&M University’s football program, the question players ask when they become draft eligible is “what about injury?”⁴⁵ However, a school’s willingness to subsidize a player’s LOV premium incentivizes the player to return to school after he becomes draft eligible and “takes away a lot of the ‘[w]hat if?’”⁴⁶

Texas A&M spent close to \$60,000 from its SAF to pay the premium for offensive lineman Chris Ogbuehi’s LOV policy.⁴⁷ When considering whether to enter the NFL Draft after his junior year, Ogbuehi received draft evaluations indicating he would likely be a first round selection.⁴⁸ To incentivize Ogbuehi to return to school for his senior season, Texas A&M offered to use SAF resources to pay his LOV policy premium.⁴⁹ Ogbuehi explained that the school’s willingness to pay his LOV premium “really helped with [his] decision” and provided “great reassurance knowing that (coming back for one more season) is not as big of a risk-reward.”⁵⁰

2014/01/12/ncaas-little-known-student-assistance-fund/ [https://perma.cc/8EM5-TZCF]

44. Dodd, *supra* note 43.

45. Tracy, *supra* note 15.

46. *Id.* Florida State University reportedly used SAF money to pay the LOV premium for quarterback Jameis Winston, who obtained \$10 million in combined PTD and LOV coverage. See Jared Shanker, *FSU Chips in on Winston’s Insurance*, ESPN (Aug. 5, 2014), http://espn.go.com/college-football/story/_/id/11310051/jameis-winston-insurance-policy-paid-part-florida-state [https://perma.cc/YJU6-WQCD].

47. See Bruce Feldman, *How Texas A&M Paid Over \$50,000 to Get Cedric Ogbuehi Back for 2014*, FOX SPORTS (July 16, 2014, 6:00 PM), <http://www.foxsports.com/college-football/story/texas-am-aggies-paid-nearly-60-grand-top-nfl-prospect-cedric-ogbuehi-071614> [https://perma.cc/XEK5-GKE7].

48. *Id.*

49. *Id.*

50. *Id.*

During Nick Saban's tenure as the head coach of the University of Alabama's football program, he has recruited and received commitments from the highest percentage of five (5) star football prospects nationwide.⁵¹ Coach Saban recognizes the slippery slope inherent in rating and insuring athletes at such a young age: "[p]retty soon, they're going to be rating a five-star in high school [for draft protection insurance]."⁵²

Due to the limited SAF money available to subsidize elite athlete LOV premiums, an attendee of the NCAA's February, 2016 Webinar asked whether universities could fund LOV policies out of their general athletic department or university budgets.⁵³ After a cognizable pause, a member of the NCAA panel answered the question by stating: "no."⁵⁴ In order for member institutions to fund LOV policies directly through general university budget dollars, a specific legislative proposal to the NCAA would need to occur.⁵⁵

C. Policy Defenses & Exclusions

The NCAA cautions student athletes that simply procuring an LOV policy does not guarantee collection under the policy in the event an injury or illness occurs during the policy's coverage period.⁵⁶ A number of defenses and exclusions exist that render collection under an LOV claim difficult.

1. Causation

Proving that an injury or illness presents the *sole* and *direct* cause of a player's loss in draft value presents a primary obstacle in a player's effort to successfully collect under an LOV policy.⁵⁷ The positional needs of teams slotted at the top of the Draft board dictate, in large part, which players get selected with the top fifteen (15) picks.⁵⁸ By way of example, an elite running back prospect might sustain an injury within his LOV policy coverage period and

51. See, e.g., *2017 Alabama Football Commitment List*, ESPN, <http://www.espn.com/colleges/alabama/football/recruiting/commitments> [<https://perma.cc/3NGW-KJDM>] (last visited Apr. 13, 2017).

52. Dodd, *supra* note 43.

53. See *NCAA Loss-of-Value Webinar*, *supra* note 9.

54. *Id.*

55. *Id.*

56. See *Loss-of-Value White Paper*, *supra* note 9.

57. See, e.g., Tracy, *supra* note 15; *NCAA Loss-of-Value White Paper*, *supra* note 9 (citing standard policy exclusions such as pre-existing injuries and illnesses, drug or alcohol use, criminal acts and mental, nervous or psychological disease or disorder).

58. See *NCAA Loss-of-Value Webinar*, *supra* note 9.

ultimately receive a rookie contract that falls below his LOV threshold figure. Here, the insurer might employ a defense that teams atop the Draft board passed on the prospect not because of his prior injury, but rather, due to those teams' relative roster strength at the running back position. For instance, NFL teams with franchise running backs in their prime (e.g., Ezekiel Elliott and Le'Veon Bell) will not likely expend a first round Draft selection on a running back prospect.

Another factor that could adversely impact a prospect's ability to collect on an LOV policy pertains to his performance throughout the pre-Draft scouting process. NFL Draft prospects participate in a series of scouting events that include, without limitation, the Senior Bowl, NFL Scouting Combine and college Pro Days. During these events, NFL scouts from every team in the League will study the premier prospects at each positional group and assess their performance within a battery of targeted drills and testing. Here, a draft prospect's status could falter for reasons entirely unrelated to the injury or illness he sustained during the LOV policy period.⁵⁹ For instance, a quarterback's draft stock might drop due to his throwing or footwork mechanics, comprehension of complex NFL coverage schemes and/or field vision.⁶⁰ Similarly, a wide receiver's draft value could plummet if it becomes apparent that his skills as a route runner require significant development. Under either of these hypothetical scenarios, a defense exists that a drop in draft value resulted from poor performance during the scouting season, rather than the player's prior injury.

Off the field issues present an additional factor unrelated to a player's injury that could present an independent cause of diminished draft value.⁶¹ Here, one could foresee a scenario wherein a player sustains an injury during the policy period, recovers from the injury, performs excellent throughout the scouting events but makes a poor off the field decision that adversely impacts his draft

59. See *NCAA Loss-of-Value White Paper*, *supra* note 9 (citing poor performance at Draft Scouting Combine as specific basis unrelated to injury that could cause player's draft value to falter).

60. See *id.* (explaining that trade or free agency decision made by team prior to NFL Draft could impact whether team requires elite draft prospect at that position).

61. In 2016, the NFL inaugurated a policy banning prospects from attending the Scouting Combine with misdemeanor or felony convictions involving violence or use of a weapon, domestic violence or sexual misconduct/assault. See Les Bowen, *NFL Scouting Combine's Exclusive Message for Problem Players*, PHILA. INQ. (Feb. 26, 2017). The NFL also sent a memo to all teams stating: "The NFL also reserves the right to deny participation of any prospect dismissed by their university or the NCAA." *Id.*

status. For instance, a player might be arrested for driving under the influence within a month of the NFL Draft.⁶² Alternatively, photographs of the prospect could surface on social media on or around Draft night that bring the prospect's judgment or character into question.⁶³ While unfortunate, under either of these scenarios, a player would have extreme difficulty proving that an injury sustained during the policy period presents the *sole* and *direct* cause of his diminished draft value.

2. *Disclosure of Medical Information*

Upon receipt of a claim made under an LOV policy, an insurer might deem the policy void, claiming that the insured athlete failed to disclose material medical information and documents during the policy application process.⁶⁴ An insurer's contention that the athlete's LOV application contains material misstatements and medical omissions might implicate the player's school.⁶⁵ In certain instances—if not a majority—the player's school plays a primary role in assisting the student athlete with the LOV application process, including the collection of relevant medical information and records.⁶⁶ The collegiate institution might control all lines of communication with the insurance underwriters throughout the application process.⁶⁷ As one might expect, a school's direct involvement in the LOV application process could implicate the school in coverage litigation liability should the insurer deem a policy void on the basis of missing or inaccurate medical information.

III. LOSS-OF-VALUE LITIGATION

A recent set of coverage litigation has arisen out of LOV policies issued to elite athletes from The University of Southern California's ("USC") football program, Marqise Lee and Morgan Breslin. The *Lee* and *Breslin* litigation share many similarities as Lee and Breslin played for the same football program (USC) and obtained

62. See, e.g., Chase Goodbread, *Analysts Assess Dak Prescott's Draft Stock Following DUI Arrest*, NFL (last updated Mar. 14, 2016, 6:21 PM), <http://www.nfl.com/news/story/0ap3000000644248/article/analysts-assess-dak-prescotts-draft-stock-following-dui-arrest> [https://perma.cc/6XA7-8XBN].

63. See, e.g., Victor Mather, *Laremy Tunsil Falls in N.F.L. Draft After Apparent Drug Video Surfaces*, N.Y. TIMES (Apr. 28, 2016), https://www.nytimes.com/2016/04/29/sports/laremy-tunsil-falls-in-nfl-draft-after-drug-video-surfaces.html?_r=0.

64. See Tracy, *supra* note 15. See also *supra* note 17 and accompanying text.

65. See, e.g., *Breslin v. USC Complaint*, *supra* note 17, at paras. 19, 21.

66. *Id.*

67. *Id.*

LOV policies from the same insurer (Lloyd's). A summary of this litigation follows below.

A. Marqise Lee Litigation

In 2012, Lee led all wide receivers nationwide in total receptions and he earned Pac-12 Offensive Player of the Year honors.⁶⁸ As the reigning Biletnikof Award winner (an honor reserved for the top receiver in all of college football), Lee projected as top first-round NFL Draft selection.⁶⁹ In August 2013, Lee submitted an application to purchase a “loss of value” policy from Lloyd's to recover or mitigate any future loss of income that might result if he sustained an injury during the August 15, 2013, to August 1, 2014, insurance policy period, which encompassed the entire 2013 college football season.⁷⁰

Per the terms of the policy, Lloyd's agreed to indemnify Lee for “loss of value” in the event his rookie NFL contract did not total \$9,600,000 or more as a result of an injury occurring during the insurance policy period.⁷¹ On September 28, 2013, Lee sustained a knee injury in a game against Arizona State University.⁷² He treated with a physician following the game and received a diagnosis of a medial collateral ligament sprain, bone contusion, posterior sprain and popliteal cyst in his left knee.⁷³ Lee missed multiple games following the injury.⁷⁴

During the 2014 NFL Draft, Lee fell from his projected first round status to the second round where the Jacksonville Jaguars selected him with the thirty-ninth (39th) overall selection.⁷⁵ This decline in draft status amounted to a multi-million-dollar loss as the \$5.2 million rookie contract he signed fell millions below the \$9.6 million threshold set forth in Lee's LOV policy.⁷⁶

Shortly after the 2014 NFL Draft, Lee submitted a claim to Lloyd's to recover this “loss of value” under the terms of his LOV

68. See Lee Complaint, *supra* note 17, at para. 12.

69. *Id.* at para. 4. See also Meyer, *supra* note 7.

70. See Lee Complaint, *supra* note 17, at para. 3. Lloyd's sold the LOV policy to Lee per a \$94,600.00 premium (Policy Certificate No. RCA06813392). *Id.* at paras. 3, 15. USC's Office of NCAA Compliance assisted Lee in obtaining the policy from Lloyd's. *Id.* at para. 13.

71. *Id.* at para. 16.

72. *Id.* at para. 17.

73. *Id.*

74. *Id.*

75. *Id.* at paras. 4, 18.

76. *Id.* at paras. 4, 19. See also Meyer, *supra* note 7.

policy.⁷⁷ In March, 2015, Lloyd's denied Lee's claim and sought to rescind Lee's LOV policy, contending that Lee failed to disclose certain medical information when applying for the subject policy.⁷⁸

In March, 2015, Lee filed suit against Lloyd's in the United States District Court for the Central District of California.⁷⁹ In seeking to recover the difference between the \$9.6 million threshold of his LOV policy and the \$5.2 million rookie contract he received, Lee asserted claims against Lloyd's sounding in breach of contract and breach of the implied covenant of good faith and fair dealing.⁸⁰ Essentially, Lee contended that Lloyd's denial of his claim constituted a breach of the LOV policy and that Lloyd's denied his claim in bad faith.⁸¹ In addition to compensatory damages, Lee sought punitive damages from Lloyd's.⁸²

On the same day that Lee filed his bad faith suit against Lloyd's in the Central District of California, Lloyd's filed a separate declaratory judgment action in The United States District Court of New Jersey.⁸³ In its Complaint, Lloyd's alleged Lee made material misrepresentations, omissions and/or concealments in the medical information submitted with his LOV policy.⁸⁴ Accordingly, Lloyd's contended, *inter alia*, that the LOV policy never took effect, that rescission of the policy proved appropriate and that the policy was null and void from its inception.⁸⁵

The District of New Jersey transferred Lloyd's declaratory judgment action to the Central District of California.⁸⁶ Following transfer, the Central District of California granted multiple stipulations from the parties to extend their respective responsive pleading deadlines.⁸⁷ Before any substantive briefing on the merits or bench

77. See Lee Complaint, *supra* note 17, at para. 5.

78. *Id.*

79. See *id.* In Lee's pleading, he averred that the ability to purchase LOV insurance is indispensable to NCAA football as it incentivizes student athletes to continue playing college football notwithstanding the risks to their future NFL careers and their projected multimillion dollar earnings as professional football players. *Id.* at para. 2.

80. *Id.*

81. *Id.* at para. 6.

82. *Id.* at para. 33.

83. See Lee Complaint, *supra* note 17.

84. *Id.* at paras. 2, 3, 4, 18.

85. *Id.* at para. 8.

86. See *Lee v. Lloyd's*, 2:16-cv-02622-ODW-JC, at Dkt. No. 33.

87. See, e.g., *Lee v. Lloyd's*, 2:15-cv-01614-ODW-JC, Dkt. Nos. 30, 33, 38, 40, 42, 44, 46, 48.

trial occurred, the parties reached a settlement of their respective claims.⁸⁸

B. Morgan Breslin Litigation

Morgan Breslin played linebacker on the same USC football team as Lee during the 2012 and 2013 seasons. Breslin projected as an early round prospect in the 2013 NFL Draft.⁸⁹ He elected to return to USC for the 2013 football season and to forego entry into the 2013 NFL Draft.⁹⁰ In September, 2013, Breslin applied for and obtained an LOV policy through Lloyd's to recover or mitigate any loss in income that might occur if he sustained an injury during the policy period of August 27, 2013 through August 1, 2014, which included the entire 2013 football season.⁹¹

Breslin sustained an injury during a September 28, 2013 game against Arizona State University.⁹² He treated with a physician following the Arizona State game—voicing complaints of groin pain.⁹³ Breslin subsequently underwent a sports hernia surgery on November 19, 2013 and an adductor longus repair surgery on April 8, 2014.⁹⁴ Breslin played in only five (5) games during the 2013 season.⁹⁵ He was not invited to the NFL Combine nor did any team select him during the 2014 NFL Draft.⁹⁶ Shortly following the 2014 NFL Draft, Breslin submitted a claim to Lloyd's to recover under the terms of his LOV policy.⁹⁷

On December 12, 2014, Lloyd's filed a declaratory judgment action in the District of New Jersey.⁹⁸ Lloyd's alleged that Breslin misrepresented, omitted and/or concealed certain medical information from his LOV policy application.⁹⁹ Like the *Lee* action, Lloyd's sought a declaration that the LOV policy did not take effect, that rescission of the policy proved lawful and that any claim made by Breslin to collect under the policy lacked merit.¹⁰⁰

88. *Id.* at Dkt. Nos. 59–61.

89. *See* Breslin v. Lloyd's Complaint, *supra* note 17, at para. 17.

90. *Id.*

91. *Id.* at para. 2, 20.

92. *Id.* at para. 21.

93. *Id.*

94. Breslin v. Lloyd's Complaint, *supra* note 17, at para. 21.

95. *Id.*

96. *Id.*

97. *Id.* at para. 22.

98. *See* Breslin v. Lloyd's Complaint, *supra* note 17.

99. *Id.* at paras. 2–3 .

100. *Id.* at Prayer for Relief.

One month after Lloyd's declaratory judgment filing, Breslin filed a Complaint against Lloyd's in the Central District of California.¹⁰¹ Breslin asserted multiple claims against Lloyd's including breach of contract, breach of the covenant of good faith and fair dealing and bad faith denial of insurance benefits.¹⁰² Breslin sought both compensatory and punitive damages from Lloyd's.¹⁰³ The District of New Jersey transferred Lloyd's declaratory judgment action to the Central District of California.¹⁰⁴ Similar to the *Lee* litigation, Breslin and Lloyd's settled their claims against one another without any substantive briefing on the merits or a bench trial.¹⁰⁵

Before Breslin and Lloyd's resolved their claims against one another, Breslin filed a separate suit against USC in Los Angeles County state court.¹⁰⁶ Breslin alleged that USC's advice to elite student-athletes regarding LOV policies plays a substantial role in retaining athletes once they become draft eligible.¹⁰⁷ The Complaint states that Breslin purchased his LOV policy based on the advice and representations of USC that the policy would protect him in the event that he sustained a qualifying injury.¹⁰⁸ The Complaint further alleges that USC directed Breslin in every step related to the policy, including completion of the application, providing medical documentation to the underwriters and acquiring a bank note to pay for the policy.¹⁰⁹

According to the Complaint, USC controlled all lines of communication with Lloyd's and Breslin had no direct communication with the insurer during the application process.¹¹⁰ As the sole source of information regarding the subject LOV policy, Breslin alleged that USC owed a duty to Breslin to explain the risks and bene-

101. See generally Breslin v. Lloyd's Complaint, *supra* note 17.

102. *Id.* at paras. 31–33.

103. *Id.* at paras. 35.

104. See *Breslin v. Lloyd's*, 2:15-cv-02441, Dkt. Nos. 27–29.

105. *Id.* at Dkt. No. 67–68.

106. See Breslin v. USC Complaint, *supra* note 17.

107. *Id.* at para. 13. The Complaint also states that school and NCAA regulations prohibit student athletes from retaining an agent, financial advisor or contract adviser to help digest, negotiate and comply with the dense terms of elite athlete insurance policies. *Id.* at para. 14. Further, the pleading alleges that these athletes are only just out of their teens without a complete college education, much less expertise in navigating complicated coverage terms. *Id.*

108. *Id.* at Preliminary Statement.

109. *Id.* Breslin further alleges that USC failed to provide him with any copy of the policy during the application process. *Id.* at para. 56.

110. *Id.* at paras. 15, 19.

fits of entering into the policy.¹¹¹ Likewise, the Complaint alleges that USC owed a duty to Breslin to ensure that elite athletes correctly complete the application documentation and that all medical information provided to the insurer proves true and accurate.¹¹²

While Breslin asserts a host of claims against USC, the primary claim sounds in breach of contract.¹¹³ The Complaint asserts that USC promised to manage Breslin's relationship with Lloyd's, and in exchange, Breslin promised by his conduct to forgo the 2013 NFL Draft and remain at USC for another season.¹¹⁴ Breslin alleges that USC breached its duties under the contract by failing to appropriately complete the LOV application and failing to submit complete and accurate medical information to Lloyd's.¹¹⁵ Ultimately, Breslin alleges that if any omission or misstatement of medical information transpired with respect to his LOV policy application, USC bears the responsibility.¹¹⁶ As a remedy, Breslin seeks both compensatory and punitive damages from USC.¹¹⁷

IV. NCAA'S POSITION ON LOSS-OF-VALUE POLICIES

The NCAA gave consideration to whether it should offer LOV policies directly to student athletes through its Exceptional Student-Athlete Disability Insurance Program ("ESDI program").¹¹⁸ The NCAA's ESDI program enables qualifying student-athletes, to purchase a *permanent* total disability insurance policy ("PTD policy") with pre-approved financing if necessary.¹¹⁹ PTD policies offered through the NCAA's ESDI program protect student-athletes against future loss of earnings as a professional athlete due to a *total* disabling injury or sickness that may occur during the collegiate ca-

111. Breslin v. USC Complaint, *supra* note 17, at para. 15.

112. *Id.*

113. *Id.* at paras. 27–31. In addition to breach of contract, Breslin's claims against USC include, without limitation, negligence, breach of fiduciary duty, fraudulent concealment and false promise. See generally Breslin v. USC Complaint, *supra* note 17.

114. *Id.* at par. 28.

115. *Id.* at par. 30.

116. *Id.* at Preliminary Statement.

117. *Id.* at Prayer for Relief.

118. See *Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9. In October 1990, a disability insurance program was initiated for exceptional student-athletes at NCAA institutions in the sports of football and men's basketball. See *Student-Athlete Insurance Programs*, NCAA, <http://www.ncaa.org/about/resources/insurance/student-athlete-insurance-programs> [https://perma.cc/X45Y-ZXMZ] (last visited Feb. 12, 2017).

119. See *Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9.

reer.¹²⁰ The injury or illness sustained during the designated coverage period must prevent the player from ever competing as a professional athlete (i.e., must be a *career-ending* injury or illness). To become eligible for coverage under a PTD policy, the football player must be projected for selection in the first two (2) rounds of the NFL Draft.¹²¹

In evaluating whether to offer LOV policies to student athletes through the ESDI program, the NCAA assembled a task force that included chief financial officers from various Division I Football Bowl Subdivision (“FBS”) conference members and NFL player personnel experts such as Bill Polian.¹²² In light of the checkered payout history, policy defenses and emerging set of coverage litigation, the NCAA decided against offering LOV policies through its ESDI program, reasoning that LOV policies “are not the business the NCAA should be in” at this time.¹²³

V. PLAYERS MITIGATING RISK BY FOREGOING BOWL GAMES

The risk of sustaining a significant injury during a collegiate bowl game is not lost on elite prospects projected for selection at the top of the NFL Draft. At the conclusion of the 2016 football season, star running backs Leonard Fournette of Louisiana State University and Christian McCaffrey of Stanford University elected to forego playing in their teams’ Bowl games.¹²⁴ Their decisions stirred a media hornets’ nest as several outlets ruminated about

120. *Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9.

121. *Loss-of-Value White Paper*, *supra* note 9; *NCAA Loss-of-Value Webinar*, *supra* note 9.

122. *See NCAA Loss-of-Value Webinar*, *supra* note 9.

123. *Id.*

124. *See* Matt Bonesteel, *Stanford’s Christian McCaffrey Joins LSU’s Leonard Fournette in Skipping Bowl Game*, WASH. POST (Dec. 19, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/12/19/stanford-christian-mccaffrey-joins-lsus-leonard-fournette-in-skipping-bowl-game/?utm_term=.7d5f325cd61e [<https://perma.cc/5HHV-E82F>]. LSU played Louisville in the 2016 Citrus Bowl game that Fournette elected to sit out. *See* Alex Kirshner, *2016 Citrus Bowl, LSU vs. Louisville*, SBNATION (Dec. 4, 2016, 3:18 PM), <http://www.sbnation.com/college-football/2016/12/4/12667804/lsu-louisville-citrus-bowl-2016-teams-date-tv-schedule> [<https://perma.cc/AH6J-XH9G>]. Stanford played North Carolina in the 2016 Sun Bowl game that McCaffrey elected to sit out. *See* Andy Hutchins, *2016 Sun Bowl, North Carolina vs. Stanford*, SBNATION (Dec. 4, 2016, 4:40 PM), <http://www.sbnation.com/college-football/2016/12/4/12665772/unc-stanford-sun-bowl-2016-teams-date-tv-schedule> [<https://perma.cc/YH5Q-DD54>].

whether this could mark the beginning of a trend for future years.¹²⁵

For over a century, the culmination of a college football player's season has involved playing in a bowl game on or around New Year's Day.¹²⁶ American football fans look forward to watching high caliber NFL prospects compete in collegiate bowl games every year. Blue chip games such as the Sugar Bowl, Orange Bowl and Fiesta Bowl represent big business for television networks, universities and the Bowl organizations themselves.¹²⁷ Should it become commonplace for elite prospects to forego bowl games, television viewership and bowl attendance could decline markedly.

The cost-benefit calculus driving a player's decision to sit out his bowl game is not complex. As a projected first-round selection in the NFL Draft, the player has already established his value to NFL scouts over multiple collegiate seasons, so the player arguably stands little to gain from completing in one more game. This holds particularly true in situations faced by Messrs. Fournette and McCaffrey where the bowl outcome holds no National Championship implications.¹²⁸ As for the cost aspect of a prospect's analysis, a significant injury sustained in a bowl game likely precludes a player's ability to perform at the NFL Scouting Combine and other pre-Draft scouting events such as Pro Days.

A textbook example of an elite prospect sustaining a bowl game injury and suffering a resulting loss in draft value involves former University of Notre Dame linebacker Jaylon Smith.¹²⁹ Given Smith's explosive athletic traits and sideline-to-sideline speed, he projected as a consensus top 5 pick in the 2016 NFL Draft.¹³⁰ While playing in the Fiesta Bowl in his final collegiate season, Smith tore

125. See, e.g., Victor Mather, *Stanford's Christian McCaffrey Is Latest Star to Skip Bowl Game*, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/2016/12/19/sports/football/christian-mccaffrey-stanford-skip-sun-bowl.html?_r=0; Laura Wagner, *College Football Players' Decisions to Skip Bowl Games Garner Support, Some Criticism*, NPR (Dec. 20, 2016, 6:18 PM), <http://www.npr.org/sections/thetwo-way/2016/12/20/506323930/college-football-players-decisions-to-skip-bowl-games-garner-support-some-critic>; Jon Solomon, *College Bowl Director Pay Rises as Fournette, McCaffrey Skip Bowl Games*, CBSSPORTS (Dec. 29, 2016), <http://www.cbssports.com/college-football/news/college-bowl-director-pay-rises-as-fournette-mccaffrey-skip-bowl-games/> [<https://perma.cc/5CQ5-UTDQ>].

126. See Mather, *supra* note 125.

127. In 2014–2015, the Sugar Bowl, Orange Bowl and Fiesta Bowl commanded the following net assets: Sugar Bowl (\$70 million), Orange Bowl (\$55.1 million), Fiesta Bowl (\$54.5 million). See Solomon, *supra* note 125.

128. See Mather, *supra* note 125.

129. *Id.*

130. See *Jaylon Smith Prospect Profile*, NFL.COM, <http://www.nfl.com/draft/2016/profiles/jaylon-smith?id=2555310> (last visited Mar. 10, 2017) (describing

the medial collateral ligament and anterior cruciate ligament in his left knee.¹³¹ Instead of commanding a rookie contract of \$20 million or more as a top 5 pick in the 2016 NFL Draft, Smith fell to the second round, signing a \$6 million rookie contract with the Dallas Cowboys.¹³² Smith did not play for the Cowboys during his rookie season as he rehabilitated his left knee injuries.¹³³

The most recent example of an injury sustained by an elite prospect during a bowl game involves former University of Michigan tight end Jake Butt.¹³⁴ As a senior tight end, Butt won the 2016 Mackey Award given to the nation's best tight end.¹³⁵ Many draft experts consider Butt a top NFL prospect.¹³⁶ Entering the bowl season, ESPN NFL Draft analyst Mel Kiper ranked Butt as the third-best draft-eligible tight end for the 2017 draft class.¹³⁷ During the 2016 Orange Bowl, Butt tore the anterior cruciate ligament in his right knee.¹³⁸ Shortly after sustaining the injury, Butt stated that it "never once crossed my mind to sit this game out and I would never change that mindset. *I play this game [because] I love it.*"¹³⁹

ESPN reported that Butt procured an LOV insurance policy at some point before the Orange Bowl game in which he sustained his right knee injury.¹⁴⁰ Butt can recover under the terms of his LOV policy if he drops below the second round of the 2017 NFL Draft.¹⁴¹ Butt's selection in the 2017 NFL Draft proves interesting on a couple levels. Draft experts consider the 2017 tight end class as the

Smith as "explosive defender" with rare lateral speed and ability to change direction with suddenness in space).

131. See Mather, *supra* note 125; *Jaylon Smith Prospect Profile*, *supra* note 130.

132. See Mather, *supra* note 125.

133. *Id.*

134. See *Wolverines TE Jake Butt Suffered Torn ACL in Orange Bowl*, ESPN (Dec. 31, 2016), http://www.espn.com/college-football/story/_/id/18385112/michigan-wolverines-te-jake-butt-suffered-torn-acl-orange-bowl.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* (alteration in original) (emphasis added). NFL scouts do not perform player evaluations in a talent vacuum. See Greg Gabriel, *The Key to Scouting Football Character in the NFL Draft*, PRO FOOTBALL WEEKLY (Oct. 10, 2016, 1:17 PM), <http://www.profootballweekly.com/2016/10/10/greg-gabriel-the-key-to-scouting-football-character-in-the-nfl-draft/amz3j5n/> [<https://perma.cc/8H5M-GJF9>]. In addition to world class athleticism, NFL scouts place great weight on a prospect's "football character." *Id.* Arguably the most important aspect of a player's football character is his love and passion for the game. *Id.*

140. *Wolverines TE Jake Butt Suffered Torn ACL in Orange Bowl*, *supra* note 134.

141. *Id.*

most gifted in recent memory.¹⁴² Respected scouting expert Mike Mayock stated that “it may be the best tight end class I’ve seen since I’ve been doing this.”¹⁴³ Steelers general manager Kevin Colbert agreed that this tight end class presents the best group of prospects that he has seen in many years.¹⁴⁴ Should Butt fall below second round consideration in the 2017 NFL Draft and subsequently submit a claim to his LOV policy insurer, a defense will exist that the depth of this year’s tight end draft class presents the reason for his drop in draft status rather than the unfortunate injury he sustained during the Orange Bowl.

VI. CONCLUSION

Preeminent athletes drive the amazing popularity of college football and the NFL Draft. If elite NFL prospects forego bowl game competition and pre-Draft events like the NFL Scouting Combine, both college football and the NFL will suffer a direct fiscal impact. LOV policies exist to mitigate the risk of injury-induced loss in draft value. However, the checkered payout history and emerging set of coverage litigation demonstrate that LOV policies alone do not present a panacea.

The million-dollar question becomes: where should this risk exist? At present, elite amateur athletes in their early-twenties bear essentially all risk of injury and subsequent loss in draft value. College football has an interest in securing bowl game participation of its most talented athletes - such that the bowl season does not become an antiquated and irrelevant vestige of the past. NFL teams and their scouts have every interest in thoroughly evaluating prospects through a series of pre-Draft scouting events such as the NFL Scouting Combine. With forward thinking and innovative spirit, a solution to this present conundrum likely exists.

142. See Gerry Dulac, *This Year Could Be Special for Tight Ends at the NFL Draft*, PITTSBURGH POST-GAZETTE (Mar. 7, 2017, 12:00 AM), <http://www.post-gazette.com/sports/steelers/2017/03/07/tight-ends-steelers-nfl-combine-draft-oj-howard-adam-shaheen/stories/201703070060> [<https://perma.cc/HV6Y-84PQ>].

143. *Id.*

144. *Id.* In addition to Butt, other top flight tight end prospects in this year’s draft class include, without limitation, O.J. Howard (University of Alabama), Evan Engram (University of Mississippi), David Njoku (University of Miami) and Bucky Hodges (Virginia Tech). *Id.*