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BY MIKAELA WHITMAN

The Nakamura lawsuit and what permanent disablement means for insurers

To protect against the financial risks of a professional athlete's career-ending injury, a number of insurers offer athlete disability insurance coverage.

IF A PROFESSIONAL ATHLETE SUFFERS A career-ending injury, the financial losses for both the athlete and his or her team can be astronomical. Both the team's on-field performance and the franchise's overall financial success depend on player health.

To protect against the financial risks of a professional athlete's career-ending injury, a number of insurers offer athlete disability insurance coverage. Such insurance is commonly purchased by professional athletes and the teams that employ them, although it is also available for an athlete's family members, agents and business managers — if they have an

insurable interest in the athlete's continued athletic participation.

Some athlete disability policies explicitly state the procedure for determining the extent of an athlete's "disability" under the policy. For example, in *Ashby v. Underwriters at Lloyd's, London*, the policy at issue stated that claims would be subject to the approval



of two medical referees, one appointed by the insured and the other by the disability insurer. If the two appointed referees did not agree, the policy called for a third independent medical referee, to be appointed by the American Medical Association, to break the tie.

But, some athlete disability policies do not specify a

mechanism to determine if an athlete is sufficiently injured such that he or she is “permanently disabled” and therefore entitled to coverage under the policy. Policies that do not provide for a “tie-breaker” on whether the athlete is “permanently disabled” will often grant an insurer the right to conduct an independent medical exam. An example of a “Right To Medical Examination” clause states:

After initial notice of Accidental Bodily Injury or Sickness or Disease the Insurers shall be allowed to secure the Insured’s medical records, to monitor treatments and/or to send any medical examiner selected by the Insurers to examine the Insured and every facility shall be given for such examination.

If a policy is silent on the effect of the insurer’s medical exam, the insurer will argue that it has a basis to deny coverage based solely upon the findings of its own medical examiner. This leaves an insured with no alternative but to file suit if the insurer’s medical examiner was incorrect.

On July 18, 2016, Haruki Nakamura, a former safety for the Baltimore Ravens and Carolina Panthers, filed suit against Certain Underwriters at Lloyd’s, London, contending that he was entitled to coverage under an athlete disability policy after he suffered a concussion that left him “totally and permanently disabled.”

The disability policy at issue defined “permanent total disablement” as follows:

Insured has suffered continuous Total Disablement for the Waiting Period stated in the Schedule [12 Months], and that as a result of the Accidental Bodily Injury ... giving rise to the Total Disablement, the Insured has no likely hope of improvement, sufficient to Participate ever again in his occupation of Football Player.

The Nakamura Complaint alleges the following:

- In August 2013, during a Carolina Panthers pre-season game against the Pittsburgh Steelers,

Nakamura suffered a hit to the head and was diagnosed with a concussion a few days later. Nakamura was placed on the injured list in September 2013 and two days later was released from his Carolina Panthers contract due to his “concussion.”

- In October 2014, Nakamura’s treating physician, Dr. Michael Collins, wrote an “Attending Physicians Report” stating that Nakamura had been permanently disabled from August 29, 2013, through October 2014 and that, “Nakamura is permanently disabled and likely has no hope of improvement sufficient to participate ever again as a professional football player.”
- In March 2015, Nakamura’s insurer invoked its “Right to Medical Examination” under the disability policy, and the insurer’s chosen medical examiner examined Nakamura.
- Despite the increased attention being given to the severity of head trauma

injuries in the NFL and the long-term dangers posed to players by CTE, the insurer's medical examiner found that "Nakamura is able to participate in his occupation of professional football player..." The insurer's examiner further stated that "whether to return to previous career is a deliberate decision he would have to take based on several considerations including probable long term effects of repetitive concussions, both past and future."

- In June 2015, the insurer denied Nakamura's claim for coverage. It argued, in part, that it was unclear whether Nakamura's concussion made him "permanently disabled," or whether, "notwithstanding Nakamura's post-concussive syndrome, Nakamura could return

Some courts have held, such as in *Kaufman v. Provident Life & Cas. Ins. Co.* and *Laidlaw v. Commercial Ins. Co. of Newark*, that for an insured to be "permanently" or "totally disabled" under an occupational disability policy, the insured must demonstrate that he or she cannot perform the "material" or "substantial" duties of his or her specific occupation.

But, courts have not determined if this standard applies to athlete disability policies and, if so, what it would mean for a professional athlete to be unable to perform the "material" or "substantial" duties of his or her occupation. The *Nakamura* lawsuit could be the first of its kind to consider what it means for a professional football player to be "permanently disabled" such that he or she cannot return to their occupation.

And, the *Nakamura* lawsuit is a reminder that professional sports teams and professional athletes alike should consider these issues when negotiating and purchasing an athlete disability policy and should review the terms and conditions of all policies in their possession, both before and after a potential career-ending injury occurs.

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