

# Athlete Disability Policies

BY JERRY OSHINSKY AND VERED YAKOVEE

For the teams and individuals that choose to do so, the procurement of athlete disability policies is a high cost of doing business. As with any such expense, the purchaser would seek the best return on his or her investment. To do so in connection with athlete disability coverage, policyholders should properly review and negotiate material terms in advance of their purchase.

## INTRODUCTION

In the last few years, large payouts under athlete disability policies have caused premiums for such coverage to skyrocket. For example, disability policies allowed the Baltimore Orioles to recover approximately \$27.3 million of Albert Belle's guaranteed salary and the New York Mets to recover a comparable amount of Mo Vaughn's guaranteed salary. On the other hand, disability policies may give rise to coverage disputes. In 2006, the Houston Astros became embroiled in a lawsuit with its insurer over a 2005–06 policy that the team purchased for the guaranteed contract of Jeff Bagwell.

Disputes such as the Astros' coverage dispute might not be avoidable, but they can be minimized through negotiations with potential insurers for adequate coverage. Thus, negotiating certain terms in an athlete's disability policy goes straight to protecting the team's bottom line—if the team elects to purchase such coverage. Indeed, premiums are not insubstantial, making the choice to invest in disability insurance a business decision instead of a foregone conclusion. For example, the Seattle Mariners forgo this type of coverage, stating that it “would not cripple us financially if an injury cost us the services of one of our marquee players. Faced with the premium cost of disability insurance, management is willing to

take what we perceive to be a very small risk.”<sup>1</sup>

If management decides to purchase disability insurance for guaranteed player contracts, protecting the company's bottom line from shortcomings in coverage can be accomplished by identifying problematic terms that are negotiable and knowing what to ask for in their stead, as outlined below.

As an aside, disability policies can be, and are, routinely purchased by athletes for themselves in situations where they are not playing under guaranteed contracts. This is true for some professional athletes, as well as all notable collegiate athletes. The principles outlined below would apply similarly to policies purchased by the team-employer or by the athlete him- or herself.

Insurers are more likely to negotiate some terms than others. For example, since the large Belle and Vaughn payouts, it may be extremely difficult for a team or athlete to purchase the previously available five-year policy. Now, three-year policies may be the maximum available on the market. The importance of negotiating those terms that *are* up for discussion is illustrated by comparing the payouts, as well as the dispute, described below.

## THE METS' AND ORIOLES' PAYOUTS

The first of two well-publicized payouts involved the 1998–2003 policy that the Baltimore Orioles purchased to protect itself against loss incurred by injury to Albert Belle. Belle, an outfielder, played two seasons with the Orioles after signing a five-year, \$65 million contract in December 1998. The Orioles' insurance policy was to pay 70 percent of Belle's annual \$13 million salary. Meanwhile, he suffered from a degenerative arthritic hip, or osteoarthritis

of his right hip. On March 9, 2001, Belle was placed on the 60-day disabled list—as may have been required by the disability policy. On the same day, the Orioles stated that Belle was “totally disabled and unable to perform as a major league baseball player” and that “Belle has agreed that he is physically incapable of performing as a player and concurs with the findings of the doctors.”<sup>2</sup>

Also in 2001, the Mets acquired Mo Vaughn—and the final three years of the \$70 million contract he had signed in 1998—in a trade with the Anaheim Angels. At the time, Vaughn was already sitting out the season due to torn biceps. Shortly thereafter, he was diagnosed with a severe, degenerative knee condition and the Mets were forced to put their new first baseman on the disabled list for the rest of the 2002 season.

The Mets, however, acquired as part of the trade the disability policy that the Angels had originally purchased for Vaughn. The policy provided that after a 90-day waiting period and other conditional factors, the carrier would be responsible for 75 percent of Vaughn's guaranteed salary. Around the time that he became disabled under the policy, the Mets owed him approximately \$29 million through the end of his contract.

While Vaughn's injury presented a financial setback for the team, it could have been more serious but for the disability coverage.

## THE ASTROS' DISPUTE

Such was not the case for Jeff Bagwell and the Houston Astros. The team entered into a five-year, \$85 million, guaranteed contract with the first baseman for a period between January 2001 and January 2006. The Astros also paid \$2,409,343 to CIGNA for an insurance policy that would cover

Bagwell's guaranteed salary in the event that he became totally disabled from performing his occupation, which the policy defined as "Professional Baseball Player–Non-Pitcher." When the Astros submitted their \$15.6 million claim for benefits under the policy, CIGNA denied coverage for various reasons, including its assertion that there was no change between

- Review the policy to determine what is required to prove PTD or TTD.

***Is a physical exam required for the determination that the player is PTD or TTD?***

- If a physical exam is required, policyholders should request that the exam be conducted by a licensed physician. For example, a prominent

## NEGOTIATING CERTAIN TERMS IN AN ATHLETE'S DISABILITY POLICY GOES STRAIGHT TO THE TEAM'S BOTTOM LINE.

Bagwell's condition at the close of the previous season and at the end of the policy period. The Astros filed a lawsuit against CIGNA on May 2, 2006, which settled for an undisclosed amount and was ultimately dismissed with prejudice on January 22, 2007. Meanwhile, Bagwell's number 5 was retired on August 26, 2007, in a game versus the Pittsburgh Pirates.

### CHECKLIST

To avoid disputes such as confronted by the Astros—and to maximize coverage under a disability policy—a checklist for the insured would include, but not be limited to, the following:

***Does the policy cover "permanent total disability" or "temporary total disability?"***

- Policies that cover permanent total disability (PTD) generally insure the policyholder against the player's career-ending injury. Policies that cover temporary total disability (TTD), however, generally start paying for missed time once the deductible period, described below, is over. The policy under which the Mets recovered for Vaughn was of the latter sort.

- Once either a PTD or TTD policy is chosen, determine what those terms mean. Among such sources of information should be definitions of those terms in the policy.

college football player, now playing in the NFL, recently self-insured against disability. The proposed policy originally listed that he could be checked by various nonphysician individuals, and not necessarily a licensed physician. He was advised by counsel to request that the policy be modified to require that the exam be conducted by a licensed physician from a predetermined list.

- Review the policy for language to see whether the policyholder or the insurance company can appoint its choice of physician.

- The policyholder should request that the exam necessarily be performed by a licensed physician of the policyholder's choosing. Thus, if the team is the policyholder, it would choose, and if the player is the policyholder, he or she would choose. Under either scenario, the physician would not be the carrier's selection, but would be the policyholder's choice.

***Does the policy require that the player be on a disability roster?***

- A policy might include language to the effect that a player will not be considered disabled if he or she is not placed on a disability roster. For example, the players' union might take the position that the player is not disabled if not placed on a disability roster. Thus, policyholders should be aware of whether such a requirement exists for coverage.

***Is the individual insured as a player or as a player in a specific position?***

- The more specific the term describing the individual's role, as he or she is to be insured, the better it is for the policyholder. For example, a pitcher could be insured as a "professional athlete," a "baseball player," or a "pitcher." If he is insured as a "baseball player" and he is subsequently injured and unable to pitch, the insurer would argue that he would not be considered totally disabled if he could still play another position, such as designated hitter. If, however, the same player was insured as a "pitcher," his disability policy would apply if he could not pitch, regardless of whether he might still be able to play a different role on the team. Thus, the policyholder should request the most specific term possible.

- Review the application as well as the policy to determine how the player or team lists the athlete's role.

***Make sure the definition of "bodily injury" is consistent throughout the policy.***

- For example, the definition of "bodily injury" may exclude sickness and/or may be inconsistent with prior language.

***Make sure that "injury, sickness, or disease" are all covered, instead of just one of them.***

***Make sure the definition of "accidental injury" does not serve to exclude other types of injury.***

- If a policy only covers "accidental injury," it may require trauma. It would be more beneficial to the policyholder if coverage could also be triggered by a degenerative condition, which could also result in total disability.

***Review the definition and implications of "first manifestation."***

- Make sure to be aware of what triggers a policy. A policy might require that the first manifestation occur within the policy period. Thus, the issue of when an injury first manifests is an important one because it could place an injury

inside, or outside of, a policy period.

- Policies should be reviewed for definitions of “first manifestation,” or “manifest,” as well as the implications of those terms.

### **Waiting period**

- The waiting period, or deductible period, specifies the amount of time the insured must wait after a claim arises and before benefits are payable. Waiting periods have generally lengthened over the last few years; whereas they were once typically 60 to 90 days, they are now typically 180 days or even a full season.

- The waiting period may be different depending on whether the claim arises during the preseason or the regular season. Both provisions should be noted. In addition, any foreseeable ambiguities should be addressed in the insurance policy. For example, negotiate and memorialize an agreement as to whether, if there is a delay in the opening of a season, those days would be considered part of the “regular season” for purposes of coverage.

### **Be sure to comply with any limitations period.**

- Limitations periods, within which to file a dispute regarding the insurance policy, may appear in the policy itself. Courts will generally uphold them if they do, so long as no statute applies and has a preemptive effect. Thus, make sure to enter into a tolling agreement upon recognition of a potential dispute if necessary to preserve rights.

### **Ensure that coverage does not end when the player dies if the team-employer is still obligated to pay his salary (e.g., to the player’s surviving spouse or estate).**

### **Determine whether it would be beneficial for the policy to also cover other risks.**

- For example, a disability policy also may cover property damage and/or business interruption.

### **Make sure reimbursement provisions are simple.**

### **Make sure the policy limits are high enough.**

- The Orioles’ policy for Belle covered 70 percent of his salary and the Mets’ policy for Vaughn covered 75 percent of his salary. Thus, in both situations, the team would be responsible for the difference.

This checklist is by no means exhaustive, as it would be impossible to predict the entirety of the issues that would be presented by a single sample disability policy. Because they are not a small investment, such policies should only be entered into after a thorough review of material terms. ■

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1. Dan Aznoff, *Mariners Sing in Contrarian Rhymes: Seattle’s Baseball Franchise Eschews Disability Insurance as Too Expensive, Preferring Instead to Play the Self-Insurance Game*, RISK & INS., Oct. 15, 2006, at 38.

2. Associated Press, *Baseball; Belle Will Retire, Orioles Say*, N.Y. TIMES, Mar. 9, 2001, at D4.