

Understand role of insurance coverage, liability issues related to managing impact of pandemic on athletics

By Claudine McCarthy, Editor

Even though any new insurance policies issued after January have a COVID-19 exclusion, you can still take steps to help your athletics department manage the insurance and liability issues likely to arise with your pre-COVID-19 insurance policies as college sports get back into full swing. That's according to Richard Giller, Esq., a partner specializing in insurance recovery with the law firm of Pillsbury Winthrop Shaw Pittman LLP, who spoke as a panelist in a recent webinar hosted by the LEAD1 Association.

"Flexibility, the ability to pivot, collaboration, and communication are going to be key" in successfully managing the pandemic's impact on college athletics, Giller said.

Despite your institution's inability to obtain insurance that covers communicable diseases, an available alternative is business interruption insurance, also known as time-element coverage, Giller noted. In addition, other options exist, such as making a claim through civil authority coverage parts in many business interruption insurance policies if you're ordered to shut down by a civil authority, or coverage for physical damage/loss, which, in some circumstances, involves diseases, bacteria, or smells, he explained. Even disinfection might be covered by insurance, he noted.

And don't make any assumptions about your current coverage, Giller advised. For example, if you receive a denial letter from your insurance company, you still might have a valid claim, he said. Also, don't assume your insurance policy doesn't include coverage for certain situations, because you might be surprised to discover that it does, he said. "Insur-

ance policies are arcane and archaic," he noted. And that's why you'll want to take the following steps:

- Put every insurer your institution has on notice that you have a potential claim.
- Review and discuss insurance policies, including coverage amounts, clauses, and renewal dates, with your institution's risk managers and inside counsel.
- Consider hiring outside counsel who specialize in insurance.

These steps could help prevent your athletics department from losing out on coverage for a claim, Giller said, and can help ensure you have enough comprehensive coverage going forward. A third-party comprehensive general liability policy could potentially cover bodily injuries that occur at sports events, and perhaps cover COVID-19 infections. When it comes to third-party insurance policies, it's important to understand those policies provide two basic forms of coverage: the duty to defend and the duty to indemnify, Giller said. "There could be instances where a lawsuit is worth almost nothing, but it could cost millions to defend against it. Sometimes, the duty to defend is more important to the policyholder than the duty to indemnify," he explained.

Also keep in mind that student assistance funds, which schools used to pay for total disability, temporary disability, and loss of value insurance premiums, can now pay for the extra year of scholarships that has resulted from extending eligibility for one year for spring sports, Giller noted.

For more information, contact richard.giller@pillsburylaw.com or visit www.pillsburylaw.com/ or <https://lead1association.com/>. ■

Prepare for potential decline in youth sports pipeline

As a result of the economic impact of the COVID-19 crisis, nearly half of youth sports organizations are at risk of shutting down permanently, according to a recent poll by LeagueSide and Morning Consult. That could have a lasting impact that would lead to a decline in the youth sports pipeline that feeds college athletics programs, explained Richard Giller, Esq., a partner with the law firm of Pillsbury Winthrop Shaw Pittman LLP, during a recent webinar hosted by the LEAD1 Association.

After a job loss, many parents can no longer afford to pay for their kids to join club sports or sports academies. In fact, more than half of parents reported being less

likely to have their children continue in youth sports programs. And even those families that could foot the bill might find that many of these organizations had to shut down, Giller said. Either way, this could lead to declines in college athletics enrollment, which might not be felt for another few years, he noted, but could significantly impact non-revenue-generating sports (such as soccer, tennis, baseball, volleyball, and gymnastics) and disproportionately impact women's sports.

For more information about the survey results, go to <https://morningconsult.com/2020/05/13/youth-sports-poll-coronavirus/>. ■

Review Q&As regarding various return-to-play scenarios

To help prepare your department for potential liability and insurance scenarios related to COVID-19, review this guidance provided by Richard Giller, Esq., a partner PillsburyWinthrop ShawPittman LLP; and Tom McMillen, President and CEO of the LEAD1 Association, during a LEAD1 webinar. The following is an excerpt of their conversation, edited for space and clarity.

Q: If a coach doesn't want to return because underlying health conditions put him in a high-risk category, how will that affect his contract?

Giller: It depends on how his contract was written. I doubt any contracts were written to address pandemics. However, schools might consider ways for the coach to maintain social distancing, such as coaching from the press box.

If there's a *force majeure* clause in a contract, it could be argued either way as to whether that clause applies to this situation or not.

Q: Could a school prorate a coach's compensation due to fewer games played due to the pandemic?

Giller: This could also be argued either way. Again, it goes back to what the contract actually says. And, schools could renegotiate the contract going forward.

Q: In light of tighter budgets, why can't schools just drop varsity sports and switch completely to club sports?

Giller: Although making the switch to club sports could work for some teams, schools can't cut just their non-revenue-producing sports or switch them all to club sports, because it could trigger scholarship and Title IX issues, and the CARES Act doesn't authorize a waiver of civil rights laws like Title IX. Cutting sports amounts to a lot more than lost revenue, because athletics teach the participants a great many life lessons, such as confidence, respect, and teamwork.

Q: How about student-athletes who don't want to take the health risk of returning to play — what impact could that have on their scholarships and eligibility?

Giller: We'll have to be flexible, pivot, and talk through these issues in collaborative efforts between lawyers, doctors, schools, conferences, and leagues. We can come up with standardized guidelines for each of the different types of sports, locations, and venues.

Q: Should schools print waivers on tickets to limit liability for fans' COVID-19 exposure at events?

Giller: There will be OSHA rules and guidelines for employees, but fans are an entirely different story. It's a good protection to have assumption of risk and COVID-19 disclosures on newly printed tickets. Lawsuits are going to happen. You can't protect yourself from being sued but you can protect yourself from having to pay a judgment. As long as schools have guidelines and establish and uphold a standard duty of care, they may be protected from ultimate judgment, but there are going to be lawsuits, regardless of what waiver or insurance you have.

Q: Should schools limit fan interaction at events?

McMillen: Although it's hard to do, it's important. Schools may need to follow the approach the NBA is taking regarding separating fans.

Q: As a silver lining of this crisis, might schools end up curbing egregious spending on facilities and coaches' contracts?

McMillen: I do think that some of those issues are coming to the forefront out of economic necessity. There are opportunities here to economize and get back to what's really important in college sports. Never let a crisis go to waste. ■

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