

**Round 2 – “A Golden State Headache”**  
**JUDGES’ SUMMARY**

N.B. These specifics are provided to give you background and guidance in evaluating the teams. There are few rigid, “right,” or “wrong” answers to negotiating problems. Some moves by negotiators may be poorly thought out, or based on a misunderstanding of the facts, or violate specific instructions from their clients. Those should cause you to grade that team poorly. Conversely, some moves by negotiators may be especially well-planned, based on a complete mastery of not only the facts, but an understanding of their client’s real-world interests, and may meet their client’s interests in a creative way. Those characteristics should cause you to grade those highly. In between, there are a myriad of behaviors that you will need to use your best judgment on: how effective was the negotiator in representing his or her client’s interests.

**Background**

The University of Southern California (USC) President and general counsel are meeting with former USC star linebacker Hunter Simon and his lawyer to negotiate a potential settlement of Simon’s Workers’ Compensation claim. Simon was forced to retire from football permanently after sustaining six concussions, and after consulting counsel, filed for workers’ compensation in California. The claim was stayed pending the negotiations. Simon is seeking compensation for himself and for his family in order to protect them financially for his lost earning capacity and increased risk of an early death as a result of his concussions. He will not settle his individual claim, however, without some relief for athletes other than himself who have suffered concussions. USC would like to settle rather than risk creating a precedent that college athletes are employees of the University they play for. But it has a \$1.8 million cap on its authority to settle Simon’s individual claim, and it must not commit a specific monetary amount or percentage of revenues to contribute for compensation to other players.

**Issues**

The issues the parties are asked to negotiate are the amount, nature and duration of the payout to Simon, the timing of the payout, health insurance and CTE research, life insurance and what USC will do for other athletes in Simon’s position. The following grid summarizes the instructions given to each side, and how those instructions match up into agreements acceptable to both sides (see next page):

	<b>USC</b>	<b>Simon</b>	<b>Zone of Possible Agreement</b>
<b>Overall Limitation</b>	No total payouts over \$1.8 million	Will not take less than \$1.5 million	\$1.5 to \$1.8 million
<b>Payout</b>	Will pay up to \$450/week for 40 years, totaling \$936,000. But would prefer \$200/week for 30 years, equaling \$312,000. Weekly payouts are guaranteed past Simon's death. Would prefer salary (post-tax revenue), but could offer disability payment. No lump sum payments over \$750K.	Prefers a lump sum payment of at least \$1 million Will accept \$400/week for 40 years, equaling \$832,000. But wants \$500/week for 45 years, totaling \$1,170,000. Weekly payouts are guaranteed past Simon's death. Has no preference as to how payout is identified, as long as payouts are equivalent.	\$400 per week for 40 years (\$832K gross) to \$450/week for 45 years (\$1.053M); payments guaranteed even if Simon dies; Can be in form of disability payments or post-tax salary as long as net payments are same.
<b>Health Insurance &amp; CTE Research</b>	Would prefer to cover Simon under individual standard plan = \$5,000/yr. for 45 years, totaling \$225,000. No top limitation on this individual item, but any payments are included in the overall cap of \$1.8 million. Individual comprehensive plan would cost \$8,000/yr. for 45 years <sup>1</sup> , totaling \$360,000. Family standard plan for 45 years cost \$10,000/yr. or \$450,000. Family comprehensive plan would cost \$20,000/yr. or \$900,000 total. Wants Simon treated at USC for concussion research at no cost to him.	Would prefer for USC to cover entire family under family comprehensive plan = \$20,000/year for 45 years, totaling \$900,000. Will not accept anything less than family standard plan = \$10,000/year for 45 years, totaling \$450,000. Must get family covered, and should not accept any individual plan. Is willing to be treated by USC Medical Center, but only if treatment is free.	Standard family coverage @ \$10,000 per year for 45 years of \$450,000 to Comprehensive family coverage @ \$20,000 per year of \$900,000. Free treatment and concussion research at USC Medical Center.

<sup>1</sup> Please note that the numbers for this figure in the confidential facts were corrected for the competitors – the numbers listed here and in the grid in the general facts is correct and the competitors have been so advised.

<p><b>Life Insurance</b></p>	<p>Will pay up to \$1,250/yr. for 45 years, for every \$500K covered under \$1M term plan, totaling \$56,250. But given Simon’s poor health, would prefer to pay \$1,000/yr. for 45 years, for every \$500K covered under \$1M term plan, totaling \$45,000. Can offer two, 4-year scholarships for Simon’s two children at value of about \$125K each, but only to USC.</p>	<p>Wants at least \$1M in life insurance coverage to be able to provide for his family, given his poor health and uncertain future. Would prefer \$2M in life insurance coverage. Would accept two college scholarships for his two children, but only will accept if added as a sweetener and does not impact overall package.</p>	<p>\$1 million dollar policy of 45 years at \$1,000/yr. (\$45K) or better policy for same period at \$1,250/yr. (\$56.25K).</p> <p>Up to 2 scholarships.</p>
<p><b>Helping Future Student-Athletes</b></p>	<p>Willing to discuss principle of USC’s paying for injuries to players out of money coming from TV/media rights and bowl postseason revenue in return for waivers of any claims they have. Cannot agree to a specific dollar amount or percentage without Board of Trustee approval.</p>	<p>Wants USC to contribute 50% of its TV &amp; bowl revenues, and make formal written request to Pac-12 for others to do the same. At least wants USC to make commitment to take action to have revenues fund greater disability payments to injured student-athletes. Cannot agree in current discussion to any provisions that affect the rights of other players in advance but would agree to a proposal that requires athletes to sign waivers in order to receive payment at time of payment.</p>	<p>Agreement in principle that USC will contribute to fund to pay athletes disabled in college athletics, to be funded by TV and bowl revenue. No advance waiver of claims, but waiver by individual athletes at time of payment.</p>

**Dynamics of the Negotiation**

**Compatible interests and positions in the individual claim.** There are strong reasons for both sides to settle. USC wants to avoid the legal precedent that players are employees, but current law favors USC so Simon would risk the personal recovery he could gain from a settlement if he litigates. Moreover, Simon’s minimum goal of a total payout over the years of \$1.5 million is \$300,000 below USC’s authorization of \$1.8 million<sup>2</sup>. If you add up the individual items in the claim, it is relatively easy for both sides to stay within their overall limitation and satisfy the other side. Specifically, USC can pay its top dollar for all weekly

<sup>2</sup> Simon receives 300 per month from the NCAA compensation program. He does not intend to give USC the benefit of this program and he will not subtract it from his requests in this cases.

compensation (\$1,053,000) and life insurance (\$56,250), and still have \$690,750 left to pay for health insurance.<sup>3</sup> The standard family plan would cost \$450,000 over 45 years so there would be no trouble paying for that, but the comprehensive family plan would cost \$900,000, putting USC \$ 209,250 over its budget. That overrun could be handled by Simon agreeing to either a reduction of his weekly payment or co-premium in an amount equal to \$209,250K over 45 years (this would amount to a substantial reduction of \$ \$89.42 per week down to \$360.58 in weekly payouts or a co-premium of \$387.50 per month for health insurance). Thus, the comprehensive family coverage would be the one sticking point if USC pays to its limit; Simon may have to make and adjustment in his individual demands for one of the three items in the package, but is authorized to do so is the overall package is worth \$1,800,007<sup>4</sup> (well above Simon's overall minimum of \$1,500,000).

**Barriers to reaching a resolution on the individual claim:** The barriers that the parties will have to overcome include time, distractions, injected legal issues, and the issue of compensation for other athletes:

**Time:** There are four major issue groupings in the problem; this means allowing for at least 5 minutes of administrative discussions, there are only ten minutes to resolve each issue. Given the range of possibilities and the need to make specific line items add up to the overall monetary requirements/restrictions, this is a formidable task. Teams who organize and manage their time well will have trouble resolving all these issues. So, you should not penalize teams simply because they failed to resolve all issues. Rather, you should reward teams who used their time productively and punish teams which wasted time unnecessarily.

**Distractions:** One clear opportunity to waste time is to get overly involved in the legal issues. It is clear that Simon has filed his claim within the statute of limitations because he practiced in August of 2012, less than one year before the July 1, 2013 date of filing his workers' comp. claim and that is timely under Labor Code Section 5405(a); there should be relatively little discussion of this issue except we armed the parties with a red herring in the *Arndt* case (see Appendix A). Simon's claim that he is an employee is doubtful and calls for distinguishing or overturning the existing precedent which says that college athletes are not employees. See *Graczyk v. Workers' Comp. Appeals Bd.* (Labor Code section 3352(k) specifically excludes student athletes from being "employees"; the plaintiff in that case, a college athlete, was denied worker's compensation benefits on the basis that he was not an employee). For a brief summary of governing law, see Appendix A. Teams representing USC should certainly assert the defense under section 3352(k) and teams representing Simon should give a brief explanation of their argument that college football games are no longer "amateur sporting events" within the meaning of that section; and that the amount of revenue and amount payments given to the

---

<sup>3</sup> \$1,053,000 + \$56,250 = \$1,109,250. When this figure is subtracted from USC's maximum of \$1,800,000, the difference is \$690,750 which is \$209,250 less than needed to pay for all \$900,000 of comprehensive life insurance.

<sup>4</sup> \$360.58 times 52 weeks times 45 years = \$843,757 + \$56,250 life insurance premiums + \$900,000 health insurance premiums = \$1,800,007.

employer and the trend of the law favors them. But both teams should avoid getting bogged down in lengthy debates. Teams that make a sound, succinct legal argument should be rewarded over those that make arguments that are long and rambling. Representatives for both sides should focus on their mutual desire to make a deal and not get seduced into wasting much time on arguing the law.

**Complexities of the remedies for other athletes.** Given that Simon's side has been instructed not to settle his own claim without getting a concrete financial commitment (a percentage of USC TV/media and bowl revenues allocated to these athletes, and USC lacks authority to make such a decision, there can be no final agreement on this issue. But the parties can go pretty far in reaching an agreement in principle for a contribution, as well as even a number to propose to the USC Board. They are otherwise compatible on the principal that USC will allocate such revenues; they can reach a resolution of the waiver issue (no advance waiver, but a release on receiving payment, and USC's promise to advocate that the Pac-12 and the FBS schools do the same. But they can't finalize the number. There will have to be another session. How soon the parties realize that they cannot finally resolve the issue, how well they avoid losing time trying to reach one, and how well they handle the planning of a second session are all ways to distinguish the quality of their representation.

### **Evaluating The Teams**

Because of the incentives for both teams to reach an agreement, we believe the problem is fairly well balanced in negotiating leverage. Ultimately, we expect the performances of the teams to vary widely on this problem. Less effective teams (1) do not realize that the individual items must meet the overall limit on their side, (2) waste too much time arguing the law, (3) are rigid and fail to adapt their proposals to the other side's needs, (4) take positions without explaining why, (5) violate their side's instructions, (6) fail to establish a positive relationship with the other side, and/or (7) demonstrate that they have not figured out in advance or at the table how to convince the other side that they have meet an overall number specified in the problem. More effective teams (A) make a concise and substantively persuasive statement of their legal position, but don't waste time arguing it, (B) incorporate the other side's ideas in finding solutions, (C) know their instructions cold, and/or (D) demonstrate a strategy during the negotiation and articulate it during the self-evaluation. And it is up to you to reflect the differences in performances in both your Evaluation Criteria and your Ranking Sheet (Attachments A and B).

## **Appendix A: Governing Law**

The competitors have been given two cases in this fact pattern which serve as a guideline as to the legal issues found in this negotiation. Competitors are not required to bring up these cases as part of their negotiation strategy but are allowed to bring in other relevant cases to supplement their strategy. The cases found in the fact pattern are:

***Graczyk v. Workers' Comp. Appeals Board***: Specifically holds that a college football player at Cal State Fullerton is not an "employee" entitled to Workers' Compensation benefits section 3352(k) of the Labor Code. Section 3352(k) is pretty clear:

Any student participating as an athlete in amateur sporting events sponsored by any public agency, public or private nonprofit college, university or school, who receives no remuneration for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto.

Thus, under current law, Simon has no claim. Simon is hoping that the courts will either interpret this provision narrowly by holding that the billion dollar industry of big-time college football is no longer an "amateur sporting event" within the meaning of section 3352(k), or that the legislature will recognize this and amend the statute.

***Arndt v. Workers' Comp. Appeals Board***, 56 Cal. App. 3d 139 (1976).is essentially a red herring. It denies death benefits to the spouse of a deceased employee when she did not bring the claim until 2 years after her husband's death and the court rejected the argument that she did not discover the injury until much later and the SOL should have been tolled. Because Simon brought his claim within the one-year sol, no issue of tolling. Much more favorable law exists for plaintiffs on tolling. See e.g. *Kaiser Fndn. Hospitals v. Workers' Compensation Board*, 39 Cal.3d 57 (1985).

**California Senate Bill No. 1525 (Student-Athlete Bill of Rights)**: Requires California's Pac-12 colleges to provide continuing education for players on teams with graduation rates below 60%, pay for sports-related medical expenses, cover medical coverage premiums for low income student-athletes, improve workout safety to avoid preventable deaths, provide financial and life skills workshops, and guarantee student-athletes the same due process rights that are given to regular students. Simon hopes that this Bill will lead the courts and/or the legislature to view student-athletes as also entitled to workers' compensation benefits.

- **California Labor Code, § 3300**
  - The state and all state agencies are employers subject to Workers' Compensation liability.

- **California Labor Code, § 3351**
  - ‘Employee’ means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.
  
- **California Labor Code § 3352**
  - ‘Employee’ excludes the following: ...
    - (k) Any student participating as an athlete in amateur sporting events sponsored by any public agency, public or private nonprofit college, university or school, who receives no remuneration for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto.
  
- **California Labor Code, § 3357**
  - Any person rendering service for another, other than as an independent contractor, sponsored by any public agency, public or private nonprofit college, university or school, who receives no remuneration for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto.
  
- **California Labor Code, § 3357**
  - Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.
  
- **California Labor Code Section 5405**
  - The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following: (a) The date of injury.