

## **2013 NSLNC**

### **ROUND TWO:**

#### ***A Golden State Headache***

### **GENERAL FACTS FOR BOTH TEAMS**

For three amazing years, Hunter Simon was the toast of the University of Southern California (USC). As the leader on the field for USC's defense from day one of his sophomore season, Simon had nowhere to go but up. Simon was the starter in his sophomore and junior seasons, earning team defensive MVP honors as a junior, and was named defensive team captain. As his senior year approached, he was continuously being evaluated and projected as a top draft pick, and it looked increasingly obvious that he would soon follow his dreams into the NFL as well.

But beginning in the summer of 2012, Simon's life took an ill-turn. After he suffered his fifth concussion in the spring practices, he began to have massive migraine headaches that seemingly came from nowhere. By the time summer practices started in August, Simon had his sixth concussion, and his symptoms kept getting worse by the day. It was clear to Simon that football would have to take a backseat to his health, and he was forced to retire from football permanently.

As a result of his concussions, the now 23-year-old Simon has periods where he is unable to concentrate, focus, or control his temper. He has also had difficulty sleeping, occasional bouts of confusion as to where he is, and mood swings. But Simon is most fearful of the fact that doctors have told him that they are unsure of the long-term effects from his many concussions, and his symptoms can get worse. Simon has seen former players affected in a far worse manner by far fewer concussions, and he is fearful of what might happen to him in the future, especially when he starts a family of his own. In particular, he sees the chronic traumatic encephalopathy (CTE) related suicide of former USC and NFL linebacker Junior Seau as something that might happen to him in the future.

Simon consulted counsel and was recommended to file for workers' compensation in California, which he did on July 30, 2013. By stipulation of Simon and USC the claim was stayed pending negotiations to resolve the dispute. The leading case on the subject, *Graczyk v. Workers' Comp. Appeals Bd.*, denied a similar player workers' compensation benefits on the basis that the plaintiff was not an employee. However, Simon feels that the increasing

commercialization of college sports, changing public opinion, and new laws and policies on the subject will cause the court to reverse its previous rulings.

Simon feels that the National Collegiate Athletic Association (NCAA) is not doing enough to combat concussions and compensate athletes who are affected by concussions. In 1994, the NCAA adopted guidelines that outlined protocols for returning to play after suffering concussions, and tools for sideline grading and evaluating. Simon feels that USC followed these minimal guidelines, but they were not enough to prevent him from further serious injury. Simon wants to be a “statement player” in order to give similar student-athletes more options for receiving care and benefits for such injuries. He feels that the passing of the California Student-Athlete Bill of Rights (S.B. 1525) signifies a reversal in the state’s public policy regarding student-athletes and college sports. Senate Bill 1525 essentially recognizes schools like USC as employers, so Simon and his counsel feel it is reasonable to impose workers’ compensation liability on the school.

Simon feels that two revenue sources which have grown astronomically in recent years are a possible source of funding to compensate the athletes whose efforts did so much to generate that revenue: TV/media rights revenue, and bowl money shares. The Bowl Championship Series (BCS), whose contract with ESPN ended in 2012, was for 12 years at \$500 million per year, and is now being replaced by the College Football Playoff (CFP). The 10 conferences in the Football Bowl Subdivision (FBS) signed a 12-year, \$5.5 billion deal agreeing to the CFP. Moreover, the Pac-12 Conference signed a 12-year, \$3 billion deal with ESPN/FOX, equaling over \$20 million per school per year.

USC is strongly against recognizing workers’ compensation as a basis for Simon’s potential claim because it feels that it will change the face of college sports in California, and remove all semblances of amateurism from the NCAA. Its counsel feels that the law is with them, and that the workers’ compensation board and the courts will not go so far as to completely reverse precedent by awarding Simon his claim. Nevertheless, the university has approached Simon and his counsel to try and convince them that a settlement is a safer, better option. Counsel for both parties have agreed to meet today to discuss the terms of this potential settlement package, which would presumably buy Simon out of his claim. The parties will discuss: (1) the amount of the payout to Simon; (2) the timing of the payout; (3) the specific items in the payout; and (4) what USC is prepared to do for other athletes in Simon’s position.

This negotiation is between USC President C. L. Max Nikias and USC’s general counsel, and Simon and his lawyer. All have agreed to meet in the hopes that a settlement can be reached.

One of the issues to be discussed is health care insurance for Simon and his family. These are the costs of applicable policies:

<i>Basic Health Insurance Plan Facts</i>	<b><u>Full Family Comprehensive</u></b>	<b><u>Full Family Standard</u></b>	<b><u>Individual Comprehensive</u></b>	<b><u>Individual Standard</u></b>
<b>Cost per Year</b>	\$20,000	\$10,000	\$8,000	\$5,000
<b>Family Coverage</b>	Full Family	Full Family	Only Simon	Only Simon
<b>Deductible</b>	\$4,000	\$10,000	\$2,500	\$5,000
<b>Co-Pay</b>	\$25 doctor, \$10 meds	\$50 doctor, \$30 meds	\$25 doctor, \$10 meds	\$50 doctor, \$30 meds
<b>Annual Limit</b>	\$1,000,000	\$500,000	\$1,000,000	\$500,000
<b>Prescription Coverage</b>	Full	Limited	Full	Limited
<b>Facility Coverage</b>	Full	Limited	Full	Limited

## APPLICABLE LAW

### Statutory

- 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, or unless expressly excluded herein, is presumed to be an employee.

### Also see:

- *Arndt v. Workers' Comp. Appeals Bd.*, 56 Cal. App. 3d 139 (1976).
- *Graczyk v. Workers' Comp. Appeals Bd.*, 184 Cal. App. 3d 997 (1986).
- California Senate Bill No. 1525 (Student-Athlete Bill of Rights)

## **CONFIDENTIAL FACTS FOR HUNTER SIMON**

Before his head injuries and subsequent withdrawal, Simon took pride in playing for USC, supported his fellow student-athletes by attending their sporting events, and he was happy that he would graduate from USC. Now, Simon continues to follow all USC sports, and he wants to stay connected with the university.

Since receiving his sixth concussion, Simon has been easily irritated, very depressed, and anxious. When in line at an ice cream shop, Simon flipped out on a fellow customer and screamed at her in front of other customers and workers when she asked if he had played football before and if he tried to pursue a career professionally. He has not returned since the incident. He is worried that his personal life will continue to be affected because he does not know how to cope with the symptoms of his concussions.

After graduating from USC, Simon co-founded Headaches Affecting Every Teammate with his wife in order to increase awareness about the seriousness of head injuries. He has also launched a nationwide media tour, has spoken at various engagements, and has tried to connect individuals and their families in similar situations so they can share their experiences with one another. However, despite the praise he has received, Simon does not have the money or resources to continue his efforts in the long-term.

Simon understands that this potential claim would affect not just him, but all other student-athletes as well. Only star players in revenue generating sports can afford to purchase disability insurance. Currently, lesser-publicized players and student-athletes in non-revenue generating sports can receive about \$430 per month from the NCAA disability program – a pittance for a young adult trying to both recover from injury and to start a family. Simon is determined to change the system, and he feels that this claim could be the best way to put pressure on the NCAA to reform at the very least.

While Simon is not motivated to hurt USC or its athletic department, he wants to set a precedent for student-athletes everywhere so that they are protected in situations like his, where playing college sports has a significant negative effect on the rest of their lives. Simon would like to see the overall package at about \$2.75M and will not agree to a deal less than \$1.5M, unless he receives everything he wants in the specific components of the package, including relief for others. The total value payment is to be calculated as actual cash paid out and is not to be calculated by reducing it to present value.

## Payout

Given his past relationship with the school's administration, Simon wants to trust the university to act in his best interests, but he remains skeptical. He would rather receive a bulk sum of money so he can do what he wishes with it, including using it to fund his foundation. Both Simon's primary physician and a concussion specialist have concluded that he has likely about 40-45 years left to live. Simon feels confident that with the proper support and health care from a reasonable settlement package, 45 years is feasible, so he must be paid for that length of time.

Ideally, Simon wants a straight lump-sum payout of \$1 million. Simon feels that this is more than fair, given that the average NFL salary in 2013 was \$1.9 million. The numbers Simon seeks appear justified because of the lost wages he could have earned if he had played for only one year; the earnings from the career he has lost would dwarf anything he is seeking here. Simon wants to push hard for the lump sum because it gives him more flexibility financially.

If a straight payout is not an option, a weekly payout is another alternative. Simon knows that if he won his workers' compensation claim, he would receive a weekly benefit designed to replace wages that are lost because of the injury. These payments would be received every two weeks. He feels much more confident than most to take the claim to court. After consulting with an attorney that specializes in workers' compensation, he estimates that if he won his claim, he should expect about between \$400 and \$500 per week; although the maximum amount he could receive is \$840 per week, he knows he is not fully disabled.

If USC will not give Simon a lump sum settlement, Simon wants a guaranteed \$500 per week payout for 45 years. He feels that if USC cannot trust him enough to make his own financial decisions by giving him the money up front, he deserves more money overall. As long as USC is willing to compensate him for at least the 40 years until he is eligible for Medicare and Social Security, he is willing to decrease from \$500 per week to \$450 per week. He will not take anything less than \$400/week.

As much as Simon hates the idea of collecting disability checks for the next 45 years, he feels this may be preferable to a salaried position, even though a salaried position would contribute to his future Social Security checks, and make him feel that he is actively working with USC to solve the problems caused by athletic concussions. He feels that he may get less from USC in after-tax revenue if he accepts a salary, and he is worried that if his condition starts to really affect him, he may not be able to keep working and collecting salary checks. Moreover, he dreams of becoming an athletic director someday, and if he is going to take a job with USC, he wants to make sure that he is not locked into one position just because of this deal. If USC

can ease these concerns, Simon does not have a preference either way between salary and disability payments as long as the after-tax payouts are equivalent.

### **Health Insurance**

Simon idolized Junior Seau. Since hearing about his death, he has had countless sleepless nights and night terrors thinking about the same thing happening to him. Simon's biggest concern is dying young like Seau, and leaving his future family and his sister with nothing. Since his most recent outburst, Simon has been regularly seeing a concussion specialist at the Amen Clinics in Newport Beach, which specializes in athletic concussions.

Simon has been told that while USC offers its employees a standard health care plan with an annual limit of \$500,000 and only in-network coverage, it can upgrade to a comprehensive health care plan with full facility coverage and an annual limit of \$1M. Full coverage is a huge priority for Simon, given the extent of his medical condition and the possibility that things will get worse. Furthermore, the standard plan does not cover treatment at the Amen Clinic. The comprehensive plan would cost \$30,000 per year to cover Simon and his wife, Cathy, and their two children Mark, age two, and Holly, age nine months.

Ideally, Simon wants the full family comprehensive plan, which would give maximum coverage to him and his family. But, he cannot afford it on his own, so he wants USC to foot the bill for this upgrade. Primarily, he needs to have Cathy, his kids, and himself covered by health insurance. He will not accept any plan that does not include them. Simon would also accept the full family standard plan, but nothing less. The standard plan would cost \$19,000 per year to cover Simon and his family. However, if Simon is forced to only accept the standard plan, he expects to be compensated elsewhere in order to fully cover his medical expenses.

Besides accepting either health insurance plan outlined above, Simon wants to be able to grow his foundation, and to continue to speak at various universities. Simon knows that while he is being treated at the Amen Clinic, he is essentially assisting in concussion research, but he wants to raise awareness of the causes, symptoms, and treatments to as many student-athletes as possible. While Simon would prefer to stay independent, he would be open to the idea of being associated with USC to help the current and future student-athletes, but only if he receives free treatment at USC in place of the Amen Clinic.

### **Life Insurance**

While Simon feels he can live another 45 years, he does not *know* how long he is going to live, especially after seeing what happened to Seau. If the payout is a weekly payout, Simon feels he needs life insurance to supplement what he will be receiving from this settlement. Though he would like is to make sure that his children go to college, his first priority is to make

sure that they and their mother have their financial needs met. He would certainly accept any scholarship offers for his two children as a sweetener, but he does not want to have to pay for the scholarships out of the overall settlement package. If Simon receives a weekly payout, he wants at least \$1M in life insurance coverage. Still, Simon would prefer much more than that to ensure a safe and stable future for his family if he does not live long.

### **Helping Future Student-Athletes**

As part of a potential settlement with USC, Simon would like to see USC make itself into an example of not just concussion awareness, but proactively working to solve the financial strife that the concussion epidemic causes student-athletes as well. A main goal of Simon's foundation is to lobby the NCAA to increase the disability payment afforded to student-athletes whose post-college lives are affected by injuries, which is currently just \$430 per month. While Simon never himself felt exploited by USC and the NCAA, he has plenty of friends and former teammates that feel they were betrayed. So, he wants to make sure something is in the settlement contract that goes to help those people.

In this spirit, Simon would like USC to get all FBS teams to commit 50% of their future TV/media rights revenue and bowl money shares to fund disability payments and concussion research. Simon firmly believes that at the very least, schools like USC that earn huge revenues from TV/media rights, and bowl game shares, should provide for the players who are injured generating the revenue. Likewise, Simon would much rather prefer to limit the money initially to just football players with head injuries because his foundation is based on those with such injuries. Yet, as long as those injured athletes are taken care of, he is open to spreading the wealth to more athletes with other, disabling injuries. However, he is sure that he does not feel he is in a position to agree to any advance waiver or preclusion of any other athlete's claim. He would agree to a system in which each athlete who accepted payments must sign a release of all claims against his school.

He feels that USC can make a statement by agreeing today to make the commitment to contribute 50% of the TV and bowl revenues themselves. He also wants USC to make a formal written request to the Pac-12, and to have Pac-12 Commissioner Larry Scott meet with the conference's chancellors, school presidents, and athletic directors to get rest of the conference on board. Simon is hoping that the Pac-12 move will push the other major conferences to do the same with their large media rights revenue and bowl money shares as well. He will not resolve this individual claim without a commitment by USC to take concrete action – both financially and in terms of advocacy – to achieve the goal of having the media rights and postseason revenue fund greater disability payments to the victims of football injuries like his own.



## **CONFIDENTIAL FACTS FOR THE UNIVERSITY OF SOUTHERN CALIFORNIA**

Located in the heart of Los Angeles, USC is a large private institution with an endowment of \$3.7 billion. Its athletic department has a long and storied history of success, both on the field and in the front office. It recently reported revenues of nearly \$84 million per year.

While President Nikias is relatively new to USC, he has been involved in academia for years as a scholar and professor. He is not a former college athlete, but he sympathizes with Simon's plight and detests the cutthroat nature of college athletics. He understands Simon's position, and respects what he stands for as a representative of all student-athletes, but he also understands that USC must protect itself given the inevitability of similar claims.

Likewise, higher education is a business, and he is worried about the potential ramifications of Simon's claim. Because a claim like this has never been successful, USC's workers' compensation insurance does not cover student-athletes, so USC would be on the hook for the entire workers' compensation package – along with any other future claims by past, present, and future student-athletes – if Simon is successful.

While he has personal doubts about the likelihood of Simon's claim succeeding, President Nikias is not a lawyer and will defer to his legal counsel. Although he knows current precedent favors USC, he is worried about current public opinion in favor of student-athletes, along with the fact that the value of the scholarship Simon received was about 10 times that received by the plaintiff in *Graczyk*.

The stakes are high. If Simon succeeds, USC will have to classify its student-athletes as employers, opening the school to tremendous liability, including, but not limited to, forcing the school to begin paying into the California Workers' Compensation Fund.

The USC Board of Trustees has communicated that while settlement is a priority, it does not want to just throw money at the problem. They want a settlement package that will be able to help Simon, and hopefully make him feel like he is still a valued member of the USC family. Even so, USC's athletic operations have already been harmed substantially by the poor economic climate so money is tight, and the Trustees are insistent that Simon not be paid significantly more than other graduate assistants are paid, even though the circumstances in this case are far different than the normal graduate assistant hire. The Board of Trustees would like to see the overall employment package (which includes the payout, health insurance, and future considerations) rest at about \$750,000. They will not sign off on a deal with total payments by USC over \$1.8 million during the life of the deal. The total value payment is to be calculated as actual cash paid out and is not to be calculated by reducing it to present value.

## **Payout**

If Simon won his workers' compensation claim, he would receive a weekly benefit that is designed to replace wages that are lost because of the injury. These payments would be received every two weeks. President Nikias feels that this is the best way to construct the settlement, as paying the settlement little by little would take an enormous strain off of the university's budget, and would allow USC to give Simon more money over a longer period of time. President Nikias is also concerned about Simon's plans after the settlement, and he feels that the weekly payments would ensure that Simon does not spend all of the money at once and come back for more. Besides, if Simon actually won his claim, he would not receive a lump sum. President Nikias feels it is only fair that USC insists on the same.

Through the workers' compensation board, an employee is eligible to receive up to a maximum of \$840 per week. However, since Simon is not fully disabled, he should not expect that maximum total. USC has consulted various workers' compensation lawyers, and they have estimated that Simon could expect around \$200 per week if he won his claim. Still, the school can pay up to \$450 per week if it would make this issue go away.

Normally, workers' compensation benefits expire at the death of the employee, which according to the school's research, may be within 30 years given Simon's condition. However, as a gesture of good faith, USC is willing to guarantee these weekly payments for up to 40 years in order to ensure that Simon's family, both present and future is provided for.

If Simon insists on an upfront lump sum payment, or an extended term of guaranteed weekly payments, the school would rather limit the total base payment to around \$400,000. If Simon is willing to concede on other issues, President Nikias and the Board of Trustees have authorized a lump sum payment of up to \$750,000.

In an effort to raise an olive branch to Simon, President Nikias has been authorized and encouraged by the USC Athletic Department to offer Simon a position in the athletic department. The job duties can be open to Simon's preferences and will allow USC to place the payout on the books as a salary instead of a disability payment. While a salary would be taxable (unlike a disability payment), President Nikias has been authorized to offer Simon up to \$450 per week in post-tax revenue.

## **Health Insurance**

President Nikias knows that Simon will be concerned about his health going forward. In that spirit, he is willing to devote a portion of the settlement to enroll Simon in a health insurance plan that would ensure he receives proper medical care for his condition. As a student, Simon

had opted out of the USC's student health plan in favor of his parent's health insurance, but as an employee he would be covered under USC's employee health plan.

All USC salaried employees are automatically covered under the individual standard plan. Given Simon's condition, this would come at a cost of \$5,000 per year to the school. However, USC employees can pay an additional premium to opt to have up to four immediate family members of their choice covered. They can also choose to opt into a more comprehensive health plan that has a higher yearly coverage limit and greater out-of-network access to other various health care providers. The standard plan is limited to \$500,000 in coverage per year, and while it would provide access to a number of very good health care providers, it would require Simon to change doctors to the one covered by the USC health plan.

Because of Simon's pre-existing condition, these health insurance plans are very expensive and will impact the settlement significantly. Upgrading the standard plan to cover Simon's family members would cost \$10,000 per year (including the \$5,000 cost for the individual standard plan) and if Simon insists on the comprehensive plan, it would cost \$10,000 per year to cover Simon, and \$20,000 per year to cover his full family.

As long as it fits within the parameters of its overall limitation on the size of the settlement, USC is willing to pay for an upgrade to Simon's health plan to the comprehensive package, but to cut costs it would much rather just cover Simon. If any of his family members suffered serious health problems of their own, it would drive up the costs of the health care plan significantly. If Simon insists on a family plan, the school can only pay for the standard plan, unless he makes significant concessions elsewhere.

While USC is eager to avoid Simon's claim, the Board of Trustees would much prefer to get something out of this settlement other than a legal defense from what may or may not be a valid workers' compensation claim. President Nikias has expressed a hope that Simon would be willing to assist the school, and more importantly, concussion research, as a test subject at the Ronald Reagan USC Medical Center. Of course, this research would include the treatment necessary for Simon, and it would come at no cost to him. In return, President Nikias hopes that Simon would be willing to speak to current USC athletes about the dangers of concussions and the importance of concussion management.

### **Life Insurance**

As a gesture of goodwill to Simon, President Nikias is willing to set aside two 4-year full-tuition scholarships to USC for his children. While the scholarships would be subject to minimum GPA and SAT scores, these standards are low enough that President Nikias feels that Simon's children should have no problem with reaching these requirements. If they use them, USC values the scholarships to the Simon family at \$125,000. Although the scholarships would

not cost USC much, it could be of great value to Simon's family. According to university policy, USC cannot offer Simon's children scholarships to another institution.

If Simon prefers, the school can offer him up to \$1 million in coverage on a basic, 40-year term life insurance plan, but this would come out of the overall settlement package at a cost of \$1,000 per year for every \$500,000 covered. If Simon cedes on other issues, USC can offer an extended term plan for 45 years at a cost of \$1,250 per year, which would also come out of USC's total settlement budget. Unfortunately, USC has not found a carrier that would offer someone with Simon's condition whole life insurance, or any life insurance, past 45 years, at a cost that would not be prohibitively expensive to either party.

### **Commitment to Help Future Student-Athletes**

President Nikias and the Board of Trustees know that given Simon's character and leadership reputation, he will likely not just be looking out for himself in negotiating a settlement to buy him out of his claim. Simon has stated that he is pursuing the workers' compensation claim mainly to set an example, and to make things better for current and future student-athletes who suffer from concussions and other injuries.

President Nikias already does a fair amount of private lobbying to Mark Emmert and the NCAA for it to make the situation better for student-athletes by ramping up concussion protocols, and increasing disability payments, which are currently just \$430 per month for suffering former student-athletes. He is willing to intensify those lobbying efforts and is open to other ideas Simon might have as to how USC can help increase concussion awareness and safety at both USC and in college sports in general. However, he cannot speak out directly against the NCAA or its policies without suffering severe backlash from others in the industry.

If Simon is looking for something financial behind what USC is already willing to commit, but there are limitations as to what USC can do. For USC to agree even in principle to the idea of using football revenue for the benefit of players is a huge step. However, President Nikias wants to get out ahead of the curve and provide for the injured players in the USC family. He accepts the moral principle that at the least, USC and other universities have an obligation to their injured players.

While head injuries have been at the forefront of late, USC would want to help all athletes with disabling injuries, but only if the school got a waiver in advance of all rights to make any tort or workers' compensation claims against the school. USC cannot pay for any private legal claim against the NCAA and has no control over the size or quantity of disability payments given to former student-athletes. As far as any other financial proposal goes, President Nikias is willing to discuss USC's support for specific concepts, including reserving a portion of TV/media rights revenue and bowl money shares to create a fund out of which to compensate

athletes with disabling injuries, but would have to go to the Board of Trustees for approval of any specific financial obligations or commitments, other than the \$1.8 million he is authorized to spend on the individual relief to Simon.