Sports Litigation Alert

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Insurers and Insureds Could be at Odds over Sports Concussion Lawsuits

By Richard C. Giller, Esq.

Richard C. Giller

Introduction

As the FIFA bribery scandal plays itself out, the sport of soccer and its governing bodies may be facing a much costlier issue both in terms of possible financial repercussions and the impact on the growth of soccer in this country; namely the impact that litigation over concussions and head trauma will have on the sport. Last year, the *New York Times* described head trauma as "the most serious — and potentially most litigious — issue threatening all of sports."[1] Two weeks before the *Times* article, a group of current and former soccer players filed a class action lawsuit against FIFA and other soccer associations claiming that the organizations had not done and were not doing enough to evaluate and manage concussions in the sport.[2]

Over the past several years dozens of concussion lawsuits have been filed by current and former youth, collegiate and professional football, hockey, and soccer players. Accordingly, sports organizations are becoming acutely aware of the overwhelming and potentially catastrophic impact concussion litigation may have on individual participants, the sports organizations themselves and future participation levels.

Sports concussion lawsuits trigger a number of important cultural, medical and legal issues. However, the focus of this article will be on one of the more pedestrian topics; *i.e.*, whether insurance coverage is available to help offset the billions of dollars of costs to defend and resolve these claims. In this author's extensive insurance litigation experience, the larger the loss, the more reticent insurers are to footing the bill so it is not surprising that insurance companies are vigorously prosecuting and defending the various insurance coverage lawsuits spawned by the concussion cases.[3]

While insurers have asserted a variety of reasons for challenging and denying coverage for sports concussion lawsuits,[4] the two primary defenses appear to be that (1) the underlying cases do not allege an acci-

1 www.nytimes.com/2014/09/10/sports/soccer/concussions-cant-be-ignored-by-soccer-any-more.html?_r=0. The article was published a few months after Germany won the World Cup in 2014. Two years earlier, an article appeared in the *USA Today* under the headline, "Concussion lawsuits are next big U.S. litigation." http://usatoday30.usatoday.com/sports/football/nfl/story/2012-06-30/concussion-lawsuits-are-next-big-US-litigation/55948928/1. Defining what constitutes a concussion is not as simple as it might seem. The Center for Disease Control defines a concussion as a type of traumatic brain injury "caused by a bump, blow, or jolt to the head or by a hit to the body that causes the head and brain to move rapidly back and forth. This sudden movement can cause the brain to bounce around or twist in the skull, stretching and damaging the brain cells and creating chemical changes in the brain. www.cdc.gov/headsup/basics/concussion_whatis.html.

2 *Mehr v.* Fédération Internationale de Football Association*, 14-cv-3879, U.S. District Court, Northern District of California (San Francisco), filed on August 27, 2014.*

3 For example, it has been reported that nearly a quarter of a million pages of documents have been produced in discovery in the various insurance coverage actions arising out of the NFL concussion cases alone.

4 Among the defenses asserted by the carriers in concussion coverage litigation are the number of occurrences, what constitutes the trigger of coverage, and whether certain exclusions such as athletic participants and employers' liability exclusions preclude coverage. Additionally, choice of law is a major and potentially outcome determinative issue in these cases. Choice of law is complicated by the national and international scope of the underlying litigation. For example, the NHL was founded in 1917 in Montreal, Quebec and it is currently headquartered in New York. The league is composed of 30 member clubs, 23 in the United States and 7 in Canada. The NHL MDL is pending in the United States District Court for the District of Minnesota. It is not yet know which state's laws will be applied in that case and this article will not attempt to analyze that issue.

dent; and (2) medical monitoring costs do not constitute covered damages under the subject policies. This article will provide a brief overview of the professional sports concussion lawsuits and the resulting insurance coverage cases and discuss how sports organizations might counter the insurance hurdles in order to maximize insurance coverage for "the most serious issue threatening all of sports" today.[5]

Summary of Professional Sports Concussion Lawsuits and the Insurance Coverage Cases

The National Football League

The NFL and its merchandising subsidiary, NFL Properties, LLC, have been named as defendants in over 150 lawsuits filed by former players and their spouses. Those lawsuits were consolidated into a single multidistrict litigation (MDL) currently pending in the District Court for the Eastern District of Pennsylvania.[6] The plaintiffs in the NFL MDL claim that the league withheld information from players about the impact of concussions. Plaintiffs also brought suit against NFL Properties and various equipment manufacturers including helmet manufacturer Riddell, Inc., alleging that they failed to ensure that the equipment licensed and approved for players' use was sufficient to protect them against the risks of brain injuries.

With nearly a billion dollars in indemnity payments at stake, it is not surprising that the NFL MDL has spawned a number of insurance coverage actions, the first of which was filed by Riddell in Los Angeles Superior Court in April 2012 against thirteen of its insurers.[7] According to Riddell, three insurers agreed to defend, one insurer agreed to defend after exhaustion of its self-insured retention, and the others have all refused to provide a defense. Four months later, Alterra America Insurance Company filed a lawsuit against the NFL in the Supreme Court of New York.[8] Two days after that, the NFL filed its own insurance complaint in Los Angeles Superior Court against thirty-three insurance companies.[9] Less than a week later, several subsidiaries of the Travelers group of insurance companies filed a lawsuit against the NFL and twenty-seven insurers in the Supreme Court of New York.[10]

Although the settlement in the NFL MDL case has been approved by the court, the various NFL insurance coverage actions all remain active and ongoing.

The National Hockey League

On November 25, 2013, over two dozen former NHL players filed suit against the league in federal court in Washington, D.C., becoming the first of eight proposed class action concussion cases filed against the NHL.[11]

5 Insurance issues arising out of sports concussion cases involving the NCAA and amateur athletics in general will be discussed in a separate, companion article.

6 In July 2011, seventy-three former NFL players filed a case entitled Maxwell, et al. v. NFL, et al., in Los Angeles Superior Court (Case No. BC465842) alleging that concussions and other injuries sustained during their NFL careers resulted in brain and other neurological damage, and that the NFL negligently failed to protect players against such long-term injuries. Less than a month later, the putative class action known as Easterling, et al. v. NFL, et al., No. 11-cv-05209-AB (E.D. Pa.) was filed by seven former players who brought similar allegations on behalf of a proposed class of former NFL players. On January 31, 2012, the Easterling and Maxwell actions, together with other NFL concussion cases were consolidated into In re: National Football League Players' Concussion Injury Litigation, MDL No. 2323, Case No. 2:12-md-02323, pending in federal court in Pennsylvania before the Honorable Anita Brody for coordinated pretrial proceedings. At present, the NFL MDL involves more than 300 consolidated actions with over 5,000 plaintiffs.

7 Riddell, Inc. v. ACE American Ins. Co., LASC Case No. BC482698. The Riddell action has been proceeding in California state court and the parties have filed summary judgment motions regarding the duty to defend or indemnify Riddell for injuries that first occurred after expiration of the relevant policy periods.

8 Alterra Am. Ins. Co. v. NFL, et al., No. 652813-2012.

9 NFL, et al. v. Fireman's Fund Ins. Co., et al., No. BC490342. The insurers filed a motion to dismiss the California case on improper venue grounds. The Los Angeles Superior Court granted the carrier's motion to stay the California litigation. A year later, the California Court of Appeal affirmed the Superior Court's stay order, pending the outcome of the New York insurance coverage actions.

10 Discover Property & Casualty Co. et al. vs. National Football League et al., No. 652933/2012. Travelers allegedly issued certain commercial general liability policies to the NFL Properties including primary policies spanning 1984 to 1997, and excess policies to the NFL spanning 1991 to 2002. The day after the Discover Property case was filed, Alterra amended its earlier filed complaint to include twenty-nine insurers as defendants.

11 Leeman, et al. v. NHL, et al., No. 1:13-cv-01856-KBJ. In addition to Leeman, the following proposed class action concussion-related injury cases have been filed against the NHL: LaCouture, et al. v. NHL, No. 1:14-cv-02531-SAS (S.D.N.Y., 4/11/14); Christian, et al. v. NHL, No. 0:14-cv-01140-SRN-JSM (D. Minn., 4/15/14); Fritsche,

On August 19, 2014, the NHL concussion cases were consolidated into a MDL and transferred to the federal court in Minnesota.[12] The plaintiffs in the NHL MDL allege that the league was aware of the effects of repeated concussions and head trauma and failed to warn players of these risks. They also claim that, rather than using its resources to protect players from known dangers, the NHL promoted and capitalized on the violence.[13] The NHL MDL is still active.

In April 2014, TIG Insurance Company filed a declaratory judgment action in the Supreme Court of New York against the NHL and eleven other insurers.[14] The NHL insurance coverage action is active and ongoing.

FIFA

On August 27, 2014, a group of current and former soccer players filed a class action against FIFA and other soccer associations in federal court in San Francisco. The lawsuit includes three claims for relief including counts for negligence, breach of a voluntary undertaking, and medical monitoring. The FIFA complaint alleges that soccer, unlike other sports, is unique in its relationship to concussions because "part of the game involves heading the ball." Headers, according to the complaint, "can be a violent striking of the ball, sometimes with such violent impact that spectators wince and the sound of the impact carries through the stands." The FIFA concussion case is active and ongoing and, as of the publication date of this article, it does not appear that any insurance coverage actions have been filed concerning the soccer concussion lawsuit.[15]

Primary Insurance Issues in Sports Concussion Cases

The insurance issues raised by sports concussion cases may be unusual in that there does not appear to be any analogous insurance cases involving concussion lawsuits filed against major sports organizations, but the defenses to coverage being trumpeted by insurance companies are far from novel. The primary bases upon which carriers are attempting to avoid paying defense and indemnity on behalf of sports organizations are well-worn and well-litigated.

By way of background, the world of insurance coverage is full of axioms one of which is that an insurer's duty to provide a defense for potentially covered claims, even frivolous ones that are unjustly brought, is broader than the carrier's duty to fund a settlement or pay a judgment. Indeed, courts recognize that policyholders, like the NFL, NHL and FIFA, purchase liability insurance in large part to be protected against the trauma and financial hardships of litigation, knowing that they stand a better chance of vindication if supported by the resources and expertise of their insurance companies than if compelled to handle and finance the defense themselves.[16] Further, unlike liability payments, defense costs are generally uncapped under most liability policies.

Sports Concussion Lawsuits Allege Accidental Loss

Most liability policies require the carrier to defend and indemnify the policyholder against bodily injury claims that are caused by an "occurrence" which is defined as an "accident." Accident is not defined in most policies. The standard dictionary definition of accident is a "chance occurrence," and this circular analysis is just one of the many tautologies in insurance coverage

et al. v. NHL, No. 1:14-cv-05732-SAS (S.D.N.Y., 7/25/14); Rohloff, et al. v. NHL, No. 0:14-cv-03038-SRN-JSM (D. Minn., 7/29/14); Larose, et al. v. NHL, No. 0:14-cv-03410-SRN-JSM (D. Minn., 9/8/14); Populok, et al. v. NHL, No. 0:14-cv-03477-SRN-JSM (D. Minn., 9/14/14); and Murphy, et al. v. NHL, No. 0:14-cv-04132-SRN-JSM (D. Minn., 10/2/14).

12 In re: National Hockey League Players' Concussion Injury Litigation, before Judge Susan Nelson MDL No. 2551, Case No. 0:14-md-02551-SRN (D. Minn.). There is also an individual concussion-related injury action pending against the NHL filed in federal court in Chicago filed by the estate of former Minnesota Wild and New York Rangers left winger Derek Boogaard. Estate of Derek Boogaard v. NHL, No. 1:13-cv-04846 (N.D. Ill. 2013). The Boogaard action differs from the class actions because it is alleged that Boogaard became addicted to pain medication prescribed by the NHL's staff members and eventually died of a drug overdose.

13 The league filed a motion to dismiss the NHL MDL, but the court denied the motion finding that the "plaintiffs have plausibly alleged that they may not have been aware that they had suffered an injury — or the possibility of injury — while they were playing in the NHL" and that the league may have concealed information from the players.

14 TIG Insurance Company v. National Hockey League, et al., No. 651162/2014.

15 On a related note, in January 2015, former wrestlers Vito LoGrasso and Evan Singleton filed suit against World Wrestling Entertainment, Inc. ("WWE") in federal court in Philadelphia. The suit alleges that WWE engaged in a "campaign of misinformation and deception to prevent its wrestlers from understanding the true nature and consequences of the injuries they have sustained." As with soccer, it does not appear that any insurance coverage litigation has been initiated arising out of the WWE concussion lawsuit.

16 Montrose Chemical Corp. v. Superior Court, 6 Cal.4th 287 (1993); Horace Mann Ins. Co. v. Barbara B., 4 Cal.4th 1076, 1086 (1993); Gray v. Zurich Ins. Co., 65 Cal.2d 263, 278 (1966); Haskel, Inc. v. Superior Court, 33 Cal.App.4th 963, 979 n. 14 (1995).

litigation. Regardless of how one defines occurrence or accident, most liability policies also include a number of exclusions related to these concepts, the first of which is that coverage does not apply to bodily injury that is "expected or intended from the standpoint of the insured."

This exclusion fails to resolve a very fundamental question as to its application; *i.e.*, what is it that must be fortuitous? For example, does the exclusion require that the injury causing act itself be intentional or does the exclusion require that the policyholder intend the resulting damage, or injury or both? The answer to these questions are critically important in concussion insurance litigation because most of the underlying lawsuits allege that the various sports organizations were aware of and withheld certain information from players regarding concussions. However, for insurance purposes, it may be difficult for carriers to establish that the leagues expected or intended that the failure to share concussion information would result in a lifetime of migraine headaches, light sensitivity, Alzheimer's disease, Chronic Traumatic Encephalopathy (CTE), or other progressive degenerative brain diseases.

The case law interpreting the "expected or intended" exclusion runs the gamut from excluding coverage for any injury caused by an intentional act[17] to concluding that the exclusion only applies to a loss that is unexpected, unusual or unforeseen, from the point of the insured.[18] This is because, as courts make clear, "true 'accidents,' taken literally, may be rare occurrences. Indeed, 'in the strictest sense and dealing in the region of physical nature, there is no such thing as an accident.'"[19] California courts generally agree that damage is "expected" only if the policyholder knew or believed that its actions were substantially certain or highly likely to result in the damage involved.[20]

A decision by the District Court in Colorado sums up application of the "expected or intended" exclusion this way: "Insurance is purchased and premiums are paid to indemnify the insured for damages caused by accidents, that is, for conduct not meant to cause harm but which goes awry. The insured may be negligent, indeed, in failing to take precautions or to foresee the possibility of harm, yet insurance coverage protects the insured from his own lack of due care. If the policyholder were to be told that the words of the 'occurrence' definition excluding coverage for 'expected or intended' damages actually mean that coverage is also lost for damage which a prudent person 'should have' foreseen, there would be no point to purchasing a policy of liability insurance."[21]

Even though concussions and other head injuries may be viewed as a foreseeable consequence of sports like football, hockey, and soccer, it does not necessarily follow that such injuries were expected or intended because ofa failure to share concussion information with the athletes. Nevertheless, if it is demonstrated in the concussion lawsuits that any of the professional sports organizations knew of evidence connecting concussive events and subsequent brain trauma but failed to take action to protect the players from unnecessary harm, the fight over whether insurance coverage is precluded by the "expected or intended" exclusion will undoubtedly be hard fought.

Medical Monitoring Costs Constitute Covered Damages

As noted above, most liability policies obligate carriers to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury.'" Most policies do not define "damages" and that has resulted in a great deal of litigation concerning the types of costs that constitute covered damages and those that do not.[22] The insurance coverage issue that

17 Fire Ins. Exch. v. Rosenberg, 930 P.2d 632 (Utah App. 1997).

18 Agoado Realty Corp. v. United Int'l Ins. Co., 95 N.Y. 2d 141 (2000), quoting from Miller v. Continental, 40 N.Y. 2d 675, 677 (1976).

19 Id.

20 Montrose Chemical Corporation v. Canadian Universal Ins. Co., 6 Cal. 4th 287 (1993). Some conduct, such as cases involving claims of sexual molestation, is universally deemed to result in expected or intended damages (and excluded under insurance policies) regardless of the subjective intent or belief of the perpetrator. The liability issues involved in concussion lawsuits do not appear to rise to the level of molestation cases.

21 I.T. Baker; Inc. v. Aetna Casualty & Surety, Co., Cook v. Rockwell 1nt.l Corp., 778 F. Supp. 512 (D. Colo. 1991). The Kentucky Supreme Court described this position as the "majority rule," refusing to apply the "expected or intended" exclusion unless the insured "specifically and subjectively intends the injury giving rise to the claim, … we agree that if injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury itself was intentional and the injury foreseeable." James Graham Brown Found.. 814 S.W.2d at 278 (citation omitted).

22 Unlike the term "damages," most policies include a definition for "bodily injury" but the standard definition — "'bodily injury' means bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time" — is yet another example of a not-so-helpful and sometimes infuriating tautology, at least from the policyholder's perspective; i.e., "bodily injury" means "bodily injury."

often arises in sports concussion cases is whether the medical monitoring costs sought in most those cases, constitute both "damages because of 'bodily injury.'"

Medical monitoring is generally described as "specialized testing" that will assist in diagnosing the adverse health effects associated with sports related head injuries. Many insurance companies argue that medical monitoring costs do not constitute bodily injury but, rather, are more akin to restitutionary or equitable relief which is often excluded under most policies. However, courts in a majority of jurisdictions disagree with the position taken by the carriers and instead conclude that medical monitoring costs trigger liability coverage. For example, in a case involving students and adults who allegedly drank public-school water contaminated with a toxic pesticide sued the pesticide manufacturer for, among other things, "medical monitoring damages," and the court concluded that such costs were a "legitimate element of consequential damages which flow from a tortious act."[23] Besides California, a number of other jurisdictions, including Illinois,[24] New Jersey,[25] New York,[26] Pennsylvania,[27] Washington,[28] and West Virginia[29] all agree that medical monitoring claims trigger, at the very least, a duty to defend the policyholder against such claims. Thus, the sports organizations seeking coverage for the concussion lawsuits filed against them should be able to secure insurance benefits to defend and possible resolve the medical monitoring claims.

Conclusion

As noted above, sports concussion cases trigger a number of important cultural, medical and legal issues including the personal and societal toll of dealing with a lifetime of migraine headaches, light sensitivity, Alzheimer's disease, CTE or other progressive degenerative brain diseases. As a result, discussing the financial impact such lawsuits might have on the sports organizations involved seems somewhat unseemly. However, those repercussions cannot be ignored. According to a number of published reports, the NFL generates annual revenues (minus expenses) ranging between $6 and $10 billion. In comparison, FIFA reportedly made $4.8 billion in revenue (less $2.2 billion in expenses) from the 2014 World Cup alone. Despite these staggering figures, the costs of defending and resolving the current and future concussion lawsuits filed against sports organizations would, absent insurance, significantly reduce the revenue numbers for the leagues. That could, in turn, result in higher ticket prices and other price increases, all of which could directly impact the common fan. In addition, the specter of concussions may be having an impact on the level of participation in youth football, hockey and soccer.

Resolving the sports concussion lawsuits in such a way that provides for the well-being of the players involved and protects future participants from similar trauma is of paramount importance. The ability of sports organizations to call upon the resources of the various insurance companies that had insured those entities for years could go a long way towards achieving both of those goals. As this article explained, the primary bases upon which insurers are attempting to avoid paying for the defense of those claims and to resolve the disputes are well-worn and well-litigated. The sports organizations appear to have solid grounds upon which to fight the insurance coverage lawsuits filed by the carriers and to obtain defense and indemnity payments for the underlying litigation.

23 Miranda v. Shell Oil Company, 26 Cal. Rptr. 2d 655, 658 (Cal. App. 1993). In a property damage case litigated by this author, the court in Watts Industries, Inc. v. Zurich American Ins. Co., 121 Cal.App.4th 1029, 18 Cal.Rptr.3d 61 (2004), rev. denied, 2004 Cal. LEXIS 11428 (12/01/04), concluded that water monitoring costs constituted covered damages: "by alleging the water is contaminated with lead, the municipalities have claimed covered property damage under AIU. Although a major reason for their request for parts replacements and water monitoring is to protect the public health, the resulting costs are incurred because of property damage."

24 American Ins. Co. v. RC2 Corp., 568 F. Supp. 2d 946 (N.D. Ill. 2008) rev'd on other grounds, 600 F.3d 763 (7th Cir. 2010), medical monitoring claim arising out of lead exposure constituted a claim for "bodily injury" triggering insurer's defense obligations.

25 Baughman v. United Dates Liability Ins. Co., 662 F. Supp. 2d 386 (D.N.J. 2009), medical monitoring triggers an insurer's duty to indemnify, reasoning that allegations of exposure to mercury resulting in an increased risk of illness, satisfy the "bodily injury" requirement.

26 Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp., 126 F. Supp. 2d 596 (W.D.N.Y. 2001), aff'd in part, rev'd in part, 302 F.3d 83 (2d Cir. 2002), claims seeking fund for medical testing and surveillance alleged "bodily injury" triggering duty to defend.

27 USF&G v. Korman Corp., 693 F. Supp. 253 (E.D. Pa. 1988), action seeking medical monitoring alleged "bodily injury" sufficient to trigger duty to defend; and Techalloy Co. v. Reliance Ins. Co.. 338 Pa. Super., 487 A.2d 820 (1984), class action seeking payment of future medical expenses alleged "bodily injury" triggered duty to defend.

28 Kitsap County v. Allstate 1ns. Co., 1nc., No. C93-557, (W.D. Wash., Mar. 28, 1995), carrier had a duty to defend an insured defendant in a toxic-landfill case, where the plaintiffs had sought medical monitoring.

29 Bradley v. SWVA, Inc.. No. 02-C-0587 (W. Va. Dec. 14, 2005), medical monitoring claims were "reasonably susceptible of an interpretation" that raised the possibility of coverage under the insurance policies.