Knock Out Blows – Concussion and Sports-Related Injuries Litigation

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I. INTRODUCTION

A 9 September 2014 article in the New York Times declared that "head trauma has become the most serious — and potentially most litigious — issue threatening all of sports."[1] The public awareness and interest in the damaging nature and potential long-term consequences of head injuries, and specifically, concussions, has grown rapidly in the past few years. Beginning in 2011, plaintiffs have commenced putative class action litigations alleging damages related to concussions[1] or other traumatic brain injuries players allegedly incurred while participating in a number of different professional or amateur organized sports. With the recent approval of a settlement agreement in the National Football League ("NFL") litigation which included a total payout by the NFL of $870 million; combined with similar ongoing class actions filed against significant sporting entities including the National Hockey League ("NHL"), National Collegiate Athletic Association ("NCAA"), and the Fédération Internationale de Football Association ("FIFA"), losses by policyholders related to concussions and head injuries may potentially exceed $1 billion over a number of years.

The liability issues for the insured organizations generally relate to whether the insured was aware of the potential for injuries and failed to warn players, or in fact, profited from the danger of the sports. In certain sports, there is an inherent risk that a player will likely get hit in the head. However, athletes are arguing that the sports organizations had a duty to warn about the effects of concussions and that the NFL for example, failed to carry out its duty to disclose that concussions might cause long-term brain damage. The organizations have already begun to look to primary insurers for defense or for reimbursement of defense costs. A number of declaratory coverage litigations have been initiated and are pending in the United States. Coughlin Duffy LLP is currently actively representing a number of insurers in declaratory judgment actions related to the NFL and NHL litigations.

While the most high profile and costly case to date has been the NFL litigation, there is potential for liability and coverage implications from numerous professional, amateur, and youth sports. Given the complex and diverse nature of head and brain injuries, as well as the broad scope of potential claimants, the claims raise a number of liability and coverage issues for insurers who have issued CGL policies to sports and/or educational organizations. The following paper will provide an overview of the ongoing sports injury litigations in the United States and a discussion of the key liability and coverage issues associated therewith.

[1] A concussion is a type of traumatic brain injury (TBI) caused by a bump, blow, or jolt to the head that can change the way your brain normally works. Concussions can also occur from a fall or a blow to the body that causes the head and brain to move quickly back and forth. The initial symptoms can include cognitive, physical, and emotional impairments or injuries. http://www.cdc.gov/concussion/

II. BACKGROUND

A. National Football League ("NFL") Litigation

1. Underlying Litigation

The National Football League ("NFL") and NFL Properties, LLC ("NFL Properties") were named as defendants in over 150 lawsuits filed by former NFL players and their spouses, eventually encompassing over 4,500 former players as plaintiffs (the "NFL Litigation"). The plaintiffs allege that they suffered long-term brain injuries, including, memory loss, depression, chronic traumatic encephalopathy ("CTE"), and in a few cases, death, including suicide, as a result of playing football in the NFL. The Plaintiffs allege that the NFL had knowledge of the potentially damaging and traumatic nature of the sport, and specifically the frequency of concussions and the long-term effects thereof, and that the NFL concealed this information from the players.

The plaintiffs claim that the NFL only began to properly warn players about the impact of concussions on their brain function in 2010, in many instances, years after players had retired. Plaintiffs contend that the NFL possessed scientific evidence of the dangers associated with concussions, yet did not disclose it, and that the NFL failed to regulate the sport in a manner that would prevent brain injuries. Players allege that they sustained multiple concussions and were improperly treated by team medical personnel and were not advised of the danger. Numerous public documents shed light on what the NFL might have known and when it was known. As early as 1994, the NFL formed the Mild Traumatic Brain Injury Committee ("MTBI") to commence a study of brain trauma. Numerous studies and reports between 1994 and 2010 analyzed concussion, head trauma, and related injuries, and observed the brains of former NFL players. As recently as 2007, Dr. Ira Casson, co-chairman of the MTBI, said that there is no link between head injuries and depression, dementia, early onset Alzheimer's, or "any long term problems." A pamphlet was also distributed by the NFL to the players that stated: "research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly."

The NFL lawsuits were transferred and consolidated to Multi-District Litigation ("MDL")[2] in the United States District Court for the Eastern District of Pennsylvania. Initially, the NFL argued that the actions should be barred as they constituted a labor dispute governed by the players' collective bargaining agreement. That argument was unsuccessful and the court

[2] MDL designations help to streamline the discovery and litigation of multiple related lawsuits. Plaintiffs may utilize a MDL litigation where a proposed class of litigants could not certified. See the 1997 Supreme Court holding in *Amchem Products, Inc. v. Windsor*, which held that a proposed class of present and future asbestos claimants alleging bodily injury could not be certified as a class under Federal Rule of Civil Procedure 23(b)(3) because the claims were too disparate and "sprawling" to be joined in a single representative class. Under Rule 23 of the Federal Rules of Civil Procedure, one or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

found the current collective bargaining agreement did not foreclose the ability for plaintiffs to pursue these claims in the courts under section 301 of the Federal Labor Law. The court then directed the parties to proceed to mediation. On 29 August 2013, likely due to mounting pressure arising from negative publicity, the NFL agreed to a $765 million dollar settlement fund. The proposed settlement was rejected by the trial judge on the basis that the settlement capped compensatory benefits for players' injuries. Specifically, the court identified that the cap on the settlement fund could mean that there would be insufficient funds to compensate for injuries of all potential underlying plaintiffs.

The settlement was revised by the NFL, and on 7 July 2014, the settlement agreement was approved by the trial court. The revised settlement agreement, approved by U.S. District Court Judge Anita Brody, removed the $675 million cap on damages. The new agreement contained an uncapped $675 million for compensatory damages for players with neurological symptoms and contained a specific payout formula based on the players' age and illness, $75 million for medical testing, $10 million for medical research, and $112 million to the plaintiffs' counsel - for a total payout of approximately $870 million. The settlement states that it "does not represent, and cannot be considered, an admission by the NFL of liability, or an admission that plaintiffs' injuries were caused by football." The settlement further contains a reopener under which the NFL could be required to contribute an additional $37.5 million in compensatory damages if the $675 million is insufficient for the number of injured claimants. It has been reported that the settlement could encompass as many as 20,000 retired football players. The settlement fund will be overseen by settlement administrators. Players will undergo baseline medical testing to show any brain injuries, and will be paid from the fund based on age and severity of illness or injury. The players do not need to show that the brain injury was caused by playing in the NFL.

The settlement sets forth various levels of neurological impairment and specific maximum awards of up to $5 million depending on the diagnosis. (i.e. $5 million for Amyotrophic Lateral Sclerosis (ALS), vs. $1.5 million for "Level 1.5 Neurocognitive Impairment" (i.e. early dementia.)) Future claims will be subject to negotiated provisions in the players' collective bargaining agreement such as a program established in 2011 that provides at least $3,500 in benefits a month to players suffering from neurological injuries.

On 12 September 2014, the NFL released actuarial information as ordered by the court. This report, which provided background on the NFL's calculation and analysis of the sufficiently of the settlement amount to cover all potential claimants, reported that approximately 6,000 of the more than 19,000 former players will develop cognitive problems serious enough to be compensated under the settlement agreement. It states that the injury prevalence is "materially higher" than those in the general population and that "[p]layers will develop these diagnoses at notably younger ages than the general population." The admission that one in three former players will develop cognitive injuries, and the direct correlation to the head injuries, represents a significant change from the NFL's earlier statements prior to the litigation commencing.

Players have until 14 October 2014 to decide whether to take part in the settlement or whether they want to opt out and independently pursue their claims in court. As of the date of this writing, only nine players have chosen to opt out of the settlement. One of the opt-out claimants is the family of well-known San Diego Chargers player, Junior Seau, who committed suicide in 2012 at age 43, and whose family alleges that brain injuries led to his death.

Certain of the lawsuits also include claims against Riddell, Inc., the manufacturer of the football helmets worn by the NFL players. The Riddell defendants were not part of the settlement, and that aspect of the litigation continues in the MDL litigation in the District Court for the Eastern District of Pennsylvania. The plaintiffs in that action claim that certain specific Riddell helmets over the years were defective and unsafe in failing to provide protection against the foreseeable risk of concussive brain injury. The players also allege that like the NFL, Riddell ignored 18 years of established science on the dangers of concussive injuries until 2002, when a warning—which still failed to sufficiently warn about long-term consequences of head injuries—was finally placed on their helmets.

2. NFL Coverage Litigation

A number of declaratory judgment actions regarding the NFL Litigation have been initiated by both the NFL and insurers related to coverage obligations. Coughlin Duffy LLP is involved in several of the actions on behalf of insurers.

a. The Alterra DJ Action

On 13 August 2012, Alterra America Insurance Company ("Alterra") filed a complaint against the NFL in the Supreme Court of New York, New York County. Alterra seeks a declaratory judgment regarding its duty to defend and indemnify the NFL for the underlying actions. It is believed that Alterra issued an excess liability policy to the NFL which was in effect from 1 August 2011 to 1 August 2012, with a limit of $25 million each occurrence, excess $51 million of underlying coverage. Alterra previously denied coverage to the NFL under its policy for the underlying NFL Litigation. On 22 August 2012, Alterra amended its complaint to include twenty-nine insurers as defendants and sought a judgment as to the obligations of the insurers for the underlying NFL Litigation. TIG Insurance Company, North River Insurance Company and U.S. Fire Insurance Company filed a third-party complaint joining American Guarantee & Liability Company and three other additional insurers to the declaratory action.

b. The NFL DJ Action

Two days after Alterra filed its action, on 15 August 2012, the NFL filed a lawsuit against thirty-three insurance companies in the Superior Court of California, Los Angeles County. Like the Alterra action, the NFL complaint seeks a ruling with respect to coverage for the underlying concussion actions. The NFL action includes insurers who issued primary, umbrella and excess occurrence-based policies to the NFL during the period 1968 to 2012. The NFL complaint asserts causes of action for breach of contract against certain primary insurers regarding the duty to defend, and claims for declaratory relief against all insurers for indemnity for all amounts the NFL becomes obligated to pay as damages in the underlying litigation. Additionally, the NFL complaint seeks a declaration under policies issued to Riddell for which the NFL may qualify as an insured or additional insured.

Motion practice took place in 2012 in the California NFL action regarding the proper forum for litigation of the declaratory litigation in light of the declaratory judgment actions pending in both New York and California. The insurers generally argued that there were substantial New York contacts with the insurance policies such that New York is the proper

forum for the litigation and the "first filed" NY action should be allowed to proceed. On 28 November 2012, the Superior Court of California granted the insurers' motion to stay the California action, finding that California was an inconvenient forum for the lawsuit. The court stated that "The NFL's choice of California carries slight weight when its forum decision is selective and tactical rather than consistent and principled. The NFL moved the underlying tort litigation in this very dispute from California to Pennsylvania…. The NFL's present preference for California thus is not consistent and principled." Further, the court noted that the NFL has been headquartered in New York for more than 50 years, that 33 of the 34 parties would need to travel to California to try the case, and that many insurance policies had no connection to California. As a result, the court stayed the California action in favor of the "first-filed" action in New York.

c. The Riddell DJ Action

Helmet manufacturer, Riddell, also filed a suit on 12 April 2012, against 13 insurers in California Superior Court seeking a declaration as to coverage for the claims against it in the NFL litigation (the "Riddell action."). According to Riddell, three insurers agreed to defend, one insurer agreed to defend after exhaustion of its self-insured retentions and subject to a reservation of rights, and the remaining insurers refused to defend. 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. Specifically, certain defendants whose policies span policy periods from 1964 through 1975, argue that many of the underlying plaintiffs do not claim injuries during at least one of the defendants' policy periods. Riddell argues that the losses it has incurred and/or continues to incur in defending against seven underlying actions premised on concussion injuries fall within the scope of several primary and excess policies that provide commercial general liability and products liability coverage. The court has not ruled on the motions in the Riddell action.

d. The Travelers DJ Action

On 21 August 2012, a week after the filing of the Alterra and NFL actions, various Travelers Insurance companies filed a lawsuit against the NFL and twenty-seven insurers in the Supreme Court of New York, New York County. 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 Travelers action similarly sought declaratory relief regarding the duty to defend and indemnify for the underlying NFL concussion litigation and a declaration that Travelers is not obligated to pay or reimburse any insurer for defense costs or indemnity. The Travelers action was consolidated with the Alterra action and is proceeding in New York Supreme Court.

Discovery has been ongoing in the declaratory judgment actions. The insurers have produced claims and underwriting documents and the NFL has produced over 160,000 pages of materials including pleadings, motions and discovery from the underlying cases; policy information; press releases; bargaining agreements; brain-injury research material; by-laws; NFL committee meeting minutes; player database charts, and certain information relied on by the NFL's actuaries. The parties have selected Michael Young of JAMS as a mediator and

mediation is ongoing on a piecemeal basis depending on the level of coverage and the issues involved.

B. National Hockey League ("NHL") Litigation[3]

On 25 November 2013, a group consisting of ten former NHL players filed a putative class action complaint (the "*Leeman* complaint") in the United States District Court for the District of Columbia purporting to represent the interests of every former NHL player having retired prior to 14 February 2013; estimated to be approximately 10,000 individuals. The *Leeman* complaint alleges seven causes of action related to the NHL's purported failure to take remedial action to prevent brain injuries caused by concussive and sub-concussive impacts allegedly sustained by the players during their professional hockey careers. The causes of action include: (1) a declaration of liability against the NHL; (2) an injunction creating a court-supervised, NHL-funded medical monitoring program; (3) damages for fraudulent misrepresentation by concealment; (4) damages for fraudulent misrepresentation by nondisclosure; (5) damages for fraud; (6) damages for negligent misrepresentation; and (7) damages for negligence.

On 9 April 2014, another group consisting of nine former NHL players filed a putative class action complaint (the "*LaCouture* complaint") in the United States District Court for the Southern District of New York. The allegations in the *LaCouture* complaint are similar to those alleged in the *Leeman* complaint with one notable difference. The *LaCouture* complaint purports to represent the interests of all former *and* current NHL players. The *LaCouture* complaint seeks damages, including punitive damages, and equitable relief, which is specified as including, but not limited to, a medical monitoring program.

On 15 April 2014, a third group consisting of three former NHL players filed a complaint (the "*Christian* complaint") in the United States District Court for the District of Minnesota. While not labeled as a putative class action complaint, the Christian complaint includes class action allegations and purports to represent the interests of all living retired-NHL players, their spouses and dependents, and the estates of deceased NHL players. (The *Leeman*, *LaCouture*, and *Christian* complaints are collectively referred to as the "NHL actions")

The NHL actions generally allege that each of the class members suffered bodily injury from concussive impacts sustained while playing in the NHL, and that the NHL caused or contributed to the injuries and increased the risk of injury through its acts and omissions. The plaintiffs assert that for decades, scientific evidence has linked brain injury to long-term neurological problems and that the NHL has known, or should have known, of this evidence yet failed to take any meaningful action to prevent unnecessary harm to its players. The plaintiffs further commonly allege that the NHL actively and purposefully concealed the danger associated

[3] The NHL was organized in Montreal, Canada in 1917 and relocated to New York in 1989. Currently, the league consists of 30 teams that are separately-owned and independently operated in various cities throughout the United States and Canada. As such, the NHL does not "employ" any of the players in the league.

with concussion injuries by promoting a culture of violence through which it profited. The bodily injuries alleged in the NHL actions are similar to those alleged in the NFL litigation.

On 19 August 2014, the Judicial Panel on Multidistrict Litigation ("JPML") ordered that the *Leeman, LaCouture,* and *Christian* actions, be consolidated for pretrial proceedings in the United States District Court for the District of Minnesota as a MDL. The JPML found the District of Minnesota to be the most convenient location because there are two actions pending there and because it provides a geographically central location for the parties and witnesses, many of whom may be located in Canada. Two other recently filed actions have not yet been added to the MDL but may in the future. (*Fritsche, et al. v. NHL* filed in the Southern District of New York and *Rohloff, et al. v. NHL* filed in the District of Minnesota).

1. NHL Coverage Litigation

On 15 April 2014, TIG Insurance Company ("TIG") filed a declaratory judgment action in the Supreme Court of New York, New York County, against the NHL and various other insurance companies. TIG alleges that it issued certain primary, umbrella, and excess liability policies to the NHL and certain NHL-related entities between 1989 and 2001. TIG seeks a determination of its rights and obligations, if any, to defend and/or indemnify the NHL in connection with the NHL actions. Coughlin Duffy LLP is representing one of the insurers who has been named as a defendant in this action.

C. National Collegiate Athletic Association ("NCAA") Litigation

A number of putative class actions have been filed against the National Collegiate Athletic Association ("NCAA") [4] alleging injuries related to concussions and head injuries. The first action was filed in 2011 by a former Eastern Illinois University football player, Adrian Arrington. Nearly a dozen subsequently filed concussion-related lawsuits have been consolidated into a MDL in the United States District Court for the Northern District of Illinois where the Arrington action was originally filed and pending. Arrington alleged that he suffered "numerous and repeated concussions" playing football at Eastern Illinois, and that he suffers from memory loss, depression and near-daily migraines as a result of his injuries. The Arrington action sought class action certification, on behalf of himself and thousands of NCAA athletes who have suffered head injuries because of the NCAA's negligence and failure to warn. A separate action, the *Durocher* action, originally filed in Indiana includes two football players, a female soccer player, and a men's hockey player, all of whom allege they suffered from concussions or concussion-like symptoms.

A settlement has recently been proposed by the NCAA under which the NCAA would create a $75 million medical monitoring program to examine players for concussions and neurological ailments and a $5 million concussion research fund. Certain plaintiffs have objected to the settlement and argue that the potential class of litigants could be as high as 4.2 million athletes and that the settlement fund is therefore insufficient. The proposed settlement would allow players to bring individual injury claims but bars their rights to sue as a class. The court has not decided whether to approve the proposed settlement.

[4] The NCAA is a non-profit association that regulates athletic activities and athletes at approximately 1,200 educational institutions at the collegiate/university level. The NCAA oversees a wide variety of different sports.

D. Fédération Internationale de Football Association ("FIFA") Litigation

The most recent concussion related litigation involves a putative class action lawsuit filed on 27 August 2014 against FIFA, based in Zurich, Switzerland. The FIFA action, filed in the United States District Court for the Northern District of California, does not seek monetary damages, but instead seeks rule changes such as limiting the number of times a player under 17 years old can head the ball, and allowing temporary substitutions in professional leagues if a player has received a head injury. The FIFA complaint contends that: "there is an epidemic of concussion injuries in soccer at all levels around the world" and that "FIFA presides over this epidemic and is one of its primary causes" as it sets rules generally for soccer. The complaint seeks an injunction to immediately address what is perceived as potential dangers impacting FIFA's oversight of football matches from youth, through professional leagues. The US Soccer Federation, US Youth Soccer Associations and several other football groups are also named as defendants. As this action was only recently filed, there have been no significant developments, or a formal response by FIFA to the complaint.

E. Painkiller Litigation and Potential Future Claims

In May 2014, a second round of NFL litigation was filed in the United States District Court for the District of Northern California alleging that the NFL illegally dispensed powerful narcotics and other drugs to keep players on the field without regard for their long-term health. This so-called "painkiller litigation" includes a number of putative class action complaints encompassing hundreds of former players between the years 1968-2008. The actions generally contend that team physicians and trainers across the NFL routinely, and often illegally, provided powerful narcotics and other controlled substances to players on game days to mask pain. Plaintiffs allege that the misuse of the medication led to further injuries or related issues of addiction. Given that the potential injuries and the usage of medication by players and teams could vary widely, there are a number of potential issues which may arise as this litigation unfolds.

In a separate action, a Colorado jury recently found in favor of high school student, Rhett Ridolfi, and against helmet manufacturer Riddell for $3.1 million on the issue of failure to warn. Plaintiff suffered a concussion while wearing a refurbished Riddell helmet during practice that led to severe brain damage and paralysis on his left side. The jury found Riddell negligent in its failure to warn and assessed 27% of the fault against it. The jury, however, rejected allegations of design defects against Riddell.

Sports critics and legal observers have opined about the possibility for more widespread litigation to follow in the wake of the large NFL settlement. Although there have not been a large number of filings related to youth, high school, or recreational sports; there have been a number of individual personal injury lawsuits related to alleged defects in equipment and the purported link to brain injury at the high school level. While it is unlikely that any other potential litigation will rise to the level of the NFL action, insurers should continue to watch for follow-on claims based on other sports including at the school and youth levels.

III. COVERAGE ISSUES

The claims outlined above, as well as the sizeable settlement in the NFL Litigation, create a potential for over $1 billion in coverage claims. We discuss below some of the key coverage issues that should be considered in the context of a coverage determination.

As an initial matter, we highlight that the concussion claims are unique in both factual basis and scope. There is thus no analogous case law to which one can look for direct guidance and legal precedent on these issues. Accordingly, the ongoing legal analysis and litigation of these claims will often involve issues of first impression and may require comparison or distinction from other types of claims such as toxic tort, asbestos, and molestation.

The threshold issue, absent an express choice of law clause in the insurance contract, is which state's law will be applied to determine coverage issues. Choice of law is generally governed by the rules of the forum state where the coverage action is filed. Many states will look to the state with the "most significant contacts" with the litigation and apply the law of that state. Certain states, such as California, may undertake a "governmental interest" test to determine which state's interests would be more impaired if its law were not applied. The choice of law determination has the potential to dramatically impact the value of a coverage dispute. As such, where the contract is silent on applicable law, it is common to see forum battles arise as a vehicle for obtaining venue in a favorable jurisdiction. Notably, the insurance policies involved in certain pending actions do not contain choice of law clauses. Certain declaratory actions have been filed or consolidated in the New York courts and the NFL declaratory action was filed in California. Insurers are likely to continue to argue that New York law should apply on the basis that the policies were generally underwritten in New York and were issued to the NFL in New York, where it is domiciled.[2] Accordingly, we address both New York and California law in this paper.

A. Duty To Defend

The NFL coverage action alleges that certain primary insurers are in breach of their duty to defend. Generally speaking, an insurer's duty to defend is extremely broad and is distinct from the duty to indemnify. This issue is central for primary insurers as defense costs are typically outside of limits and because the primary policies are not likely to exhaust. The duty to defend exists unless "'there is no possible factual or legal basis on which the insurer will be obligated to indemnify the insured.'"[3] Even if only a single claim in the complaint potentially falls within the policy's indemnity coverage, the insurer must defend the entire action. The duty to defend is being heavily litigated in the coverage actions as the sports organizations seek reimbursement for defense costs.

New York courts have frequently held that an insurer's duty to defend turns on whether the allegations contained within the four corners of the underlying complaint are within the scope of risk covered by the policy. In other words, the insurer's duty to defend is triggered whenever the facts alleged in the underlying complaint raise a potentially covered claim.[4] The court, therefore, must compare the allegations of the underlying complaint with the language of the policy and determine whether there is any potential for the establishment of a claim. The obligation of an insurer to defend does not extend to claims that are not covered by the policy or

that are expressly excluded from coverage. Generally, the insurer cannot rely on extrinsic facts to deny defense, and if the complaint or other facts known to the insurer indicate a possibility of coverage the insurer must defend.

In California, an insurer's duty to defend is broader than its duty to indemnify and California takes an expansive view of the duty to defend. California holds that the duty to defend is a broad one, based both on a comparison of the allegations of the pleadings with the terms of the policy, and also on facts that are extrinsic to the complaint that may reveal the possibility that the claim (or even a part of the claim) may be covered.[5] Where coverage is in doubt, an insurer must continue to defend until it discovers undisputed facts that eliminate the potential for liability. A complaint is to be "liberally construed" in favor of potential coverage. The insured need only show that the underlying claim may fall within policy coverage. The insurer on the other hand, bears the burden of proving that the claim falls outside of the terms of the policy. To date, few insurers have affirmatively undertaken the defense of an insured in concussion related litigation.

B. Occurrence / Expected and Intended

A defense being asserted by insurers in response to the concussion claims is that the bodily injuries do not constitute an "occurrence" as that term is defined under the policy because the alleged injuries were expected on the part of the governing sports agency. Although minimal discovery has taken place on this issue, numerous parties have alleged that the NFL, NHL, or NCAA knew of the danger associated with multiple concussions or head trauma and that the alleged bodily injuries were expected. For example, underlying complaints allege that the NFL "fraudulently concealed the long-term effects of concussions." The underlying complaints further allege that there are independent scientific studies dating back to the 1980s that discuss the risks associated with concussions, and that the NFL itself formed a committee to undertake concussion research in 1994, but it was not until June 2010 that the NFL first warned any player of the long term risks associated with multiple concussions.

Interpretation of the term, "occurrence" will turn on which state's law is applied to the reading of the contract. By way of example, courts in New York have determined that if the alleged event was the reasonably foreseeable result of intentional conduct then it does not constitute an "occurrence" as that term is defined by the policy.[6] California law, on the other hand, holds that damage is "expected" if "the insured knew or believed its conduct was substantially certain or highly likely to result in that kind of damage. California appellate rulings have applied a "subjective" standard for "expected or intended." "Expected" is given a slightly broader meaning than "intended." *See Montrose Chemical Corporation v. Canadian Universal Ins. Co., 6 Cal. 4th 287, 861 P.2d 1153 (1993)(*pollution would be "expected" if the insured knew or believed that "its conduct was substantially certain or highly likely to result in that kind of damage. Under this analysis, insurers will have a greater chance of prevailing on this coverage defense under New York law.

If it is demonstrated as alleged, that the NFL, NHL, or NCAA knew of evidence connecting brain injuries with concussive and sub-concussive events and failed to take any remedial action to protect the players from unnecessary harm, it is possible that a claim for

coverage would be precluded as not constituting an occurrence under the policies. It is arguably public knowledge, and has been for a period of time, that head injuries are a known and expected consequence of sports such as football, hockey, and soccer. However, in depth discovery did not take place in the NFL Litigation, and it is unclear if other plaintiffs will attempt to determine what the defendants in other actions knew, and when they knew it. Numerous additional factual issues arise in the context of developing this defense, including the amount of medical research and scholarship on the impact of head injuries and whether the sports organization was involved or aware of those studies. The expected or intended defense will thus turn on what the sports organization purportedly knew, and when they knew it, and what the players may have known, in order to argue that the insured knew, expected, or even as alleged as to the NFL and NHL, profited from the violent and certain danger of the specific sport.

C. Trigger

Which policies are triggered by a particular underlying claimant is a difficult determination in concussive injury claims. The claims at issue involve thousands of players who may have been injured over a number of decades. Further, the nature of brain injuries related to concussions is that the symptoms or injuries may manifest at a later date or progress into other diseases. For example, a number of claimants allege they suffer from Chronic Traumatic Encephalopathy (CTE), a progressive, degenerative disease of the brain often resulting from multiple concussions. CTE triggers degeneration of the brain tissue which can begin months, years, or even decades after the last concussion. CTE symptoms generally may include memory loss, confusion, impaired judgment, paranoia, impulse control problems, aggression, depression, and, eventually, progressive dementia similar to Alzheimer's.

The applicable trigger will again be determined under the law of the state whose law is found to apply to the insurance contracts. In New York, courts apply the injury-in-fact theory to determine when insurance coverage is triggered.[7] Under the injury-in-fact theory, policies are triggered when evidence shows that an injury actually occurred to a particular claimant during the policy period, irrespective of when the injury is caused or discovered.[8] Thus, for a policy to be triggered there must be actual impairment of a bodily function that occurs during the policy period. Notably, coverage may be triggered each time existing injuries are aggravated or new injuries occur.[9]

An injury-in-fact theory of trigger may not lend itself to application in factual scenarios involving the brain injuries alleged in the concussion litigations.[10] In the concussion cases, it is difficult to pinpoint a precise point in time where the alleged injury can be said to have "occurred." For example, in the context of asbestos, New York has required claimants to prove to a medical certainty the point in time where asbestos overwhelmed the body's defenses, and found it is that point that constitutes the injury-in-fact No court has yet determined when the injury-in-fact occurred in the context of concussive injuries. It is possible that because of the violent nature of a sport like American football or hockey, a court could potentially deem that injury-in-fact occurs upon "exposure", which could be argued to be the time the player enters the league. Thus, "injury-in-fact" could range from as early as the date the player enters the league, to the date he manifested symptoms, triggering all policies during that time period. [11]

Similar to New York, California courts hold that the date of an "occurrence" is the date when the injury or damage actually resulted, not the date the accident occurred. In other words,

it is the actual damage, not the act causing the damage that is determinative of the issue. California employs the continuous trigger theory in environmental contamination cases, finding coverage is afforded over successive policy periods, beginning with exposure through manifestation. Additionally, the California Supreme Court has held that a continuous trigger should be applied to claims of continuous or progressively deteriorating damage or injury.[12] As to asbestos bodily injury claims, California courts have adopted a "continuous trigger" from the date of first exposure to insured's product through date of death or claim.[13] Under a continuous trigger, all policies in effect from date of first exposure until date of death or date of claim, whichever occurs first, are triggered.

Because the concussion litigation is a new type of loss, and because the injuries alleged are being disputed and litigated in the underlying actions, what transpires in the underlying litigations will heavily influence the trigger analysis. The science may demonstrate that repeated hits following a concussion or subsequent concussions cause further, distinct injuries (leading to the triggering of multiple policies) or that any long-term effects from a single concussion are tied only to that injury (leading to a single-date-of accident trigger). It is likely that the court in the New York actions will evaluate when the bodily injury takes place by examining the actual facts and science underpinning the underlying claims.

D. Number Of Occurrences

The issue of number of occurrences may be relevant to both primary and excess insurers and will again turn on the applicable state's law. The New York Court of Appeals has recently ruled on the number of occurrences issue in a case involving sexual molestation. *Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, PA*., 21 N.Y.3d 139 (N.Y. 2013). In *Diocese*, the court reiterated that the "unfortunate event" test will apply to determine the number occurrences "within the meaning of an insurance clause limiting coverage to a certain amount per occurrence."[14] The "unfortunate event" test will apply "absent policy language indicating an intent to aggregate separate incidents into a single occurrence."[15] The *Diocese* Court specifically rejected "other approaches that would equate the number of occurrences with either "the sole proximate cause" (meaning a single cause of loss and therefore one occurrence) or by the "number of persons damaged" (i.e. each person is a separate occurrence.)[16]

Under the "unfortunate event" test, a court will "consider whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors."[17] The policyholder in *Diocese* argued that the definition of "occurrence" encompasses multiple claims, losses and incidents because the definition of "occurrence" includes a "continuous or repeated exposure to substantially the same general harmful conditions." While the *Diocese* Court conceded that the definition of "occurrence" may include situations involving multiple events, the court said that the language sounded more like language designed to deal with asbestos fibers in the air, or lead-based paint on the walls, rather than the molestation claims at issue in the case before it. The court thus ruled that "[a]pplying the unfortunate event test we conclude that the incidents of sexual abuse within the underlying action constituted multiple occurrences" and applied one occurrence per year.[18]

For cases involving multiple claimants and unidentifiable incidents, such as asbestos cases, New York courts have also applied the "unfortunate event" test, but it has generally led to a different result.[19] A New York court stated that applying the "unfortunate event" test, "the asbestos exposure claims [the insured] seeks to join as one occurrence (per policy period) represent multiple occurrences. The court next looked to the temporal and spatial relationships between the incidents to determine whether they can nonetheless be viewed as a single unfortunate event, and thus a single occurrence. In that context, the court ruled that the incidents shared few, if any, commonalities, differing in terms of when and where exposure occurred.[20]

California courts have similarly rejected the position that thousands of claims alleging exposure to asbestos under a wide range of circumstances at a variety of locations could constitute a single event. In the molestation context, the California Court of Appeals determined in a negligent supervision context, that after the first incident of molestation of each child, each subsequent molestation was part of the same occurrence because it stemmed from the same negligence on the part of the day care owner.[21] California courts have adopted the "cause" approach for determining the number of occurrences.

Either court may find that the claims of injury by each plaintiff constitute a separate occurrence and that an occurrence occurs for each policy within the triggered period. In *Diocese*, the court ruled that there was one occurrence in each policy year. The difficultly with determining the number of occurrences for head-injury cases is that they are a hybrid type of case. They are analogous to sexual molestation cases because they involve human contact at different times and locations and not ingestion of a fiber or lead, however, a significant difference between the molestation cases and head injuries is that the molestation cases involve identifiable discrete incidents whereas head injuries may constitute a cumulative condition occurring over multiple contacts in both games and practices. To claim that each separate hit that results in a head injury is an occurrence may be too extreme for the court because the players potentially suffer injury every time helmet-to-helmet contact is made. According to one article, "it is not always the severity of the hit that can cause brain trauma that can lead to CTE. The mere accumulation of hits can be just as devastating."[22]

E. Allocation

Where a court finds that multiple policies are triggered, the next issue of significance will be the issue of allocation among triggered policies. Because there is no established case law addressing the concussion claims, look to toxic tort and asbestos allocation decisions for guidance.

In New York, the leading case of *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, a case involving coverage for property damage related to a gas plant, the Court of Appeals affirmed use of the time-on-the-risk methodology for determining an insurer's liability.[23] However, the court recognized that there are alternate *pro rata* methodologies, including that adopted by the Supreme Court of New Jersey in *Owens-Illinois, Inc. v. United Insurance Co.*, 138 N.J. 437 (1994) (insurer liable for liability corresponding to the ratio of the total coverage provided by that insurer to the total coverage provided by all the policies in effect), and stated that those other *pro rata* methods may also be appropriate. Cases decided by New York courts after *Consolidated Edison* generally have applied the *pro rata* by time-on-the-risk allocation

method in cases involving successive triggered policies including in the context of bodily injury and asbestos.[24] [25]

California, on the other hand, has adopted an "all sums" theory for allocation in the context of property damage, such that each insurer on the risk during the period of loss is liable for "all sums" and obligated to indemnify the insured for the entirety of the ensuing damage or injury.[26] Under this approach, the insured is permitted to stack consecutive policies. The court's reasoning could be extended to apply to other types of long-tail situations such as asbestos or other bodily injury exposure claims. California courts generally apply horizontal exhaustion as opposed to vertical exhaustion. The California Supreme Court in *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 693 (1995), found that an insurer may be liable for the entire loss up to its policy limits even if several policy periods are triggered, but that the insurer may then allocate the loss among additional insurers based on the "other insurance" provisions or equitable considerations.

The analysis of allocation in large complex claims such as the concussion claims cannot be easily predicted or calculated without all information related to the claims and coverage profile. However, understanding how a court will likely look to allocate the claims will benefit any potential analysis of each insurer's exposure. In fact, given the long tail nature of these claims, the number of potential claimants, and the potential slow development of the diseases, the issue of allocation, has the potential to drastically impact an insurer's exposure.

F. Other Issues

1. Athletic or Sports Participants Exclusion

Insurers should be aware as to whether any of their policies contain an "Athletic or Sports Participants Exclusion" which could potentially be invoked as a bar to coverage. It is believed that certain earlier policies, including those issued to the NHL, may have contained this exclusion prior to its removal in 1996. This exclusion could include language such as:

> This insurance does not apply to "bodily injury" to any person while:
>
> 1. Practicing for; or
> 2. Participating in;
>
> Any sports or athletic contest or exhibition that you sponsor.

This exclusion potentially may provide a basis to exclude coverage for the injuries alleged in the concussion actions to the extent it is interpreted to apply to the bodily injury arising from playing any sport sponsored by the insured organization.

2. Medical Monitoring

Many of the complaints at issue, including the NFL settlement, seek medical monitoring for the benefit of the plaintiffs. A potential defense available to insurers is that the medical monitoring does not constitute bodily injury and therefore is not covered. "Bodily Injury" is generally defined to mean "bodily injury, sickness, or disease sustained by a person, including

death resulting from any of these at any time." Other policies define bodily injury as "bodily injury, sickness, disease, disability, shock, mental anguish, mental injury and humiliation, including resulting death." While the definition of bodily injury in the ISO form makes no mention of mental injuries, medical monitoring may be covered. However, the relief sought through medical monitoring is generally described as "specialized testing…that will assist in diagnosing the adverse health effects associated with hockey-related [head injuries]".[27] Such "specialized testing" may potentially not be considered bodily injury because it does not fall within the definition of bodily injury.

IV. CONCLUSION

Concussion, and sports related litigation has grown rapidly and created significant financial and legal exposure for the insurance industry. While the initial liability claims related to the NFL have generally been resolved, the size of the settlement has led to significant and ongoing coverage disputes. Further, based on the success and speed by which the NFL ligation was resolved, numerous other actions, and potential other types of litigation have, or are likely to follow. Accordingly, concussion and sports related litigation is an upcoming claim type that should be on insurers' radar over the next year.

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[11] http://www.nytimes.com/2014/09/10/sports/soccer/concussions-cant-be-ignored-by-soccer-any-more.html

[2] *See Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 822 N.Y.S.2d 30, 34 (N.Y. App. Div. 2006), aff'd, 876 N.E.2d 500 (N.Y. 2007) (the insured's domicile at time of contracting is considered to be the principal place of the insured risk).

[3] *Id.* (quoting *Frontier Insulation Contractors, Inc. v. Merchs. Mut. Ins. Co.*, 91 N.Y.2d 169, 175 (1997)).

[4] *See*, *e.g., Technicon Elec. Corp. v. American Home Assur. Co.*, 74 N.Y.2d 66, 73 (1989).

[5] *See Gray v. Zurich Insurance Co*., 419 P.2d 168 (Cal. 1966).

[6] *Brooklyn Law Sch. v. Aetna Cas. & Sur. Co.*, 849 F.2d 788, 789 (2d Cir. 1988) ("[L]iability coverage depends upon whether the alleged injury was intentionally caused or was an unintended, although foreseeable, result of the alleged intentional conduct."). An "occurrence" is generally defined as an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

[7] *Continental Cas. Co. v. Employers Ins. Co. of Wausau*, 60 A.D.3d 128, 148 (1st Dept. 2008).

[8] *Stonewall*, 73 F.3d at 1195; *Keasbey*, 60 A.D.3d at 148–49; *Maryland Cas. Co. v. W.R. Grace & Co.*, 23 F.3d 617, 625–26 (2d Cir. 1993).

[9] *Autotronic Systems, Inc. v. Aetna Life & Cas.*, 89 A.D.2d 401, 404 (3d Dept. 1982); *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1498 (S.D.N.Y. 1983).

[10] *See American Home Prods. Corp.*, 565 F. Supp. at 1498.

[11] *See American Home Prods. Corp.*, 565 F. Supp. at 1498 (holding that an injury-in-fact can occur "at any or all points from exposure to manifestation, on the ground that identifiable injuries have been proved to have occurred at each point to a reasonable degree of medical certainty.").

[12] *Montrose Chemical Corp. v. Admiral Ins. Co.,* 10 Cal. 4th 645 (Cal. 1995).

[13] *Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co.,* 45 Cal. App.4th 1, (1st Dist. 1996)

[14] *Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, PA*., 21 N.Y.3d 139, 148-151 (N.Y. 2013).

[15] *Id.*
[16] *Id.*
[17] *Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, PA.,* 21 N.Y.3d 139, 143 (N.Y. 2013)
[18] *Roman Catholic Diocese*, 21 N.Y.3d at 139.
[19] *See e.g. Appalachian Ins. Co. v. General Elec. Co.,* 8 N.Y.3d 162, 174 (N.Y. 2007). In *Appalachian*, the insured sought coverage for over 400,000 asbestos related claims that allegedly occurred over 40 years.
[20] *Id.*
[21] *State Farm Fire & Casualty Co. v. Elizabeth N.* 9 Cal. App. 4th 1232 (Cal. Ct. App. 1992)
[22] http://highschoolbioethics.med.nyu.edu/briefs/head-to-head
[23] *Consolidated Edison Co. of N.Y.,* 98 N.Y.2d at 224–25.
[24] Other New York decisions have applied pro rata allocation as well, *Olin Corp. v. Insurance Co. of N. Am.*, 221 F.3d 307, 321-25 (2d. Cir. 2000), and have applied it to personal injury claims, *Continental Cas. Co. v. Employers Ins. Co. of Wausau*, 22 Misc. 3d 729, 737 (Sup. Ct. N.Y. Cnty 2008) (pro-rata allocation applied to asbestos claims); *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co.,* 87 A.D.3d 1057, 1060 (2d Dept. 2011) (applying pro rata to sexual abuse claims); *Serio v. Public Serv. Mut. Ins. Co.,* 304 A.D.2d 167, 172–73 (2d Dept. 2003) (applying pro rata allocation to lead paint claims).
[25] *See State v. Generali Ins. Co.*, 844 N.Y.S.2d 13 (App. Div. 2007) (lead paint claims); *Serio v. Pub. Serv. Mut. Ins. Co.,* 759 N.Y.S.2d 110 (App. Div. 2003) (same); *Continental Cas. Co. v. Employers Ins. of Wausau*, 871 N.Y.S.2d 48 (App. Div. 2008) (asbestos bodily injury claims); *Crucible Materials Corp. v. Certain Underwriters at Lloyd's, London*, 681 F. Supp. 2d 216 (N.D.N.Y. 2010) (pollution property damage claims).
[26] *State of California v. Continental Insurance Company,55 Cal. 4th 186, 281 P. 3d 1000 (Cal. 2012)*
[27] See *Leeman* Complaint.