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Maximizing Insurance Coverage for Concussion Injury Claims

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Claims against sports leagues for injuries allegedly resulting from concussions are on the rise. The cost of defending these suits could prove very costly and raise a number of unsettled insurance coverage issues, including what insurance policies afford coverage, how the defense costs and damages will be allocated, and whether any policy exclusions apply to limit coverage.

Policyholders will first want to understand what insurance policies may be implicated. Typically, a league or school's commercial general liability (CGL) policy will respond to a concussion-related claim because these policies cover liability for accidental bodily injury taking place during the policy period. Depending on the particulars of the claim, a policyholder's directors and officers and corporate liability (D&O) policy, which typically covers the insured's liability for alleged "wrongful acts," may also respond to a concussion-related claim.

Determining when the accident or injury took place, and consequently what policy applies, is key to maximizing insurance coverage. Depending on the applicable state law, the injury may be deemed to take place when the injured person was first exposed to the harmful conditions, when the injury was discovered, when it actually took place, or for the entire duration from exposure through manifestation.

Additionally, if the injuries are determined to have taken place during several policy periods and thus trigger coverage under multiple policies, there will likely be a fight among the insurers as to what insurer should pay what amount of the damages. Depending on the applicable state law and policy language, the damages may be allocated on an "all sums" basis, which allows the insured to collect the entire amount of damages from any one primary insurance policy that it is triggered (and all excess insurance policies to that policy). Alternatively, insurers may argue that the damages should be allocated among the different insurance policies on a "pro-rata" basis, where the insurer is required to pay for only a portion of the policyholder's liability divided among the triggered policy periods or based on damage that allegedly took place during that policy period.

There are also various policy terms and exclusions that insurers may seek to rely on in an attempt to deny or limit coverage for concussion-related claims. For instance, insurers may seek to rely on the intentional acts exclusion, which purportedly bars coverage for bodily injury intended or expected from the standpoint of the insured. For example, in *TIG Insurance Co. v. National Hockey League*, the NHL sought

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insurance coverage for a class action brought by retired NHL players for injuries alleged to be the result of concussions. The insurer denied coverage under the intentional acts exclusion because the players alleged that the NHL was aware that multiple blows to the head could lead to long-term brain injury. The court stayed the coverage action.

An insurer may try to deny coverage if it can establish that the league (or perhaps team) knew about the player's alleged injuries before the policy period began. The Arena Football League's insurer raised this defense in *Everest National Insurance Co. v. Arena Football One, LLC*. In addition, policyholders should review policies before purchase to ensure that they do not include exclusions for "continuous progressive injury" which seek to bar coverage for bodily injury that allegedly began before the policy period started, regardless of whether the policyholder knew about it.

Similarly, in another recently filed suit, *Great American Assurance Co. v. Conference USA*, Conference USA's insurer argued that the intentional acts exclusion precluded coverage for injuries alleged to be the result of concussions. The scope and applicability of this exclusion depends on the applicable state law, which in some jurisdictions provides the exclusion applies only if the policyholder is found to have intended the injury while in others the courts consider whether the injury was substantially certain to occur. The insurer also relied on a limited event coverage endorsement to the policy that did not include football as a covered event—policyholders need to be attentive to such endorsements to ensure that they are not included in their policy in the first instance. According to court documents, the parties in *Great American* are in the process of finalizing a settlement.

In *Breland v. Arena Football One, LLC*, a former player brought concussion-related claims against the Arena Football League and sought coverage from the League's CGL and D&O insurer. The court dismissed the suit, finding the player's injuries took place outside of the policy period of the CGL policy and were barred under the D&O policy's bodily injury exclusion.

Lastly, insurers may seek to deny coverage by citing an insured's alleged failure to comply with insurance policies' cooperation requirements. In *Altterra America Insurance Co. v. National Football League*, one of the NFL's insurers is attempting to avoid coverage for a \$1 billion settlement because the league allegedly failed to provide information to the insurer. Case law generally, and the new Restatement of the Law, Liability Insurance specifically, require an insurer to prove it was prejudiced from the policyholder's alleged lack of cooperation. However, in the first instance, it is important to give due consideration to information requests from your insurer.

Concussion claims present a significant exposure to professional, amateur, collegiate and high school contact sports leagues across the country. It is therefore important that all such leagues, colleges and schools carefully review their insurance policies before purchase to ensure that they provide the expected coverage and do not include provisions that could lead to coverage disputes. In addition, in the event of a claim, these cases show that policyholders must be prepared to promptly and aggressively pursue coverage and navigate complex insurance coverage issues in order to maximize recoveries.

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