

Potential Emerging Risk Of Concussion Claims To Insurers

Law360, New York (December 18, 2012, 11:36 AM ET) -- In 2011, hundreds of former National Football League players began to sue the NFL, alleging that the league breached a duty to warn and protect them from long-term brain injury threats posed by repeated concussions and severe head impacts. These claims sparked increased attention by the media — and heightened concern among parents and scientific researchers — on whether it is safe for kids to play high-impact sports like football.

The plaintiffs' bar also took notice. In September 2012, Blake Ripple, a former high-school football player, filed a lawsuit in federal court in Texas against his former high-school football coach and school district. Ripple alleged that even though the defendants knew the dangers of football head injuries, they permitted him to suffer over 30 concussions or subconcussions while playing football. Ripple alleged that due to these brain injuries, he was not able to live independently. The defendants denied any wrongdoing.

The Ripple lawsuit is similar to a growing number of claims allegedly related to brain injuries sustained during college, high school and youth sports. The claims involve highly sympathetic alleged victims — injured kids.

Moreover, there is an abundance of potential claimants. An estimated 1.1 million kids play high-school football each year, and an additional 3.5 million kids play below the high-school level. An estimated half million kids play hockey in the U.S. Other sports, such as soccer, give rise to millions of additional potential claimants.

While youth sport concussion lawsuits have grown in prevalence, they have garnered less notoriety than concussion lawsuits — and related insurance coverage declaratory judgment actions — involving the NFL and National College Athletic Association.

The NFL Lawsuits

Currently, the NFL is a defendant in over 150 separate lawsuits brought by over 3,600 former players. The Judicial Panel on Multidistrict Litigation (MDL) has consolidated many of these suits for coordinated pretrial proceedings in the U.S. District Court for the Eastern District of Pennsylvania (In re National Football League Players' Concussion Injury Litigation).

In July 2012, the former players filed an amended “master complaint” that alleged that the NFL “ignored, minimized, disputed, and actively suppressed broader awareness of the link between sub-concussive and concussive injuries in football and the chronic neuro-cognitive damage, illnesses and decline suffered by former players.” The players’ complaint included claims for wrongful death, fraudulent concealment, negligent misrepresentation and negligence. The NFL publicly denied wrongdoing.

Riddell Inc., a football helmet manufacturer, is also a defendant in some of the former NFL players’ lawsuits. The players asserted strict liability, failure to warn, negligence and fraudulent concealment claims against Riddell for the alleged failure of its helmets to prevent concussions. Riddell publicly denied wrongdoing.

The NFL and Riddell moved to dismiss the players’ master complaint on the grounds that the claims are preempted by federal labor law and, therefore, the players must follow the dispute resolution procedures contained in the NFL’s collective bargaining agreement with the players. These motions are still pending.

Lawsuits Spark Insurance Coverage Disputes

Not surprisingly, the NFL concussion lawsuits have sparked several insurance coverage disputes. For example, in August 2012, Alterra American Insurance Company filed a declaratory judgment action against the NFL in New York state court alleging that Alterra had no duty to defend the NFL against the former player lawsuits. Alterra’s amended complaint asserted that it denied coverage because the NFL allegedly breached its duty to cooperate by failing to provide Alterra with information regarding the players’ concussion lawsuits.

In correspondence to the NFL that has been filed with the court, Alterra also denied coverage on the ground that no bodily injury was alleged to have taken place during its policy’s effective period and because the insurance did “not apply to bodily injury ... expected or intended from the standpoint of the insured.” The NFL moved to dismiss arguing, among other reasons, that Alterra did not allege that its high-excess policy layer (over \$51 million) had been reached.

The NFL also filed a declaratory judgment action in August 2012 in California state court against 30 insurance companies, alleging that they have improperly failed to defend the NFL against the former player lawsuits. According to court filings, as of September 2012, the NFL and related companies had incurred more than \$7 million in unreimbursed defense costs.

The NCAA Lawsuits

In addition to Riddell and the NFL, the NCAA is a defendant against well-publicized concussion claims. In November 2011, three former college football players and a former college soccer player filed a lawsuit in federal court in Illinois on behalf of a putative class of former college athletes who have “sustained a concussion(s) or suffered concussion-like symptoms while playing sports at an NCAA school, and who have, since ending their NCAA careers, developed chronic headaches, chronic dizziness or dementia or Alzheimer’s disease ... as a result of the concussion(s).”

The plaintiffs alleged that the NCAA engaged in a pattern of negligence and inaction with respect to concussions and concussion-related problems. The NCAA denied these allegations and asserted numerous affirmative defenses, including a defense that the plaintiffs knowingly assumed the risk presented by participating in college sports. The case remains in the discovery stage.

Similar to the NFL lawsuits, the NCAA concussion lawsuit has triggered insurance coverage disputes. In June 2012, TIG Insurance Company (and other insurers) filed a declaratory judgment action against the NCAA in federal court in Kansas. TIG seeks a declaration that it is not obligated to defend or indemnify the NCAA in the underlying concussion lawsuit.

In its declaratory judgment complaint, TIG asserted that no coverage existed because, among other reasons: the alleged injuries did not take place during the term of certain relevant insurance policies; the alleged injuries do not constitute “bodily injury,” as defined in certain relevant policies; to the extent the NCAA “expected or intended” the injuries alleged in the underlying lawsuit, no coverage existed; and the underlying complaint’s claims for unjust enrichment, fraudulent concealment and medical monitoring did not seek damages because of bodily injury.

TIG also asserted that no coverage existed under several of the implicated policies because they contained an “Athletics Participants exclusion that precludes coverage for liability arising out [of] activities or injuries sustained by persons practicing for or participating in an athletic contest.”

The NCAA’s deadline to respond to the complaint is in late January 2013.

Concussion Claims as an Emerging Risk

While the media is paying keen attention to lawsuits against the NFL and NCAA, the rise of concussion and brain injury claims related to youth sports may ultimately prove to be the greater risk both to potential defendants and to their insurers. Certainly, the plaintiffs’ bar has begun to focus on such claims. As with most potential emerging risks, insurers will be faced with both liability and coverage issues.

With regard to liability, defense counsel will advance some expected arguments. For example, defense counsel will argue that a defendant should not be responsible for injuries when the plaintiff knowingly participates in an inherently risky activity such as football. However, the plaintiffs’ lawyers will likely respond that a 13-year-old playing football for his junior high school lacks the capacity to knowingly assume risk in the way that an NFL linebacker does.

In addition, certain defendants in youth sport concussion claims — such as towns or nonprofit youth leagues — may claim immunity from or statutory caps on liability. Depending on the jurisdiction, the plaintiffs’ bar may seek to avoid immunity by naming a coach or athletic administrator in his individual capacity or by focusing on helmet manufacturers as defendants.

Although kids with youth sports concussion claims are sympathetic plaintiffs, juries are also likely to have some sympathy for the defendants in these claims. For example, Pop Warner football chapters, which are run largely by volunteer parents, are very different than billion-dollar sports organizations (like the NFL) or multinational tobacco companies. While this fact could reduce the prevalence of large jury awards, it is unlikely to eliminate liability altogether.

Expected Coverage Issues

Depending on the facts of each case and the underlying plaintiff's allegations, insurance companies may be able to raise a variety of meritorious coverage defenses in connection with youth sports concussion claims. Although there have not been any recent reported decisions that specifically address coverage issues in the context of such claims, the NFL, Riddell and the NCAA declaratory judgment actions are illustrative of at least some of the potential coverage defenses that may be available.

Specifically, insurers may be able to challenge coverage on (at least) the following grounds:

- The claimant did not allege that his injuries took place during the applicable policy period.
- When the underlying plaintiff seeks to demonstrate that the insured knew that the plaintiff would almost certainly suffer additional concussions if he continued to play football, there is no coverage based on the "expected or intended injury" exclusion.
- When the alleged underlying tort is predicated on forcing a kid who has a concussion to keep playing, there is no coverage because the resulting additional bodily injury was not caused by an occurrence, which typically is defined in common general liability forms as "an accident."
- For equipment manufacturers, there may be no coverage due to certain products exclusions in their policies.
- Common law "known loss" or "known risk" defenses to coverage may apply.
- The policy contains an "Athletic Or Sports Participants" exclusion endorsement.

Given the recent media attention on concussion claims and the huge number of potential claimants, insurance companies are wise to watch the development of these claims and how courts view potential coverage defenses.

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