

## INSURANCE AND REINSURANCE CASUALTY SUBCOMMITTEE APRIL 2015

### IN THIS ISSUE

*Almost three years after the concussion litigation was filed against the NFL, it is still not over and has had a domino effect on multiple other sports leagues. This article explores the current status and potential effects of concussion litigations filed against the NFL to the recently filed lawsuit against Pop Warner.*

## Concussions Reverberate from the Pros to Pop Warner

### ABOUT THE AUTHORS



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### ABOUT THE COMMITTEE

The Insurance and Reinsurance Committee members, including U.S. and multinational attorneys, are lawyers who deal on a regular basis with issues of insurance availability, insurance coverage and related litigation at all levels of insurance above the primary level. The Committee offers presentations on these subjects at the Annual and Midyear Meetings. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

In March of 2013, approximately nine months after multiple NFL players sued the NFL for concussion-related injuries, these authors reported on the status of the litigation, predicted that it could change sports as we know them, and explained how it could impact football leagues from the highest level all the way to pee wee football. Two years later, the NFL litigation is not over, and the authors' prediction that concussion lawsuits would progress to the lowest levels has unfortunately come to fruition, as litigation has ensued against the NCAA and now has impacted high schools and Pop Warner football threatening to further change the landscape, or possibly end, football as we know it.

#### **A. NFL Litigation**

Although it didn't take long for the NFL and retired NFL players to reach a settlement in the NFL concussion litigation, it has been over a year since the initial settlement was announced and it is still not final. This is largely because the Judge presiding over the case, the Honorable Anita Brody sitting for the United States District Court for the Eastern District of Pennsylvania, has to approve the settlement. In January 2014, Judge Brody refused to approve the settlement on the basis that the \$675 million cap for the medical fund would not be sufficient to compensate all of the retired NFL players who would qualify.

As a result of Judge Brody's concerns, in June of 2014, the NFL and the retired players

revised the settlement to remove the \$675 million cap, which Judge Brody preliminarily approved the following month. Judge Brody also conducted a hearing on the fairness of the settlement in November 2014, but in February 2015, she suggested that the parties make a series of additional changes, including expanding coverage for players diagnosed with CTE. Therefore, to date, Judge Brody has not issued final approval of the settlement.

Under the terms of the revised settlement, retired players would be paid, up to a maximum of \$5 million, based on their specific diagnosis, the amount of years that they played in the NFL, and their age at the time of diagnosis. However, one of the terms that is causing a difference of opinion is that players who died prior to 2006 will not be eligible for a payout under the settlement, unless the applicable statute of limitations in the player's home state permits the claim. In addition, one of the new terms of the settlement provides for a cutoff date by which a player with CTE would have to die in order to receive benefits. CTE can only be diagnosed after death. As a result, some players have objected to this new term, claiming that it creates a situation where former players have an incentive to commit suicide before the cutoff date so that their families are eligible to recover under the settlement.

While it is clear that there are still issues with the new settlement, including that there are many former players or families of former

players who are currently part of the class and may not be eligible for a payout under the new terms of the settlement, it is obvious that a large majority of the class is in favor of the settlement. According to court filings, there are approximately 25,000 former NFL players who will be impacted by the settlement. Of those 25,000 players, only approximately 200 players have opted out of the settlement. This indicates overwhelming support by the players for the settlement to be approved by Judge Brody. Only time will tell whether Judge Brody will agree, but her decision will not only influence the NFL litigation, but also the NCAA litigation that is following a similar path.

## B. NCAA Litigation

In July 2014, only a month after the NFL and the former NFL players reached a revised settlement in the NFL litigation, the NCAA announced that it had also reached a settlement with the college athletes whereby the NCAA would provide a fund of \$70 million for concussion testing and diagnosis of current and former NCAA college athletes. The class action, which is consolidated in a federal court in the Northern District of Illinois, could include up to 4.2 million current and former college athletes, including 2.4 million of those athletes participating in non-contact sports.<sup>1</sup>

The fact that the NCAA litigation includes athletes from a variety of sports raises some major differences that are not applicable in the NFL litigation. Most importantly, the Judge overseeing the case, U.S. District Judge John Lee, is responsible for ensuring that the proposed settlement would protect all eligible athletes. To that end, Judge Lee urged the parties that former college athletes in non-contact sports should be added to the class as plaintiffs so that the element of adequate representation was met. Despite that instruction, however, Judge Lee at a hearing in November 2014, denied the plaintiffs' motion to add two *current* college athletes in track and field and golf, making the distinction that he wanted *former* athletes to be added.

The distinction between current and former college athletes, as well as between contact and non-contact sports, is a significant issue that must be addressed by the parties and Judge Lee before there is any hope of a final settlement in the NCAA litigation. One question, which is the same question that has plagued the NFL litigation for years, is whether the \$70 million amount will be sufficient to cover all eligible athletes. Furthermore, the large difference in this amount and the \$675 million amount being paid by the NFL can be attributed to the fact that the NCAA settlement only covers diagnostic medical expenses, not actual treatment, which is a major criticism of the NCAA settlement.

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<sup>1</sup> According to the proposed settlement, "contact sports" are defined as football, lacrosse, wrestling, ice hockey, field hockey, soccer, and basketball.

Another problem with the NCAA concussion settlement is highlighted by the story of Ryan Hoffman, a former University of North Carolina football player who was the subject of a *New York Times* article in March 2015.<sup>2</sup> Despite his talent and success at the college level, Ryan never made it to the NFL, and although he could only recall having one diagnosed concussion during his college days, he took many more hits to his head than he can remember. Ryan suffers from all of the classic symptoms of CTE – depression, memory loss, impulse control, and aggression, but since CTE cannot be diagnosed until after death, Ryan’s diagnosis is inconclusive. More significantly though, Ryan’s symptoms have prevented him from holding down a job and Ryan is currently homeless. Ryan Hoffman’s story portrays the inevitable conclusion that there are many former NCAA athletes who need more help than any settlement can provide. As stated in the *New York Times* article, “even if the NCAA paid a billion-dollar settlement, it may not be enough to help all the college players suffering right now.”

Ryan Hoffman is one of thousands or even millions of former NCAA college athletes who dedicated their college careers to their sport without earning a dime, but never made it to the professional level. Despite suffering from the lingering effects of head injuries incurred during their college careers, those former players such as Ryan, are

forced to find other careers, but what if they cannot as a result of their injury? Is this something that will be compensated by the NCAA concussion settlement? The current answer is no, but this is a dilemma that Judge John Lee should be addressing in whether to approve the NCAA settlement. For Ryan Hoffman’s sake, we can only hope that Judge Lee follows Judge Brody’s lead in scrutinizing the settlement with a fine tooth comb.

### C. High School Litigation

In late November of 2014, the first lawsuit against a high school athletic association related to concussions was filed in Illinois against the Illinois High School Association (IHSA) by a former high school football player, Daniel Bukal. The lawsuit alleges that Bukal suffered multiple concussions while playing football at Notre Dame College Prep from 1999-2003 and more than 10 years later, he still suffers from migraines and memory loss.

The lawsuit alleges that the IHSA didn’t do enough to stem the potential damage from concussions, and demands that changes be made, including the requirement that all schools have trained medical personnel present at all games and on-call for practices, and a requirement for computer-based concussion screening. The IHSA, on the other hand, claims that the costs of implementing these requests would present a major challenge to many high school

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<http://www.nytimes.com/2015/03/08/sports/ncaaf>

[football/ryan-hoffman-a-unc-football-player-two-decades-ago-is-now-homeless.html?\\_r=0](http://www.nytimes.com/2015/03/08/sports/ncaaf/football/ryan-hoffman-a-unc-football-player-two-decades-ago-is-now-homeless.html?_r=0)

programs and that the IHSA has already implemented new safety procedures in recent years, including mandatory concussion education for coaches and the prohibition of hitting during summer football practices.

According to the IHSA Executive Director Marty Hickman, this lawsuit, if successful, could have a major impact on the sport of football in the state of Illinois. Hickman stated that these changes could have the impact of creating a “two-tier system of high school football in Illinois, where wealthier districts can afford new safety mandates and higher insurance costs, and poorer districts are forced to drop football.” Hickman added that if this lawsuit is successful, then other former high school players will inevitably file lawsuits as well and the cost of insurance could become “prohibitively expensive”. In fact, Hickman stated that the cost of insurance has already increased because insurance companies are requiring schools to buy separate concussion policies.

While the IHSA is the only known high school association to be sued over concussions to date, it is clear that they are only the first, but certainly not the last. Interestingly, Daniel Bukal is represented by attorney Joseph Siprut, who is the same attorney that filed the class action against the NCAA. According to Siprut, the goal is to sue every state high school athletic association in the country in an effort to force them to change their rules to make the game safer. Therefore, this is only the beginning of concussion lawsuits at the high school level,

which should raise a very realistic concern that the “two-tier” system addressed by Marty Hickman could become the norm across the country. The effect could be that many high schools cease to offer football as a recognized sport.

#### **D. Pop Warner Litigation**

As predicted, concussion litigation has reached the level of pee wee football, where a former football player who killed himself at age 25 has sued the youth football league Pop Warner in a federal court in Wisconsin. The lawsuit filed by Joseph Chernach’s Estate claims that Pop Warner failed to train its coaches properly; didn’t use the safest helmets; didn’t teach its young participants how to wear their helmets properly; and didn’t limit the amount of hitting in practice. After suffering from the common symptoms of CTE, Joseph Chernach committed suicide in 2012. It was later confirmed that he had CTE. The Estate is seeking over \$5 million in punitive damages.

Similar to the concerns over the high school concussion litigation, there is a fear that this lawsuit, if successful, could threaten the existence of youth football leagues, as insurers will inevitably increase their premiums to offset the risk. While Pop Warner, as the largest youth league in the country, may be able to sustain these increased costs, other smaller leagues may not.

In order to succeed in this lawsuit, the Chernach Estate will face the same obstacles

that were faced by the former NFL players and played a large role in producing the settlement in the NFL litigation. The Estate will not only have to prove that the CTE led to him committing suicide, but also that the CTE was caused by repeated hits to his head sustained while playing in Pop Warner. This will be a difficult task, considering Chernach went on to play football in high school, participated in wrestling for 12 years, and was a pole-vaulter on the track team. Any of these activities could have led to his CTE. Regardless of the success by Chernach's Estate in the lawsuit against Pop Warner, it is clear that a new wave of litigation is here, and the potential plaintiffs are endless considering most, if not all, football players started in pee wee football.

force football leagues to make a decision: either change or cease to exist.

#### **E. Conclusion**

The concussion litigation, especially from Pop Warner to the NCAA is causing and will cause many organizations and educational institutions to reevaluate the cost/benefit of maintaining a football program that combines the value of team sports while adequately protecting its participants. Inevitably, many of the programs will be discontinued because of the expense and risks highlighted by these lawsuits. Some see this as a shame that will result in football talent drying up, which may affect the college and NFL games, while others see this as a blessing that will stop football players across the nation from sacrificing their future health for the inevitable head injury. Regardless, the concussion litigation will

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