

INSURANCE AND REINSURANCE CASUALTY SUBCOMMITTEE

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It was only a year ago that these authors reported on the status of the litigation filed by over 2,000 former NFL football players against the NFL for concussion-related symptoms and the allegation that the NFL concealed certain information from the players. In just under one year, there has not only been an agreed-upon settlement that was later rejected by the Judge presiding over the NFL litigation, but also there have been numerous other concussion-related lawsuits filed across the sports world, trickling down from other professional sports leagues to the college arena. This article will address the current status of the NFL concussion litigation, including the effects of the Judge rejecting the proposed settlement, provide an analysis of the lawsuits being filed against other sports leagues across the nation and potential other "targets" for future litigation.*

The Hits Keep Coming: No End in Sight to the Concussion Dilemma

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A. NFL Litigation

On August 29, 2013, the NFL and retired NFL players announced that they had reached a \$760 million settlement. The settlement was broken down as follows: \$675 million to be placed in a Monetary Award Fund that would award cash to retired NFL players depending on their diagnosis; \$75 million for a baseline assessment program that would offer neurological evaluations to test for and determine any cognitive deficits; and \$10 million to establish an Education Fund to promote safety and injury prevention to football players, including initiatives in youth football. Additionally, the NFL agreed to pay the players' attorney's fees, not to exceed a total of \$112.5 million.

While the announced settlement indicated a step in the right direction to the public, experts in multidistrict or class action litigation knew that it did not end the litigation. The fate of the settlement rested with Judge Brody, who needed to approve it. While opinions in the public arena as to the amount of the settlement were mixed, it was Judge Brody who had the final word, and on January 14, 2014, Judge Brody made clear that she did not approve of the settlement. In a 12 page opinion filed as a matter of public record, Judge Brody announced that she was denying the former NFL players' Motion for Preliminary Approval of the settlement. She stated, "I am primarily concerned that not all Retired NFL Football Players who ultimately receive a Qualifying Diagnosis or their related claimants will be paid." Judge Brody's opinion was issued in response to information and thousands of pages of documents provided by the players and the league intended to convince her of the fairness of the settlement. Although Judge Brody emphasized her belief that the settlement was a result of "good faith, arm's-length

negotiations between adversaries," she did not feel that the record was sufficient to address her concerns.

Judge Brody's rejection of the proposed settlement echoes some of the concerns raised by former players and experts, many of whom insisted that the settlement was too small considering the NFL generates an estimated \$10 billion in revenue per year. However, it was not only the amount that raised concerns. The proposed settlement was also questioned because it did not account for all of the potential injuries from which the former players are suffering. For example, the family of the late Junior Seau publicly objected to the proposed settlement because it would not pay for claims of wrongful death. The lawsuit filed by Seau's family seeks compensation not for his pain and suffering, but for his children's. Thus, the family contends they would not be properly compensated by the settlement, even though it would provide up to \$4 million for players like Seau who were diagnosed with traumatic brain injuries after their death.¹

* While there were a reported 2,000 players at the time, it is now estimated that over 4,500 former players filed lawsuits against the NFL for concussion-related injuries, all of which have been consolidated before the Honorable Judge Anita Brody in the multidistrict litigation in the Eastern District of Pennsylvania.

¹ The situation faced by Seau's family raises another sign that concussion-related litigation has no end in sight, even if a settlement is ultimately reached and approved by Judge Brody. If and when a settlement is approved, the retired players will have the right to opt out of the settlement, meaning that they cannot obtain the benefits of the settlement but can proceed with their own individual litigation against the NFL. In fact, this is not the only option available to players choosing to opt out. In late 2013, some former Kansas City Chiefs' players chose not to be a part of the NFL lawsuit, and instead decided to file a lawsuit against the Kansas City Chiefs team. Although they assert similar claims, it is the first lawsuit filed against an NFL team, and could signal another potential avenue of relief for players choosing to opt out of any settlement. This

Where do the parties go from here? While Judge Brody rejected the proposed settlement, it was done “without prejudice.” Consequently, the players and the league have spent the last two months searching for more information and evidence that will convince Judge Brody that there will be sufficient funds to cover all known and potential injuries suffered by the retired players. If Judge Brody is still not convinced, then the NFL will either have to increase the monetary portion of the settlement, or give the Judge some assurance that extra funds will be provided in the future if the Fund proves to be insufficient. If Judge Brody cannot ultimately be convinced that a settlement is fair and in the best interests of the players, then the cases will proceed to trial. Nonetheless, Judge Brody’s rejection of the first proposed settlement is a clear indication that she recognizes the significance of this case, because of not only the inherent effects it will have on the NFL and its players, but also the impact it is likely to have on a potential settlement in concussion-related lawsuits filed against other professional and collegiate sports leagues.

B. NHL Litigation

Once the \$760 million settlement in the NFL concussion litigation was announced, it was not a matter of *if*, but *when*, the next major lawsuit would be filed and which league would be the unlucky defendant. On November 25, 2013, that question was

implicates a major benefit of the settlement, which is that those players opting in to the settlement will not have to prove that their current ailments or symptoms were caused by concussions that they sustained while in the NFL. Those opting out of the settlement will have to prove that in order to recover, a burden which many experts believe to be a difficult one.

answered when ten former hockey players² filed a class-action lawsuit against the National Hockey League (“NHL”) in the U.S. District Court for the District of Columbia, in which they claim that the league knew or should have known about the dangers posed by concussions and failed to do enough to reduce the risks of head injuries or educate the players about those risks.

While no formal Answer or Motion has been filed, the NHL is expected to make some of the same arguments raised by the NFL, including the possibility that the collective bargaining agreement preempts any litigation. That argument was denied by Judge Brody in the NFL litigation, but it is not yet clear whether the NHL will have any more compelling arguments in favor of preemption.

There is one major difference between the concussion litigations faced by the NHL and NFL. Fighting has always been a major component of professional hockey. As the only major league sport that regularly allows and features fighting between players, the NHL is in a unique position when it comes to defending these concussion lawsuits. The NHL will most certainly argue that a player’s concussion may have been caused by fighting; that hockey players were never required to fight during games; and that if any concussion-related symptoms were caused by a fight engaged in by the player during the game, then the player assumed the risk of that injury voluntarily. On the other hand, the

² Unlike the NFL lawsuits, the 10 members of the original class filing suit against the NHL are not any of the NHL’s most-recognizable names. In fact, three of them (Darren Banks, Brad Aiken, and Morris Titanic) played 20 or fewer games in the NHL. Further, the most recognizable name, Ricky Vaive, has since removed his name from the lawsuit. However, within 48 hours of the suit being filed, more than 200 other former NHL players stepped forward to join the lawsuit and many more are expected.

players specifically mention fighting in their 47 page Complaint, alleging that the NHL increased the risk of players by “refusing to ban fighting and body checking and by continuing to employ hockey players whose main function is to fight or violently body check players on the other team.” Therefore, it is likely that the NHL allowing and potential encouragement of fighting will play a significant part in the concussion lawsuits. Similarly, causation, or lack thereof, of the players’ ailments or injuries to concussions suffered during routine plays during the game versus a fight during the game, will have to be explored.

Although the concussion litigation against the NHL is still in its early stages, there is no doubt that it will have a significant impact on the league. Since there are NHL teams and players based in the United States, as well as Canada, it is possible that the NHL could simultaneously face lawsuits in both countries. Furthermore, the NHL does not generate anywhere near the amount of revenue generated by the NFL. Thus, the NHL will not be in a position to settle these lawsuits for an amount even close to the \$760 million agreed upon by the NFL, and any substantial settlement or penalty could have a significant impact on the long-term viability of the NHL.

C. MLB Potential Litigation

Major League Baseball (“MLB”) has not yet been the target of concussion-related lawsuits, but many experts believe that it is only a matter of time. Clearly, baseball is not a contact sport and thus, it has been long thought that concussions were not a serious threat to baseball players. However, the suicide of former MLB player, Ryan Freel, who was diagnosed with CTE and suffered as many as 10 concussions during his playing career, has made experts and baseball insiders

reconsider the danger of concussions in baseball players.

Although concussions do not appear to be as widespread in baseball as in football or hockey, the case of Ryan Freel displays that they do still occur and the MLB has recognized the potential liability by enacting certain rule changes in the last few years. For one, the MLB recently announced an experimental rule, 7.13, intended to limit violent collisions at home plate. While home plate collisions are not the only scenario that could lead to a concussion in baseball, they are the leading cause, and thus, many experts and former players have applauded the MLB for taking a proactive approach, as opposed to the NFL and NHL which took a reactive approach.

Changes to the rules are not the only proactive approach that the MLB has taken to reduce concussions (and the possibility of being sued over concussion-related symptoms). At the beginning of the 2013 season, the MLB mandated that a new helmet, which was certified to prevent injury for speeds up to 100 mph, be worn by all players. While the new helmet is admittedly not concussion-proof, it is still clear that the heavier, slightly larger helmet was designed for added protection from concussions. Similarly, the MLB earlier this year approved a new cap to be worn by pitchers, although it is still optional, that is aimed at preventing head injuries to pitchers who are struck by line drive hits to the head.

Despite the MLB’s attempt to enact certain rule changes and implement new equipment aimed at reducing concussions by players, the modern belief is that it may be too late, and it is only a matter of time before the MLB is forced to defend multiple concussion-related lawsuits, like the NFL and NHL.

D. NCAA Litigation

The wave of concussion-related lawsuits has not stopped with professional sports. In the wake of the large potential settlement in the NFL litigation, lawsuits have also started to proliferate against the NCAA for similar allegations – that the NCAA had knowledge of the risks of concussions but failed to share that information with its players and failed to enact policies protecting players from such injuries.

While the first lawsuit was filed in 2011 by former Eastern Illinois football player, Adrian Arrington, many lawsuits have since followed, and they have all been consolidated in a multidistrict litigation in a federal court in the Northern District of Illinois. It is expected that these cases will take a similar path as the NFL litigation, although the NCAA seems eager to settle the cases sooner rather than later. However, there is one overlapping issue with the NFL litigation that must be resolved before any of the cases can settle.

As discussed above, Judge Brody rejected the proposed settlement between the former NFL players and the NFL. In her opinion, she also referenced her concern over the release that was to be included in the settlement for the NCAA and other amateur football organizations. Apparently, the NFL sought to immunize the NCAA as part of the proposed settlement. However, this attempt for a “universal” settlement raises a question as to whether this can be accomplished, since there may be players who suffered concussions during college but are not part of the class of NFL retired players. In effect, those players may not be able to seek relief from the NCAA if a release of this nature was included in the NFL settlement, leading to Judge Brody’s concerns.

E. Other Potential Litigation

This article reflects that no sports league is immune from suit for concussion-related symptoms, but it still does not stop there. Since the lingering effects of concussions can be so severe, it is not just the leagues and the teams that are bearing the blame. Naturally, the makers of helmets are the easiest to blame, and Riddell is actually a named defendant in the NFL litigation, although it doesn’t seem that Riddell was contributing to the proposed settlement. However, it does not mean that makers of helmets are not target defendants. In fact, Riddell is facing at least three other class action lawsuits stemming from an allegation that Riddell falsely advertised that athletes who wore their helmets were less likely to suffer concussions. The claim was based on a 2003 study done at the University of Pittsburgh, but the plaintiffs allege that the study is scientifically flawed, which Riddell knew about and ignored.

Additionally, certain types of artificial turf have received blame for contributing to football players’ concussions and other head injuries. Although there are no known lawsuits against turf manufacturers to date, it could be only a matter of time. As early as 2002, studies were conducted on different turfs used in NFL stadiums. The results indicated that artificial turf used in domed stadiums was the hardest surface, resulting in the least impact attenuation. According to the study, this may have contributed to the high incidence of concussions in some NFL players.

In sum, concussion litigation is here to stay. Despite years of litigating in courts across the country, this is only the beginning. As expected, the NFL litigation has brought concussions to the front stage, making professional sports leagues question rules that



have been in place for hundreds of years; threatening the long-term existence of other leagues; and putting any and all companies making sports equipment at risk. Simply put, the NFL litigation has had a domino effect, causing litigation to be filed all the way to the collegiate level and the affiliated industries, with no end in sight. This begs the question: who is next?

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