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WHO'S GOING TO PAY THE BILLS?: THE INSURANCE SIDE OF THE NFL'S CONCUSSION LITIGATIONS

*Scott A. Andresen**

INTRODUCTION

While most of the public's attention is on the 4,127 named player-plaintiffs in the National Football League's 214 concussion-related lawsuits (as of February 22, 2013)¹, a less-publicized East Coast-West Coast battle the likes of which have not been seen since Biggie Smalls and Tupac Shakur is currently playing itself out in the state courts of New York and California. The battle is over who is going to pay the NFL's² costs for litigation expenses and any damages incurred in connection with the NFL's aforementioned concussion litigations.

THE NFL'S MULTIDISTRICT CONCUSSION LITIGATION: WHAT'S AT STAKE?

On January 31, 2012, the United States Judicial Panel on Multidistrict Litigation centralized the 200+ concussion-related lawsuits against the NFL in the Eastern District of Pennsylvania. A Master Complaint was filed in June 2012, with the NFL subsequently filing a motion to dismiss the action arguing that the plaintiffs' claims are a labor dispute which should be resolved by interpreting the terms of applicable collective bargaining agreements. Oral arguments on the NFL's motion to dismiss are set to take place on April 9, 2013. A win for the plaintiffs, and the NFL (and/or its insurers) could be staring at a potential eleven-figure damages verdict. A win for the NFL, and the plaintiffs' chance for a massive payday essentially disappears—leaving the NFL and its insurers to 'only' fight over the payment of tens of millions of dollars in legal bills.³

* Research assistance provided by Stephanie Horner, Marquette University Law School

1. Source: *NFLConcussionLitigation.com*

2. For purposes of this article, "NFL" shall include the National Football League and NFL Properties

3. Additionally, an unfavorable outcome for the NFL in the multidistrict litigation could change the very nature of sports in America if colleges, high schools, junior leagues and otherwise are subjected to increased insurance premiums (or outright inability to obtain insurance coverage) by insurers who are forced to account for the increased risk of concussion/neurological lawsuits on behalf of those who play contact sports like football, hockey and lacrosse.

WEST COAST LITIGATION

*National Football League v. Fireman's Fund Insurance Co.,
BC490342 (L.A. Super. Ct., filed Aug. 15, 2012)*

On August 15, 2012, the NFL filed suit in the California Superior Court in Los Angeles against 32⁴ of its general liability insurers who provided 185+ primary and excess liability policies from 1968 to 2012, stating that the defendants “have failed or refused to discharge their obligations to defend the NFL and NFL Properties in the [concussion] lawsuits in accordance with their policy obligations and have thereby breached their duty to defend.” The suit, among other prayers for relief, seeks damages in excess of \$5 million (against 12 of the insurers) for breach of their duty to defend the NFL against the concussion lawsuits, a declaration that one or more of the insurers are obligated to defend the NFL against the concussion lawsuits, and a declaration that one or more of the insurers are obligated to indemnify the NFL for all sums that they may become legally liable to pay as damages or in settlement of the concussion lawsuits.

The lawsuit was purportedly initiated by the NFL in California because the NFL maintains three (formerly four) teams within the state; there have been eleven Super Bowls, three Pro Bowls, and numerous playoff games within the state; most of the players who are plaintiffs in the concussion litigation played in NFL games in California; all of the parties were/are incorporated or qualified to transact business in California; and many of the policies in question were brokered in California or issued by companies headquartered in California. However, it is far more likely that the NFL found more urgency in initiating a lawsuit in Los Angeles before placing another football team there because of California’s “continuous trigger theory.”

Under the “continuous trigger theory,” an event is recognized as an insurable loss (or “occurrence”, in insurance parlance) along a continuum from when damage first appears until it terminates. The continuous damage is eligible for coverage under every policy in existence during the period that damage occurred, with each policy covering its share of damage that occurred during the time the policy was in effect. To that end, the NFL states in its complaint that “in a case alleging or involving injury occurring over a period of time, each policy in effect during that period is ‘triggered’ and separately requires each issuing

4. The Complaint interestingly states in ¶41 that “The NFL and NFL Properties have identified most, but not all, of the . . . insurance policies issued to one or both of them and in effect during the period of March 4, 1968 to August 1, 2012.”

insurer to pay the entire amount the insurer becomes legally obligated to pay because of injury caused by the occurrence.”⁵

All but one of the defendants moved to stay or dismiss the NFL's action on *forum non conveniens* grounds. On November 28, 2012, the Court granted the defendants' motion to stay the action in deference to the *Alterra* lawsuit (discussed below) pending in New York. The NFL appealed the Court's order and has filed its appellant's brief. The insurers-appellees brief was due on March 6, 2013.⁶

EAST COAST LITIGATIONS

Alterra America Ins. Co. v. NFL, #652813/2012 (N.Y. Sup. Ct., filed August 13, 2012)

Two days before the NFL's commencement of its lawsuit in California, Alterra American Insurance Company initiated an action in the state court of New York seeking a declaration that Alterra does not have a duty to defend or indemnify the NFL against the numerous concussion lawsuits filed against the NFL. Alterra subsequently filed an amended complaint against the NFL and thirty of its insurers on August 22, 2013 seeking, in addition to the declaratory relief requested in the original complaint, declarations that the NFL breached their contractual obligation to cooperate with Alterra (by failing to provide Alterra information about other insurance coverage related to the concussion litigations) and seeking a declaration of the rights and obligations of the other thirty insurance company defendants.

The NFL filed a motion to dismiss or stay Alterra's amended complaint on September 12, 2012 arguing, in part, that the action initiated in California by the NFL was the first-filed and most comprehensive action on the matter at hand. A hearing on the NFL's motion is scheduled for March 15, 2013.

Discovery Prop. & Cas. Co. v. NFL, #652933/2012 (N.Y. Sup. Ct., filed August 21, 2012)

On August 21, 2012, five insurance entities initiated an action in the state court of New York against the NFL and twenty seven other insurers seeking a declaration that they have no duty to defend the National Football League in the concussion litigations as they were insurers of NFL Properties only, not the National Football League, and that they do not have a duty to defend or indemnify the NFL or

5. National Football League v. Fireman's Fund Insurance Co., BC490342, Complaint ¶46

6. Cal. Ct. of Appeal, Second Appellate Dist., #B245619

NFLP against any award of damages or settlement in the concussion lawsuits.

The NFL filed a motion to dismiss or stay the plaintiffs' complaint on September 17, 2012 that was nearly identical to the motion filed 5 days earlier in the *Alterra* matter. The matter has been fully briefed and is awaiting a decision by the Court.

WHAT'S NEXT?

While we await the courts' decisions in the three actions detailed above and the ultimate decision of whether this matter will be adjudicated in a California or New York courtroom, the ultimate determination of who owes what to whom may not be made for a decade or more. With the NFL having coverage provided by a multitude of insurers over a four decade period, it will be no easy task to figure out what insurers are liable for what injuries to what players. This matter will further be complicated by the insurers mounting their own defense to liability under theories, for example, that the NFL intentionally concealed the known risks to players and thereby committed uninsurable fraud upon them, or that the concussions were foreseen and expected consequences of playing in the National Football League and are not an insurable unexpected risk or "occurrence."