LEAD1 ASSOCIATION

NAME, IMAGE, AND LIKENESS ("NIL") INSTITUTIONAL REPORT

OCTOBER-NOVEMBER 2022

"With NIL comes many new opportunities and challenges for college sports. The LEAD1 NIL Institutional Report helps our members navigate through these changes."

—Tom McMillen, President and Chief Executive Officer of LEAD1 Association

Assessing the Insurance Coverage Issues in the Concussion Lawsuits Filed Against the NCAA

By Richard C. Giller, of Greenspoon Marder

Over ten years ago, the New York Post correctly predicted that concussion lawsuits would be the "next big U.S. litigation."[1] Fast forward a decade and we find ourselves immersed in dozens of concussion lawsuits filed against the National Collegiate Athletic Association (NCAA) including a potentially ground breaking individual concussion case filed by Alana Gee, the widow of former University of Southern California (USC) linebacker Matthew Gee, who died in his sleep at the age of 49.[2] The Gee case started the first few days of trial last week in Los Angeles Superior Court,[3] and the significance of a jury verdict in that case—one way or another—could have far-reaching financial repercussions as well as impacting the future of college sports.

Sports concussion lawsuits trigger a number of important and well-documented cultural, medical, and legal issues, from the personal and social toll of the athlete and his family dealing with a lifetime of degenerative brain diseases and symptoms—like migraine headaches, paranoia, anxiety, Amyotrophic Lateral Sclerosis (ALS), Chronic Traumatic Encephalopathy (CTE), Alzheimer's, Parkinson's, many of which lead to premature death—to who, as between the NCAA on the one hand and individual schools and conferences on the other, is legally culpable for failing to protect athletes from concussions or advise athletes about the long term effects of brain injuries.[4] Many of those issues have been analyzed by others but the focus of this article, while touching on some of the heartbreaking facts in the individual cases, will be on whether insurance coverage is available to the NCAA to help offset the millions or billions of dollars at stake in defending and resolving these concussion cases.

Concussion Cases Involving the NCAA

In September 2011, Adrian Arrington, a former Eastern Illinois University football player, filed a class action lawsuit against the NCAA seeking damages arising out of concussions sustained by hundreds of student-athletes. That case alleged, among other things, that the NCAA knew about, but disregarded, information concerning the long-term effects that concussions could have on the future lives of student-athletes, and that the Association ignored studies linking the frequency and severity of concussions with certain sports.

Dozens of other lawsuits against the NCAA followed and, in December 2013, all of pending the actions were consolidated into a single multi-district litigation (MDL), which is currently pending in Chicago. The parties to the NCAA concussion class action case ultimately settled the lawsuit with the Association agreeing to establish a $70 million fund for concussion testing and diagnosis for student-athletes and committing an additional $5 million to research in addition to the testing and diagnosis funding.

In addition to defending against the class action lawsuit, the NCAA has also been named as a defendant in over two dozen individual concussion lawsuits, like the Gee case. The thrust of the individual actions is that the NCAA (1) had a duty to protect athletes from concussive and sub-concussive head injuries; (2) was negligent in the performance of that duty; (3) athletes suffered brain injuries as a result; and (4) such injuries took place between 1998 and 2005. Of the twenty-nine individual lawsuits twelve involve student-athletes who are now deceased; fourteen athletes were diagnosed with CTE or CTE-like symptoms;[5] five were diagnosed with early-onset Alzheimer's; three with ALS; and one with Parkinson's disease.

The list of common post-concussion symptoms experienced by individual athletes include, severe headaches, dizziness, hearing loss, memory loss, vision problems, depression, dementia, impulsivity to anger, delirium, psychotic episodes, speech impediment, loss of inhibition and impulse control, panic, anxiety, irritability, paranoia, disorientation, hallucinations, social isolation, suicidal thoughts, and cognitive dysfunction, among a host of other symptoms. As alleged in a heartbreaking lawsuit filed by the wife of Cullen Finnerty, the winningest quarterback in NCAA history with a 51-4 record

1 https://nypost.com/2012/06/30/concussion-lawsuits-are-next-big-u-s-litigation/

2 According to a 2020 Sports Illustrated article entitled "In 1989, USC Had a Depth Chart of a Dozen Linebackers. Five Have Died, Each Before Age 50" (https://www.si.com/college/2020/10/07/usc-and-its-dying-linebackers), Gee was the fifth of 12 USC linebackers from the 1989 team to die after protracted mental health-related issues.

3 The *Gee* trial began on October 10, 2022. It appears that the first four days have consisted of rulings on multiple pre-trial motions, objections to proposed jury instructions, and motions in *limine* (MILs) with the court granting, in whole or in part, several MILs, while denying most of the others. On Friday, October 14 alone, the parties filed nine pleadings, totaling over 830 pages of documents, including five MILs filed by Plaintiff, a trial brief and declaration regarding alleged spoliation of evidence filed by the NCAA, and an opposition to a jury instruction along with a response to certain deposition designations and counter-designations filed by Plaintiff.

4 The NCAA has argued in some of the individual concussion cases that it does not owe a legal duty to the student athletes who play sports at is member schools because, according to the Association, it has very little control over how its member schools educate, train, and care for student athletes.

5 It is generally accepted that CTE cannot be definitively diagnosed until after death.

at Grand Valley State, Cullen suffered from paranoia, fatigue, and forgetfulness, because of head trauma sustained in college, all of which eventually led to his death. During a fishing trip in Michigan in 2013, Cullen became so confused and anxious that he apparently wandered into and got lost in the woods where, three days later, he was found dead at the age of 30. An autopsy revealed that he died of pneumonia brought on by inhalation of vomit after he became disoriented, possibly because of a combination CTE and painkillers.

Twenty of the individual concussion lawsuits are still pending.[6] As one might imagine, with millions—and possibly billions—of dollars in defense costs and indemnity payments at stake, sports concussion lawsuits have spawned their own insurance coverage lawsuits pitting the NCAA against the insurers that had issued policies covering the time frames at issue. This article will focus on the NCAA coverage case that remains pending.

The NCAA Insurance Coverage Case Seeking Coverage for the Concussion Lawsuits

In June 2012, TIG Insurance Company filed a declaratory judgment action against the NCAA in Kansas federal court disputing that it had a duty to either defend or indemnify the Association in the concussion MDL. The Kansas coverage litigation between the NCAA and its insurers was voluntarily dismissed by TIG in August 2013.

In December 2012, the NCAA filed its own declaratory judgment action in Indiana state court against twenty-three insurance companies that had issued primary and excess liability policies to the Association.[7] In May 2021, the NCAA filed a summary judgment motion against one of its insurers—USF&G—asserting that the carrier had a duty to provide the Association with a defense in the individual lawsuits and claiming that, as of January 17, 2020, the NCAA had paid nearly $12.5 million in unreimbursed defense costs in connection with the concussion cases.

By joint motion filed on November 30, 2020, the summary judgment hearing was taken off calendar because, according to the motion, the NCAA and USF&G "agreed in principle to a settlement regarding payment of defense costs." The NCAA v. TIG insurance coverage case is currently stayed indefinitely "pursuant to defense costs sharing agreements … negotiated between the NCAA and the defendants," with respect to all of the underlying actions. The defenses asserted by the insurers in both the Kansas and Indiana insurance coverage cases are discussed below.

Assessing the Carrier's Coverage Defenses

The insurance companies assert four primary defenses against being required to defend or indemnify the NCAA in the concussion lawsuits: (1) coverage is precluded because some policies contain an "Athletics Participants Exclusion (APE);" (2) the "Employer's Liability Exclusion" (ELE) in some policies bar coverage for "bodily injury" to an "employee" of the insured "arising out of and in the course of employment by the insured;" (4) medical monitoring costs do not constitute "damages because of bodily injury"; and (4) the damages sought do not constitute an "accident" because they were "expected or intended from the standpoint of the insured," and, therefore excluded. Each of these arguments is well-worn and well-litigated.

The APE exclusion appears to only exist in a handful of policies and, in those policies, the exclusion only precludes coverage for "bodily injury" sustained while practicing or participating in a sport. Because the quoted phase is an undefined term, it may not extend to the resulting mental illnesses, sicknesses, or diseases, diagnosed in concussed players. Additionally, the claims asserted against the NCAA often include claims of negligence in the assessment and treatment of the head injuries. These claims also likely fall outside of the APE. As several cases have concluded, the failure to provide adequate medical care following a sporting accident and claims of negligent emergency treatment on-site do not fall within an Athletic Participants exclusion.

The ELE also does not appear to apply to the concussion claims filed against the NCAA because student-athletes at individual member institutions do not qualify as "employees" of the NCAA. Despite prior rulings by administrative bodies that scholarship football players were "employees" for purposes of forming a union, there is no authority for the proposition that student-athletes are employees of the individual member institutions or the NCAA while playing their sport and, therefore, the ELE does not apply.

As a preliminary matter, nearly every individual concussion cases seeks compensatory damages so this coverage defense has no bearing on the insurance issues in those cases. As for cases seeking medical monitoring costs, a majority of jurisdictions (including California, Illinois, New Jersey, New York, Pennsylvania, Washington, and West Virginia). These courts agree that medical monitoring claims trigger, at the very least, a duty to defend the policyholder against such claims.

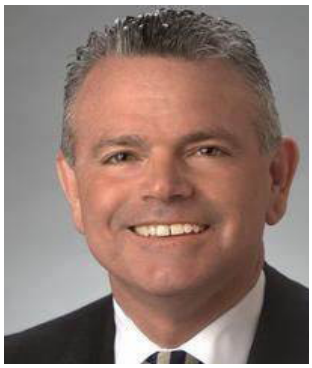
See NCAA on Page 19

6 Seven of the individual cases have been voluntarily dismissed, which could mean that a settlement was reached between the NCAA and the plaintiffs in those cases. The NCAA successfully defeated two of the individual cases, one on summary judgment and the other after trial, the latter is currently on appeal.

7 The docket in the Indiana coverage case is 92-pages long and consists of over 830 separate entries with one insurer being dismissed without prejudice (Fireman's Fund) and a second insurer dismissed with prejudice (Zurich/Maryland Casualty).

Of course, it may be quite different for the NCAA to tag a school vicariously for a rules violation by a booster or collective than to have Title IX liability imposed on a school for such third-party conduct. Nevertheless, much like in Daniels, Title IX could be implicated if the school has knowledge of and "acquiesces" to boosters or collectives supporting student-athlete NIL activity in a way that discriminates based on sex (e.g., a collective providing only NIL deals to football players). Liability could potentially turn on the level of interaction, association, or engagement between the school and the booster organization or collective that is engaged in NIL activity in a potentially discriminatory manner. While general consensus is that the advent NIL in college sports should provide equal opportunities and benefits for all student-athletes regardless of sex or sport, boosters or collectives targeting the more lucrative or popular sports, like football and men's basketball, could conceivably present the same sort of equity issues present in Daniels.

For these reasons, Title IX must be a primary consideration for any school that is subject to its requirements and has student-athletes engaging in NIL activity, especially with booster organizations or collectives actively supporting its student-athletes, even in circumstances where the institution is not proactively involved with such organizations or collectives or their NIL activity. To be sure, the NCAA has done little to enforce its own rules prohibiting the use of NIL as a pay-for-play scheme or as an impermissible recruiting inducement, which arguably has led many participants in NIL activity to push the envelope with respect to those rules. While that may be happening, schools cannot lose sight of Title IX and their potential liability for the third-party activity that may be going on around them (with their own varying degrees of knowledge, facilitation, and participation). Consequently, in this brave (and risk-provoking) new world of NIL, the big regulatory bomb to drop is not likely to be an NCAA compliance matter, but rather, a Title IX action brought by or for women student-athletes who see NIL as a benefit or opportunity that is being disparately delivered to male student athletes, including through third parties known to or interconnected with their school.



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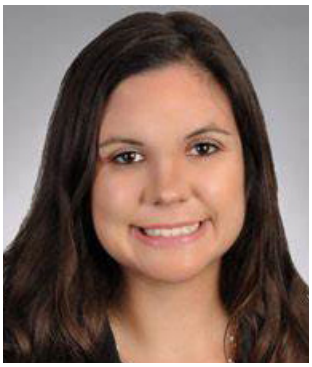

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NCAA

Continued from page 6

Most liability policies require the carrier to defend and indemnify the policyholder against bodily injury claims as defined in the policy (including sickness and disease) that are caused by an "occurrence" which is defined as an "accident." Accident is not defined in most policies but, regardless of how one defines occurrence or accident, most liability policies exclude bodily injury that is "expected or intended from the standpoint of the insured."

This exclusion fails to resolve a very fundamental question as to its application; i.e., what is it that must be fortuitous? For example, does the exclusion only apply where the injury causing act itself is intentional or is it limited to those situations where the policyholder intended the resulting damage, or injury, or are both required? The answer to these questions could be critically important in concussion insurance litigation because most of the underlying lawsuits allege that the NCAA was aware of and withheld certain information from players regarding concussions but not necessarily that the NCAA expected or intended that the failure to share concussion information would result in a lifetime of chronic, progressive, and degenerative brain diseases for concussed student-athletes.

One court summed up application of the "expected or intended" exclusion this way: "Insurance is purchased … to indemnify the insured for damages caused by accidents, that is, for conduct not meant to cause harm but which goes awry. The insured may be negligent, indeed, in failing to take precautions or to foresee the possibility of harm, yet insurance coverage protects the insured

from his own lack of due care. If the policyholder were to be told that the words of the 'occurrence' definition excluding coverage for 'expected or intended' damages actually mean that coverage is also lost for damage which a prudent person 'should have' foreseen, there would be no point to purchasing a policy of liability insurance."[8] As a result, this coverage defense may not succeed.

Conclusion

Resolving the sports concussion lawsuits in such a way that provides for the wellbeing of the players involved and protects future student-athletes from similar trauma is of paramount importance. The ability of the NCAA to call upon the resources of the numerous insurance companies that had insured the Association over the years could go a long way towards achieving this goal. As this article explained, the primary bases upon which insurers are attempting to avoid paying for the defense or indemnity of the concussion cases are well-worn and well-litigated. In this author's opinion, the NCAA appears to have solid grounds upon which to secure defense and indemnity payments for the underlying concussion lawsuits and defeat the coverage defenses being proffered by the carriers.

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8 *I.T. Baker; Inc. v. Aetna Casualty & Surety, Co., Cook v. Rockwell 1nt.l Corp.*, 778 F. Supp. 512 (D. Colo. 1991). The Kentucky Supreme Court described this position as the "majority rule," refusing to apply the "expected or intended" exclusion unless the insured "specifically and subjectively intend[ed] the injury giving rise to the claim, ... we agree that if injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury itself was intentional and the injury foreseeable." *Brown Found. v. St. Paul Ins. Co.*, 814 S.W.2d 273, 278 (1991) (citation omitted).