

**THEIR BLOOD, THEIR SWEAT, WHOSE PROBLEM?:
INSURANCE COVERAGE IMPLICATIONS OF THE NFL
CONCUSSION LITIGATION**

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*“They didn’t protect us at all I took shots in my foot, in my shoulders,
in my ribs. They had to know of the ramifications of going back out there
with different injuries. The money aspect of it just forced them to not pay
attention.”¹*

*Ronald Lippett
New England Patriots, 1983—1991*

INTRODUCTION

Although they may not have been paying attention then, they are certainly paying attention now. Before the first coin toss of the 2013 season, the National Football League (“NFL”) was tackled with a class action brought by a proposed plaintiff class of over 5000 former players.² The complaint alleged that the NFL failed to take proper action to protect players from the known long-term neurological effects of concussions and, instead, negligently and fraudulently withheld such information.³ After

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1. Nancy Armour, Howard Fendrich & Martha Irvine, *They Use You Up: Hall of Famer Dorsett Suing NFL*, NFL NEWS (Feb. 2, 2012), <http://www.nfl.com/news/story/09000d5d826879a6/article/they-use-you-up-hall-of-famer-dorsett-suing-nfl>.

2. *Turner v. NFL (In re NFL Players’ Concussion Injury Litig.)*, 307 F.R.D. 351, 361 (E.D. Pa. 2015).

3. *Id.* at 362.

almost two years of mediation efforts, the parties agreed to a \$765 million settlement to be paid over sixty-five years.⁴ Still, approximately 200 players elected to opt-out of the settlement, preserving the right to file a subsequent action against the NFL.⁵ Confronted with an indefinite amount of potential liability in suits brought by these opt-out plaintiffs, coupled with defense costs and settlement funds, the NFL turned to its insurance providers to help offset the costs.⁶ However, despite the NFL having paid its annual premiums for coverage, insurance providers have fumbled their end of the bargain.

Over thirty insurance providers have issued almost 200 insurance policies to the NFL over the past forty years.⁷ Judicial decree will dictate whether these insurers will be required to assume monetary liability for the concussion settlement, defense obligations, or the individual suits brought by opt-out plaintiffs. Though, if insurers are held liable to any extent, there are some preliminary determinations that must be made before any resolution is possible. For starters, it will be imperative to identify which provider's policies will afford coverage to which players, with which injuries, during which periods of time. A separate factual finding will need to be conducted for each insurance provider involved.⁸ Experts speculate that this process could take upwards of ten years, not unlike the extensive and drawn out asbestos litigation that has plagued the American court system for decades.⁹ This fear of having to wait multiple years before the possibility of any vindication or certitude illustrates why so many players opted-in to the settlement class. As explained by lead counsel for the former players, "time is of the essence for people . . . who [are] battling . . . fatal . . . disease[s]."¹⁰

This Commentary explores the insurance implications of the ongoing NFL concussion litigation. Part I describes the procedural history of the concussion lawsuits, the settlement reached between the NFL and over 4500 former players, and obstacles that stand in the way for players that

4. *Id.* at 364–65, 395.

5. *Id.* at 369.

6. See National Football League & NFL Properties LLC's Complaint for Breach of Contract & Declaratory Relief at 2, *NFL v. Fireman's Fund Ins. Co.*, No. BC-490342 (Cal. Super. Ct. Aug. 15, 2012).

7. BETH A. BAUER, JOSEPH A. ZIEMIANSKI & JAMES YUKEVICH, *ULTIMATE GAME-CHANGER?* (2015), <http://www.thefederation.org/documents/07.Ultimate%20Game%20Changer.pdf>.

8. See Brian Sumers, *NFL Favors LA for Insurance Lawsuit, if Not for Team*, *DAILY JOURNAL* (Aug. 22, 2012), http://www.dicksteinshapiro.com/sites/default/files/NFL_favors_LA_insurance_lawsuit_Aug2012.pdf.

9. *Id.*

10. *Lawyers: NFL Concussion Deal Excludes Central Brain Injury*, *FOX SPORTS* (Nov. 19, 2015), <http://www.foxsports.com/nfl/story/concussion-lawsuit-appeal-settlement-excludes-central-brain-injury-111915>.

chose to opt-out of the settlement class and reserve the right to pursue individual claims against the NFL. Part II examines the pending coverage litigation regarding insurers' obligations to defend and/or indemnify the NFL for settlement expenses and the ongoing underlying concussion claims. Specifically, it highlights how dispositive choice of law determinations will be to the outcome of the litigation, as jurisdictions apply competing theories of policy interpretation, including when coverage is triggered, the duty to defend, and other policy exclusions.

I. OVERVIEW OF THE NFL CONCUSSION LITIGATION AND SETTLEMENT

On July 19, 2011, seventy-three retired NFL players filed a complaint alleging that the NFL negligently and fraudulently concealed its knowledge of the long-term neurological effects of concussions.¹¹ In January 2012, the Judicial Panel on Multi-District Litigation combined the cases in an action in the Eastern District of Pennsylvania captioned *In re: National Football League Players' Concussion Injury Litigation* ("NFL MDL"), assigned to the Honorable Anita Brody.¹² Hundreds of similar lawsuits were subsequently filed, resulting in over 5000 plaintiffs to the NFL MDL.¹³

In January 2014, after months of mediation, the parties moved for preliminary approval of a settlement and class certification.¹⁴ Judge Brody denied the motion, fearing the monetary amount would not sufficiently compensate all eligible class members.¹⁵ The parties then revised the settlement to uncap the fund, allowing all qualified players to be compensated over sixty-five years, whether or not the total exceeded \$765 million.¹⁶ Satisfied that the revisions addressed her apprehensions, Judge Brody granted preliminary approval of the settlement and class certification under Rule 23(b)(3) in July 2014.¹⁷

11. BAUER, ZIEMIANSKI & YUKEVICH, *supra* note 7. While Riddell, Inc., the NFL's helmet manufacturer, is also a defendant, the scope of this Commentary is limited to the NFL. It should be further noted that there is also an insurance coverage action pending between Riddell and thirteen of its insurers. Richard C. Giller, *Insurers and Insureds Could be at Odds over Sports Concussion Lawsuits*, SPORTS LITIG. ALERT (June 26, 2015), <http://www.polsinelli.com/~media/Intelligence%20Documents/SLA%201212%20reprint%20Giller>.

12. BAUER, ZIEMIANSKI & YUKEVICH, *supra* note 7.

13. *Id.*

14. *Turner v. NFL (In re NFL Players' Concussion Injury Litig.)*, 307 F.R.D. 351, 364 (E.D. Pa. 2015).

15. *Id.*

16. *Id.*

17. *Id.* at 364–65.

The class includes all living retired NFL players; authorized representatives of deceased, legally incapacitated, or incompetent retired players; and individuals who are dependent on living or retired players.¹⁸ The settlement contains six Qualifying Diagnoses, each assigned a maximum award up to \$5 million.¹⁹ Neither a showing that playing in the NFL actually caused the injuries nor are actual damages required to receive compensation.²⁰

Judge Brody accepted the plan through the July 2014 order granting preliminary approval as a means of authorizing the NFL to inform players of their legal rights and options, before final approval, which was granted on April 22, 2015.²¹ To provide sufficient notice required under Rule 23 and due process, the settlement incorporated a Class Notice Plan, designed to reach players through various avenues.²² Under it, the NFL disseminated announcements through print, television, internet, and radio outlets to reach unknown potential beneficiaries.²³ An expert anticipated the notice would reach ninety percent of the prospective class members, a projection Judge Brody found more than adequate.²⁴ Players were informed of the option to opt-out of the class or object to the settlement at a Fairness Hearing.²⁵ The notice further illustrated that opting-out was the only option that would allow a player to file a later suit against the NFL alleging similar claims.²⁶

Fearing excessive costs accrued from litigating individual claims, the NFL reserved the right to rescind the settlement if too many players opted-out.²⁷ Yet, the NFL never had to exercise this right because only 208 retired players opted-out of the settlement class, and eighty-three objections were filed on behalf of 205 objectors.²⁸ This represented about 1% of the approximate class of over 20,000 former players, which was not

18. *Id.* at 365. For the purposes of this Commentary, “retired players” or “players” shall refer to retired NFL players and their authorized representatives, derivative claimants, heirs, and those who are dependents of such players.

19. *Id.* at 366.

20. *Id.*

21. *Id.* at 383 n.41.

22. *Turner v. NFL (In re NFL Players’ Concussion Injury Litig.)*, 301 F.R.D. 191, 203 (E.D. Pa. 2014).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Andrew Brandt, *NFL Concussion Litigation Resolved: Inside the Settlement with Plaintiff’s Co-Lead Counsel, Sol Weiss*, 21 JEFFREY S. MOORAD SPORTS L.J. 1, 5–6 (2014).

28. *Turner v. NFL (In re NFL Players’ Concussion Injury Litig.)*, 307 F.R.D. 351, 369 (E.D. Pa. 2015).

enough to warrant rescission.²⁹ While potential higher damage awards may have enticed some players to opt-out of the class and pursue individual claims, key legal hurdles still stand in the way. For example, players seeking to litigate on their own face preemption and causation defenses.³⁰ Additionally, there is a lack of authority on the neurological effects of concussions and head trauma sustained during a professional athletes' career.³¹ As a result, prior aggregate asbestos litigation will likely influence the analysis in these cases. Similar to asbestos litigation, the concussion cases are often long-tail liability claims, where it is difficult to measure expected damages because injuries get worse over an extended period of time.

Prior to settlement negotiations, the NFL filed a motion to dismiss, alleging that the players' claims were preempted because the claims directly implicated player safety provisions of prior Collective Bargaining Agreements ("CBA").³² A favorable ruling for the NFL would have required players to adhere to the CBA's mandatory arbitration clause, keeping the claims out of federal courts.³³ Though the settlement agreement eliminated Judge Brody's obligation to make a ruling on the motion to dismiss, players who elected to opt-out of the settlement will undoubtedly encounter identical arguments.³⁴

Even assuming players are able to overcome preemption challenges, they still must prove causation.³⁵ This may very well be the most challenging evidentiary element to overcome. On the other hand, establishing causation is not a prerequisite to receiving funds from the settlement, which may explain why merely one percent of the class opted-out.³⁶ Most, if not all, NFL players began playing football at a young age and, as a result, were exposed to high-impact contact for many years. Guaranteed compensation certainly made the settlement attractive to players who were unsure of their ability to ascertain with certainty that the cause of their ultimate injury occurred while playing for the NFL.

29. *Id.*

30. Brandt, *supra* note 27, at 2, 6.

31. See SUZANNE COCCO MIDLIGE & MICHAEL E. HRINEWSKI, COUGHLIN DUFFY, KNOCK OUT BLOWS—CONCUSSION AND SPORTS-RELATED INJURIES LITIGATION 1 (2014), http://www.coughlinduffy.com/uploads/29/doc/KNOCK_OUT_BLOWS_-_CONCUSSION_AND_SPORTS-RELATED_INJURIES_LITIGATION.pdf.

32. *In re NFL Players' Concussion Injury Litig.*, 307 F.R.D. at 362–63.

33. *Id.* at 363.

34. *Id.*

35. John Guccione, *Moving Past A "Pocket Change" Settlement: The Threat of Preemption and How The Loss of Chance Doctrine Can Help NFL Concussion Plaintiffs Prove Causation*, 22 J.L. & POL'Y 907, 940 (2014).

36. See *supra* text accompanying notes 29–30.

II. INSURANCE COVERAGE IMPLICATIONS

While the settlement has been approved, the NFL's troubles are far from over. The source of the funds for settlement and future litigation remain uncertain because insurance coverage lawsuits remain ongoing and contentious. A majority of the policies at issue do not contain a clause specifying which state's law applies to coverage disputes.³⁷ As a result, an initial choice of law determination must be made, which likely will have a significant effect on the litigation.³⁸ Aside from the coverage dispute regarding whether the insurance companies must fund the settlement, courts nationwide ultimately may be called upon to interpret policy language as to suits brought by opt-out plaintiffs. While policy interpretation in one state may benefit one party, interpretation of the same language in another may be devastating. Some coverage issues will involve competing trigger theories, allocation of damages, the duty to defend, indemnification, fraud exclusions, and whether the players' injuries were expected and intended by the NFL.³⁹

A. *The Current Landscape*

In August 2012, Alterra American Insurance Company sued the NFL in New York, seeking relief of any obligation to defend or indemnify the NFL in all underlying concussion claims.⁴⁰ This action came after Alterra declined the NFL's requests for defense in the concussion lawsuits in 2011.⁴¹ Two days later, the NFL filed a competing suit in California against thirty-two insurers of 187 Commercial General Liability ("CGL") policies issued between 1968 and 2012, seeking an order compelling defense and indemnification costs.⁴²

It is no surprise that the dueling actions were filed, as New York is thought to be more favorable towards insurers, and California is regarded

37. See MIDLIGE & HRINEWSKI, *supra* note 31, at 10.

38. *Id.*

39. See PATRICK M. KELLY & WILLIAM K. ENGER, *ON-SIDE KICK IN THE NFL CONCUSSION LITIGATION: THE NFL AND ITS CARRIER'S EFFORTS TO CONTROL POSSESSION OF FORUM AND CHOICE OF LAW IN THE RACE FOR JURISDICTIONAL HOME-FIELD ADVANTAGE* 6 (2013), <http://www.thefederation.org/documents/FDCC%202013%20Winter%20Meeting%20Program%20Materials.pdf>.

40. *Id.* at 3.

41. *Id.*

42. BAUER, ZIEMANSKI & YUKEVICH, *supra* note 7.

as a policyholder-friendly state.⁴³ Indeed, the judge presiding over the California action acknowledged that the NFL was “selective and tactical” in choosing California as its forum.⁴⁴

Both the NFL and the insurers filed motions to dismiss the opposing claims on the theory of forum non conveniens.⁴⁵ The California court stayed the proceeding initiated by the NFL stay, pending the outcome of the New York action.⁴⁶ Although the NFL appealed, the California Court of Appeals affirmed the trial court’s decision rejecting the NFL’s argument that because California is the home to three NFL teams, California was the proper venue.⁴⁷ Rather, in a forum non conveniens analysis, the nature of the NFL’s activities, aside from its member teams, must be evaluated.⁴⁸ The NFL’s headquarters are in New York, where its important documents and key executives are located.⁴⁹ Thus, the court concluded that the NFL operates independent of each member team in New York, making it the appropriate venue.⁵⁰

B. Trigger Theories

“This insurance applies to ‘bodily injury’ and ‘property damage,’ *only* if the ‘bodily injury’ or ‘property damage’ *occurs during the policy period.*”⁵¹

Essentially every CGL insurance policy contains language similar to the above clause and, while it may appear boilerplate, it raises diverging interpretations of when injury actually occurred in cases of repeated exposure. Assuming insurers fail to disclaim coverage otherwise, a court must decide whether a player’s alleged injuries should be treated as a single occurrence or a series of continuing occurrences enveloping multiple policy years, “based on the number of concussions sustained” or “years” in the NFL.⁵² This distinction is crucial because the date of injury is

43. Ken Belson, *Concussion Liability Costs May Rise, and Not Just for N.F.L.*, N.Y. TIMES (Dec. 10, 2012), http://www.nytimes.com/2012/12/11/sports/football/insurance-liability-in-nfl-concussion-suits-may-have-costly-consequences.html?_r=0.

44. Nat’l Football League v. Fireman’s Fund Ins. Co., 157 Cal. Rptr. 3d 318, 328 (Ct. App. 2013).

45. *Id.* at 327.

46. *Id.*

47. *Id.* at 346–48.

48. *Id.* at 348.

49. *Id.* at 331.

50. *Id.* at 333.

51. John B. Mumford, Jr. & Kathryn E. Kasper, *Football Helmets, Latent Claims, and Long-Tails: Can Insurers Get Courts to Recognize the Injury-in-Fact Trigger?*, in *INSURANCE COVERAGE AND PRACTICE* 171, 175 (2013) (emphasis omitted).

52. See Belson, *supra* note 43.

dispositive of when coverage is triggered, and which policies are implicated. Over the past half century, courts have grappled with competing policy trigger applications when recurring incidents of exposure cause injury over time.⁵³

The types of neurological injuries alleged in the underlying player suits can take years to manifest themselves. For example, suppose a player suffered concussions during both the 1971 and 1973 football seasons. Now assume this player did not become aware of the snowballing effect of his injuries until brain damage was discovered in 2010. It would be extremely difficult, if not impossible, to identify exactly when his injury first occurred. An insurance company who issued policies in 1970 may argue that its coverage is not implicated at all. Insurers from 1988 would argue that the injuries were inflicted prior to issuance of its policies. However, the NFL will likely seek coverage under various policies, including policies issued after a player sustained his first concussion, whether or not he was still in the league. The argument that will prevail depends on the jurisprudence in the state whose law applies. Courts around the country employ at least four different theories of assessments to pinpoint when an injury indeed took place, thus triggering applicable policies.⁵⁴ These theories include: 1) exposure, 2) manifestation, 3) continuous trigger, and 4) injury-in-fact.⁵⁵

The exposure theory was first adopted by the Sixth Circuit in a 1980 asbestos coverage case.⁵⁶ Under it, “bodily injury” occurs upon initial exposure to asbestos fibers, rather than when disease manifests itself or is discovered.⁵⁷ In an asbestos claim, the triggering event is “the tissue damage which takes place upon initial inhalation of asbestos.”⁵⁸ Thus, only policies that provided coverage during the time of initial exposure are triggered.⁵⁹ If the exposure theory is applied to the concussion claims, it would be to the detriment of the NFL. The NFL would be limited to indemnification only from policies in effect during initial exposure.⁶⁰ Reducing the amount of applicable policies increases the likelihood that the NFL’s liability will exceed policy limits and furthers the dangers associated with now-insolvent insurers.

53. *Id.*

54. PETER J. KALIS, THOMAS M. REITER & JAMES R. SEGERHALI, POLICYHOLDER’S GUIDE TO THE LAW OF INSURANCE COVERAGE 2–11 (2001).

55. *Id.*

56. *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1223 (6th Cir. 1980).

57. *Id.*

58. *Id.*

59. *See id.*

60. *See id.*

Regardless of its potential pecuniary disadvantages to the NFL, the feasibility of the exposure theory in concussion litigation is minimal. Exacting the time of initial exposure in the asbestos context is clear-cut, and would only entail identifying a claimant's first day of work at an establishment that manufactured asbestos-containing products. Conversely, assuming playing in the NFL did cause a neurological damage, "it would be extremely difficult to determine when players received their first concussion or any concussion at all, especially in the case of veteran players who played at a time when even less was known about concussions."⁶¹ Even if the date were easily identifiable, it would be near impossible to ascertain that a player's first concussion, rather than his fifth, was the devastating blow.

Under the manifestation theory, only policies in effect when an injury "manifests" are triggered.⁶² The First Circuit explained that manifestation is the date in which an individual's disease became "reasonably capable of medical diagnosis."⁶³ Though, as a result of the limited certainty regarding the neurological effects of concussions, there is great difficulty in identifying the date of diagnosability. For example, "was it when a player obtained a concussion and felt dizzy, when a player could not remember the name of his children, or somewhere in between these two moments?"⁶⁴ Application of this theory to concussion litigation would yield similar disadvantages to the NFL as the exposure theory. On the other hand, these approaches would be beneficial to certain insurers; namely, those who issued older policies that likely expired before players experienced any recognizable harms. However, providers of the few triggered policies would be disadvantaged because they would bear the total burden of liability.

Other courts utilize the continuous trigger theory. Under it, an occurrence is recognized continuously from initial exposure until the injury manifests itself and every policy that falls within that continuum is triggered.⁶⁵ In the California action, the NFL advocated for this theory, arguing that "in a case alleging or involving injury occurring over a period

61. Melanie A. Orphanos, Note, *NFL's Litigation Skates Onto the Ice*, 20 CONN. INS. L.J. 635, 655 (2014) (explaining that "it would be difficult to pinpoint a precise time as the 'initial exposure' because if players did not exhibit symptoms of a concussion, no official diagnostic medical test was conducted when a player was hit").

62. KALIS, REITER & SEGERHALI, *supra* note 54, at 2–13.

63. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 25 (1st Cir. 1982).

64. Orphanos, *supra* note 61, at 657.

65. Gregory A. Goodman, Note, *Insurance Triggers as Judicial Gatekeepers in Toxic Mold Litigation*, 57 VAND. L. REV. 241, 267 (2004).

of time, each policy in effect during that period is ‘triggered.’”⁶⁶ Essentially, this theory would allow the NFL to collect from every policy in force from the time of a player’s first concussion until he was diagnosed or ultimately succumbed to his injuries.

The injury-in-fact theory was implemented in a 1984 products liability case by the Second Circuit applying New York law.⁶⁷ In rejecting both the exposure and manifestation theories, the court held that “an occurrence of ‘personal injury, sickness, or disease’ is read to mean any point in time at which a finder of fact determines that the effects of exposure [during the policy period] actually resulted in [an] injury.”⁶⁸ This requires a fact-specific inquiry conducted by a medical professional into the underlying causes of the medical condition.⁶⁹ While it may appear that the injury-in-fact theory would limit the amount of policies triggered, “a number of courts, applying the ‘injury-in-fact’ trigger, have ruled, or suggested, that policies in effect during the entirety of the progressive injury process are triggered.”⁷⁰ A broad application effectively produces parallel results as the continuous trigger theory, and would benefit the NFL.⁷¹

In sum, endorsing a trigger theory that spans across multiple policy periods is in the NFL’s best interest because it would increase the aggregate amount of potential indemnification funds available to the NFL.

C. *The Duty to Defend*

Ordinarily, an “insurance company has the right to defend the insured, generally interpreted to mean that the company has the right to control the litigation.”⁷² However, courts uniformly agree that once an insurer

66. *The Insurance Side of the NFL’s Concussion Litigation—Who Pays the Bill?*, CONCUSSION POLICY & THE LAW (Apr. 4, 2013), http://concussionpolicyandthelaw.com/2013/04/04/the-insurance-side-of-the-nfls-concussion-litigations-who-pays-the-bill/#_ftnref5.

67. *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 762 (2d Cir. 1984).

68. *Id.* at 763 (quoting *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1489 (S.D.N.Y. 1983)).

69. *Id.*

70. KALIS, REITER & SEGERDAHL, *supra* note 54, at 2–17.

71. *See id.* However, some courts still do adhere to a strict interpretation of the injury-in-fact theory. The D.C. Circuit, applying New York law to an asbestos case, confirmed that an injury, rather than mere exposure, must occur during the policy period and that any other interpretation is “simply unsound linguistically.” *Abex Corp. v. Md. Cas. Co.*, 790 F.2d 119, 127 (D.C. Cir. 1986); *see also* Goodman, *supra* note 65, at 267.

72. Jay M. Feinman, *The Restatement of the Law of Liability Insurance as a Restatement: An Introduction to the Issue*, 68 RUTGERS U. L. REV. 1, 3 (2015); *see also* Laura A. Foggan & Karen L. Toto, *The Draft ALI Restatement of the Law of Liability Insurance: Consequences of Breach of the Duty to Defend Are Not and Should Not Become the Automatic Forfeiture of Coverage*, 68 RUTGERS U. L. REV. 65, 77 (2015).

denies coverage, that right is forfeited.⁷³ Therefore, by seeking to eliminate coverage obligations, the NFL's insurers surrendered any right to participate in settlement negotiations. Though, if it is determined that coverage is indeed afforded, insurers will be required to indemnify the NFL up to its policy limits, absent a showing of bad faith or unreasonableness.⁷⁴ In determining the reasonableness of a settlement, courts consider the risk and liability exposure to the defendant in the underlying suit.⁷⁵ Here, considering that the NFL faced potential damages of several billion dollars, it is likely the settlement was reasonable and reached in good faith.⁷⁶

Notwithstanding the settlement, successful suits brought by opt-out plaintiffs will result in the NFL and insurers disputing the apportionment of damages, while successful verdicts for the NFL will leave them contesting defense costs. Further, depending on duty to defend principles in the applicable forum, insurers may be required to provide defense for the NFL in future suits. The NFL alleged that the insurers "refus[ed] and fail[ed] to defend the NFL . . . in and against the injury lawsuits in accordance with their policy obligations."⁷⁷ Conversely, insurers assert the duty to defend is eliminated because the claims are disqualified by policy exclusions.⁷⁸

Typically, an insurer's duty to defend a third-party suit against its insured is extremely broad, regardless of numerous, sometimes inconsistent, theories of liability.⁷⁹ For example, in New York, if the facts alleged in the underlying complaint could potentially give rise to a single cause of action within coverage, the insurer is obligated to defend the

73. See, e.g., *Griggs v. Bertram*, 443 A.2d 163, 172 (N.J. 1982). See also Timothy P. Law & Lisa A. Szymanski, *Reserving the Right to Contest Coverage, Under the Proposed Restatement of the Law of Liability Insurance*, 68 RUTGERS U. L. REV. 29, 56 (2015) (explaining that the principle that "an insurance company breaches its defense obligation, [when] it forfeits its right to exert any control over the defense . . . accords with precedent").

74. See *Griggs*, 443 A.2d at 172; Kenneth S. Abraham, *The Liability Insurer's Duty to Settle Uncertain and Mixed Claims*, 68 RUTGERS U. L. REV. 337, 361 (2015).

75. See, e.g., *Fox Dev. Co. v. Praetorian Ins. Co.*, No. A-0386-13T2, 2015 WL 1879989, at *7 (App. Div. Apr. 27, 2015).

76. Daniel Engber, *The NFL Concussion Settlement Is Bad News for Football Fans*, SLATE, (Aug. 29, 2013, 9:09 PM), http://www.slate.com/articles/sports/sports_nut/2013/08/nfl_concussion_settlement_how_the_deal_will_thwart_research_into_the_dangers.html.

77. Complaint at 17, *Nat'l Football League, et al., v. Fireman's Fund Ins. Co. et al.* (No. BC-490342) (Cal. Super. Ct. Aug. 15, 2012).

78. Giller, *supra* note 11.

79. *Id.*

entire lawsuit.⁸⁰ In other words, the duty to defend exists unless “there is no possible factual or legal basis on which the insurer might eventually be obligated to indemnify” the insured.⁸¹ Therefore, under this broad interpretation of the duty to defend, insurers would likely be required to reimburse at least part of the NFL’s defense costs.

Yet, a few outlier states have developed their own means of interpreting the duty. For instance, the New Jersey Supreme Court fashioned a unique approach to an insurer’s duty to defend when an underlying complaint against a policyholder alleges competing causes of action, some that are covered and some that are excluded from coverage.⁸² The court emphasized the potential conflict of interests because an unfavorable verdict for the policyholder would allow the insurer to disclaim coverage under policy exclusions.⁸³ As a result, the insurer did not have an immediate duty to defend, and instead would have a duty to reimburse defense costs if it were later decided the claim fell within coverage.⁸⁴

Similarly, prior concussion suits filed against the NFL have certainly included conflicting theories of liability, such as negligent misrepresentation and fraudulent concealment.⁸⁵ Although CGL policies typically cover claims of negligence, claims involving intentional conduct are generally excluded.⁸⁶ It is to be expected that future lawsuits will mirror those earlier causes of action. Therefore, New Jersey law could disadvantage the NFL because of the conflicts of interests that would arise in defending the claims. Insurers would be relieved of the duty to defend and only be required to reimburse the NFL’s defense costs upon a subsequent finding of coverage.

D. Other Policy Exclusions and Considerations

As illustrated, the NFL is accused of fraudulently concealing known neurological long-term risks of concussions and head trauma.⁸⁷ In 1994,

80. See Charles Silver & William T. Barker, *The Treatment of Insurers’ Defense-Related Responsibilities in the Principles of the Law of Liability Insurance: A Critique*, 68 RUTGERS U. L. REV. 83, 91 (2015).

81. *Abex Corp. v. Md. Cas. Co.*, 790 F.2d 119, 129 (D.C. Cir. 1986).

82. *Burd v. Sussex Mut. Ins. Co.*, 267 A.2d 7, 10 (N.J. 1970).

83. *Id.* at 11.

84. *Id.*

85. Compare *Turner v. NFL (In re NFL Players’ Concussion Injury Litig.)*, 301 F.R.D. 191, 202 (E.D. Pa. 2014), with *Dent v. NFL*, No. C 14-02324 WHA, 2014 WL 7205048, at *1–2, 9 (N.D. Cal. Dec. 17, 2014).

86. *Burd*, 267 A.2d at 9–10.

87. See Complaint and Jury Demand at 17–19, *Moss v. NFL*, No. 2:14-cv-4480 (E.D. Pa. July 25, 2014).

the NFL formed the Mild Traumatic Brain Injury (“MTBI”) Committee to study long-term effects of head injuries.⁸⁸ Players assert that the MTBI Committee relied upon data that was “infected” and published “misleading and erroneous findings” that “misinformed them of the risks and complications inherent in sustaining concussions.”⁸⁹ The MTBI remained in effect until 2010, when new experts were appointed and the panel was renamed “Head, Neck and Spine Medical Committee.”⁹⁰ Under the guidance of this newly appointed committee, the NFL implemented preventative measures, such as issuing fines for illegal tackles and discontinuing the practice of allowing players to re-enter a game after sustaining a concussion.⁹¹ Nevertheless, players criticize the NFL for failing to take any serious steps towards addressing the known risks of head injuries until 2010, “[f]ollowing a decade and a half of burying its head in the sand.”⁹²

Standard CGL policies do not provide coverage for intentional and/or fraudulent conduct.⁹³ The scope of coverage afforded to the NFL will be predicated on the legitimacy of the allegations in the pleadings filed by opt-out plaintiffs. In other words, adjudication of the underlying claims will govern the applicability of policy exclusions. For example, if found guilty of fraudulent concealment, fraud exclusions would prevent the NFL from receiving indemnification from insurers.

Furthermore, insurance policies are intended to cover unforeseen liability and contain exclusions for expected or intended occurrences.⁹⁴ As such, insurance companies can avoid liability by proving that the neurological injuries sustained by NFL players were likely to occur and are inherent in playing such an aggressive, full-contact sport.⁹⁵ Such an argument is not without merit, as deeply rooted in the history of American football is concern regarding fatal head injuries.⁹⁶ Under the direction of President Theodore Roosevelt, an organization was formed as early as

88. Lauren Ezell, *The NFL's Concussion Crisis*, PBS (Oct. 8, 2013), <http://www.pbs.org/wgbh/frontline/article/timeline-the-nfls-concussion-crisis/>.

89. Complaint and Jury Demand, *supra* note 87, at 36–37.

90. *Id.* at 27.

91. *Id.* at 29–30.

92. *Id.* at 31, 36.

93. *Id.*

94. Craig F. Stanovich, *I Did Not Expect That! The CGL Exclusion for Expected or Intended Injury*, IRMI (Mar. 2008), <https://www.irmi.com/articles/expert-commentary/cgl-exclusion-for-expected-or-intended-injury>.

95. Sumers, *supra* note 8.

96. See Marc Edelman, *How Antitrust Law Could Reform College Football: Section 1 of the Sherman Act and the Hope for Tangible Change*, 68 RUTGERS U. L. REV. 809, 814–15 (2016).

1906 to combat head trauma and promote player safety in college football.⁹⁷ Additionally, echoing the aforementioned allegations made by players, insurers can maintain that the NFL was aware of the long-term effects of concussions.

However, insurers bear the burden of demonstrating applicability of exclusions, which will again turn on policy interpretations adopted by the relevant jurisdiction. Some jurisdictions only apply the expected or intended exclusion upon a finding of intent.⁹⁸ In embracing this view, the Second Circuit explained that “[i]t is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before.”⁹⁹ Thus, to the benefit of the NFL, knowledge would be immaterial and insurers would be required to prove intent.¹⁰⁰ Despite its potential degree of culpability, it would be farfetched to assert that the NFL intended players to endure long-term complications. In contrast, other jurisdictions that support a far broader and insurer-friendly analysis apply the exclusion if “the natural and probable consequences of the act result in injury.”¹⁰¹ Accordingly, insurers would merely have to demonstrate the NFL withheld medical information and that player injuries reasonably follow such action. This further exemplifies how important choice of law determinations will be in future concussion litigation, as policy interpretation can make or break a claimant’s likelihood of success.

CONCLUSION

Despite the foregoing uncertainties over ultimate responsibility for funding the settlement and future claims, the NFL was willing to agree to the settlement. Perhaps this stems from the reality that regardless of the outcome, the NFL’s financial health is not likely to be compromised.¹⁰² The tax-exempt league brings in over \$9 billion in revenues annually, receiving \$1.9 billion alone from ESPN for rights to air Monday Night Football.¹⁰³

97. *Id.* That organization was later renamed and is what we now know as the NCAA. *Id.*

98. Stanovich, *supra* note 94.

99. *Id.* (quoting *City of Johnston, N.Y. v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989)).

100. *See id.*

101. *Id.*

102. *See* Glenn M. Wong, *SN Concussion Report: NFL Could Lose Billions in Player Lawsuits*, SPORTINGNEWS (Aug. 24, 2012), <http://www.sportingnews.com/nfl-news/4041843-nfl-concussion-lawsuits-money-bankrupt-players-sue-head-injuries>.

103. Jay Yarow, *ESPN Made 2 Critical Mistakes, and Now It's Paying the Price*, BUSINESS INSIDER (Oct. 27, 2015, 9:28 AM), <http://www.businessinsider.com/espn-mistakes-led-to-layoffs-2015-10>.

Furthermore, current Commissioner Roger Goodell expects the league's annual revenues to reach \$25 billion within next fifteen years.¹⁰⁴ This affluence effectively allows the NFL to self-insure and eliminate the consequences of costly litigation. Regardless, any sense of finality to the concussion litigation is not in the near future. Insurance providers are actively attempting to remove themselves from the concussion liability debacle, after years of profiting from premiums paid by the NFL. At the same time, the NFL built its empire at the expense of players' health, and now seeks to flout its accountability for such. Ultimately, irrespective of whether it is the insurers or the NFL who pay the financial cost for these medical expenses, it is the players, suffering from cognitive decline and brain damage, who bear the true cost.

104. Dan Diamond, *NFL Pays \$765 Million to Settle Concussion Case, Still Wins*, FORBES (Aug. 29, 2013, 4:06 PM), <http://www.forbes.com/sites/dandiamond/2013/08/29/nfl-pays-765-million-to-settle-concussion-case-still-wins/>.