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# NFL'S LITIGATION SKATES ONTO THE ICE

MELANIE A. ORPHANOS\*

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*This article addresses the insurance implications of the pending concussion litigation between the National Hockey League and its current and former players. The author draws comparisons to similar litigation brought against the National Football League and the NFL's interactions with its insurers to forecast the obstacles the parties in the NHL litigation will face in establishing coverage by the many insurance carriers who have insured the NHL over time. The author identifies obstacles including determining the moment when coverage is "triggered" and whether certain actions by the NHL will preclude coverage and relieve the insurers of their duty to defend because of the policies' "expected or intended" clauses.*

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## I. INTRODUCTION

Days before the National Football League ("NFL") kicked off its 2013 season, it took strides toward resolving the biggest legal threat in its ninety-four year history: concussion litigation. The NFL made a preliminary settlement with approximately 4,500 former players and agreed to pay \$765 million.<sup>1</sup> In the settlement, the NFL included a specific provision explaining that the settlement "cannot be considered an admission by the NFL of liability, or an admission that plaintiffs' injuries were caused by football."<sup>2</sup> While many assumed that this settlement would be accepted, the judge handling this litigation denied preliminary approval

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\* University of Connecticut School of Law, Juris Doctor Candidate, 2014. I would like to thank Professor Patricia McCoy for her invaluable assistance in writing this Note through multiple drafts. I would also like to thank my mother and best friend, Leona Chodosh, for her unwavering support and for inspiring me to always chase my dreams.

<sup>1</sup> Arthur L. Caplan & Lee H. Igel, *What's Unsettled About the NFL Concussions Settlement*, FORBES.COM (Aug. 30, 2013), <http://www.forbes.com/sites/leeigel/2013/08/30/whats-unsettled-about-the-nfl-concussions-settlement/>.

<sup>2</sup> Mark Fainaru-Wada, et al., *NFL, Players Reach Concussion Deal*, ESPN.COM, (Aug. 29, 2013), [http://espn.go.com/nfl/story/\\_/id/9612138/judge-nfl-players-settle-concussion-suit](http://espn.go.com/nfl/story/_/id/9612138/judge-nfl-players-settle-concussion-suit).

of the settlement.<sup>3</sup> In the coming months, the NFL will likely try to restructure this settlement, or at a minimum, prove that it is fair through appropriate documentation in order to put this case behind it.

The settlement will be historic, as it will change all contact sport organizations and how they approach concussions, but its likely settlement is a bit *unsettling*, as it will allow the NFL to avoid answering numerous questions that could have resulted in a multi-billion dollar case.<sup>4</sup>

Despite the NFL concussion litigation settlement being imminent, the NFL's insurers' responsibility for paying for this settlement is still uncertain.<sup>5</sup> The insurers' duty to indemnify is unlikely to be triggered because there is evidence that the NFL committed intentional torts that would be excluded from coverage. Conversely, the insurers' duty to defend seems more definite and it is likely that under the NFL's current Comprehensive General Liability ("CGL") policies, the NFL's insurers' duty to defend will be triggered through the settlement process thus far and through trial if the settlement negotiations are unsuccessful. While it appears that, eventually, this litigation will be resolved in a settlement, some players may still choose to opt out of the settlement if one is reached.<sup>6</sup>

As the NFL's insurers' duty to defend would likely be triggered, these insurers should take a closer look at their policies moving forward. However, the NFL's insurers are not the only ones who should be evaluating their policies for potential exposure. In fact, all insurers of contact sports in the United States must evaluate the policies they are offering to their contact sport insureds in this concussion era. This includes the National Hockey League ("NHL" or the "League") who, mere months

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<sup>3</sup> Mem., In Re: Nat'l Football League Players' Concussion Injury Litig., No. 2:12-md-02323-AB (E.D. Pa. Jan. 14, 2014) at 10.

<sup>4</sup> See Rick Maese & Cindy Boren, *NFL, Former Players Settle Concussion Lawsuits*, WASH. POST (Aug. 29, 2013), [http://articles.washingtonpost.com/2013-08-29/sports/41578247\\_1\\_former-players-nfl-players-association-nfl-retirees](http://articles.washingtonpost.com/2013-08-29/sports/41578247_1_former-players-nfl-players-association-nfl-retirees).

<sup>5</sup> Sheena Harrison, *NFL Settles Concussion Claims, but Insurers' Role in Paying Costs Still Unclear*, Bus. Ins., (Sept. 8, 2013), <http://www.businessinsurance.com/article/20130908/NEWS06/130909875>.

<sup>6</sup> See, e.g., Steve Fainaru & Mark Fainaru-Wada, *Lawyer Blasts Concussion Agreement*, ESPN.COM (Jan. 14, 2014), [http://espn.go.com/espn/otl/story/\\_/id/10295307/attorney-blasts-concussion-deal-recommend-clients-continue-sue-nfl](http://espn.go.com/espn/otl/story/_/id/10295307/attorney-blasts-concussion-deal-recommend-clients-continue-sue-nfl) (Some of the players' lawyers have suggested that even if the NFL concussion litigation does eventually settle, certain players will choose to opt out of the settlement agreement and continue to sue the NFL.).

after the NFL and its players reached a preliminary settlement, are now facing similar concussion litigation.<sup>7</sup> In the NHL, a similar class action lawsuit currently consisting of ten former players “seek[ing] to represent a class of more than 10,000 retired NHL players”<sup>8</sup> is alleging, among other claims, fraudulent misrepresentation by concealment, fraudulent misrepresentation by nondisclosure, fraud, negligent misrepresentation, and negligence.<sup>9</sup> These types of large, player-led, class action lawsuits will undoubtedly change the face of contact sports forever and will require insurers to decide if they should change the policies they offer to their contact sport insureds or insure them at all.

As some concussion litigation may proceed in the NFL, and as the NHL has its own upcoming litigation, both of these organizations will likely turn to their insurers to defend and indemnify them. This Note focuses on the numerous insurance issues that will be addressed in both class actions by examining the progress made thus far in both cases. More specifically, this Note discusses these insurance issues by examining some of the arguments that the NFL's insurers did advance,<sup>10</sup> which the NHL's insurers may also advance, to potentially limit or nullify their liability to the leagues. Additionally, this Note evaluates the likelihood that if concussion litigation does proceed to trial, courts will implement a continuous trigger theory to decide when the insured's policies are triggered. Due to the resulting potential liability of such a theory, insurers have an even stronger incentive to alter their policies going forward to avoid future exposure for millions of dollars to current and former injured players.

Parts I and II discuss the medical background of concussions and the general history of the NFL concussion litigation. Part III examines the arguments that were left unanswered in the NFL concussion litigation and how they are likely to unfold in the NHL concussion litigation.

Part IV concludes that a continuous trigger theory would likely be used to determine insurance coverage in circumstances such as the

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<sup>7</sup> See, e.g., Paul D. Anderson, *Concussion Litigation Strikes the NHL*, NFL CONCUSSION LITIG. (Nov. 26, 2013), <http://nflconcussionlitigation.com/?p=1542>.

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., Class Action Complaint, Leeman, Aitken, et. al. v. Nat'l Hockey League & NHL Bd. of Governors, No. 1:13-cv-01856 (D.D.C. Nov. 25, 2013) at 36-46.

<sup>10</sup> Paul D. Anderson, *NFL's Insurer Balks at Concussion Defense*, NFL CONCUSSION LITIG. (Sept. 16, 2012), <http://nflconcussionlitigation.com/?p=1026>.

concussion litigation presenting latent harm. Specifically, there are three competing theories about what triggers coverage for concussion injuries: the initial exposure trigger theory, the manifestation trigger theory, and the continuous trigger theory. This Part argues that a CGL policy is triggered at the point of exposure to a mild traumatic brain injury (“MTBI”) through the time when a players’ neurological disease manifests itself. Accordingly, using either the point of exposure or the point of manifestation alone to trigger insurance policies would not align with the reasonable expectations of the insured, as the injury does not occur at either of these discrete moments. Moreover, because it is extremely difficult to determine exactly when the players’ MTBIs occurred, the manifestation trigger theory and the initial exposure trigger theory would be too difficult to implement. In cases presenting this type of latent harm, a continuous trigger would be the best approach to determine when an insurance policy is triggered, considering this difficulty of ascertaining when the players’ injuries “occurred.” As such, insurers should address this in their policies, and some insurers may choose to do so by adding concussion exclusions or providing a definition for “trigger” in the event of a concussion.

Part V considers that the insurers will likely argue that the League intended or expected the injuries that the players suffered, which may exclude these injuries from coverage. Finally, Part VI explains that there is a strong likelihood that the insurers will be required to defend the League under their current insurance policies despite the fact that the players’ claims may potentially not be covered.

## II. MEDICAL BACKGROUND

The NFL concussion litigation greatly heightened concern for concussions in not only the NFL, but in all contact sports. For this reason, it is likely that sports’ medical personnel nationwide will focus more on the causes and diagnoses of concussions for the foreseeable future. The American Association of Neurological Surgeons (“AANS”) defines a concussion as an “injury to the brain that results in temporary loss of normal brain function, [which is typically] caused by a blow to the head.”<sup>11</sup>

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<sup>11</sup> See *Concussion*, AM. ASSOC. OF NEUROLOGICAL SURGEONS (Dec. 2011), <http://www.aans.org/Patient%20Information/Conditions%20and%20Treatments/Concussion.aspx> (explaining that neurosurgeons and other brain-injury experts emphasize that although “some concussions are less serious than others, there is no such thing as a ‘minor concussion’”).

The AANS notes that concussions are serious injuries and cautions that “[e]ven mild concussions should not be taken lightly.”<sup>12</sup> When concussions are ignored or otherwise improperly treated prior to a player reentering a game or practice, that player is more likely to suffer another concussion.<sup>13</sup> This is especially troubling because sources suggest that the harm caused by concussions has a cumulative effect and can result in neuropsychological impairment and neurologic abnormalities.<sup>14</sup> This link between concussions and neurologic abnormalities and diseases has been illustrated by numerous players’ stories.<sup>15</sup> In fact, in 2012, researchers announced that thirty-four NFL players “whose brains were studied suffered from chronic traumatic encephalopathy (“CTE”), a degenerative brain disease brought on by repeated hits to the head that results in confusion, depression and, eventually, dementia.”<sup>16</sup>

CTE has also been discovered in former hockey players’ brains.<sup>17</sup> For instance, in 2011 the brain of Derek Boogaard, a twenty-eight-year-old hockey player, was studied after he died from what was ruled an accidental

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<sup>12</sup> *Id.*

<sup>13</sup> Michael W. Collins & Kristen L. Hawn, *The Clinical Management of Sports Concussion*, 1 CURRENT SPORTS MED. REPORTS 12, 12 (2002).

<sup>14</sup> *Id.* See AM. ASSOC. OF NEUROLOGICAL SURGEONS, *supra* note 11 (cautioning that one concussion soon after another “does not have to be very strong for its effects to be deadly or permanently disabling”).

<sup>15</sup> See, e.g., Sydney Lupkin, *CTE, a Degenerative Brain Disease, Found in 34 Pro Football Players*, ABC NEWS (Dec. 3, 2012), <http://abcnews.go.com/Health/cte-degenerative-brain-disease-found-34-pro-football/story?id=17869457> (“Researchers at Boston University’s Center for the Study of Traumatic Encephalopathy published the largest case series study of CTE to date, according to the center. Of the 85 brains donated by the families of deceased veterans and athletes with histories of repeated head trauma, they found CTE in [sixty-eight] of them. Of those, [thirty-four] were professional football players, nine others played college football and six played only high school football.” Additionally, several NFL players have committed suicide in recent years whose brains contained CTE including former Kansas City Chiefs player Jovan Belcher, former NFL players Junior Seau, Dave Duerson, former Pittsburgh Steelers player Terry Long, and former Philadelphia Eagles player Andre Waters.).

<sup>16</sup> *Id.*

<sup>17</sup> See John Branch, *Derek Boogaard: A Brain ‘Going Bad,’* N.Y. TIMES (Dec. 5, 2011), [http://www.nytimes.com/2011/12/06/sports/hockey/derek-boogaard-a-brain-going-bad.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2011/12/06/sports/hockey/derek-boogaard-a-brain-going-bad.html?pagewanted=1&_r=1). (In the preceding two years, CTE was also discovered in the brains of two other former NHL players, Reggie Fleming and Rick Martin.).

overdose.<sup>18</sup> The neuropathologist at the Boston University's Center for the Study of Traumatic Encephalopathy, who has examined nearly eighty brains of former athletes, was shocked by how advanced the degree of brain damage was in such a young player.<sup>19</sup> A few months after Boogaard's death, two more young NHL players were found dead: Rick Rypien, a twenty-seven-year-old player who committed suicide, and Wade Belak, a twenty-seven-year-old player who reportedly hanged himself.<sup>20</sup> At the time of this writing, it appears that neither player's brain was studied for CTE.<sup>21</sup>

#### A. NFL LITIGATION AND SETTLEMENT

As more news surfaced of past contact sports players who committed suicide and had CTE in their brains, numerous NFL players took a historic step and brought a class action lawsuit against the NFL. In August 2011, the first professional football players filed lawsuits against the NFL alleging more than ten counts, including fraudulent concealment, fraud, negligent misrepresentation, and negligence.<sup>22</sup> The players' claims centered around the premise that the NFL did know, or at least should have known, about the potentially serious implications of sustaining concussions and not only failed to inform players, but also intentionally hid this information from them.<sup>23</sup> If these lawsuits proceed to court, the players would face numerous obstacles. Obstacles include possible dismissal due to arbitration clauses in the collective bargaining agreements that they entered into with the League,<sup>24</sup> difficulty proving that their injuries

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., Pat Hauldren, *NHL Enforcers Deadly and Dying*, EXAMINER.COM (Sept. 2, 2011) <http://www.examiner.com/article/nhl-enforcers-deadly-and-dying>.

<sup>22</sup> See, e.g., Plaintiffs' Amended Master Admin. Long-Form Complaint, In Re: Nat'l Football, No. 2:12-md-02323-AB (E.D. Pa. Jul. 17, 2012).

<sup>23</sup> See generally *id.* at 15-44.

<sup>24</sup> The League argued that the players' claims were preempted by the arbitration clauses in the players' collective bargaining agreements ("CBAs"), Defendant's Motion to Dismiss, In Re: Nat'l Football, at 6, 7, 15. No. 2:12-md-02323-AB (E.D. Pa. Aug. 30, 2012), and up until the settlement made little effort to set forth arguments countering the players' claims due to this CBA argument. See *id.* at 14-34. The validity of this preemption argument would have been crucial had the case not settled because if all of these claims were preempted by the CBAs the players will be forced to pursue their case through the "agreed-to arbitration

occurred while playing professional football in the NFL,<sup>25</sup> and difficulty proving that they did not expect their injuries.<sup>26</sup>

In a proactive response, many of the NFL's insurers filed motions for declaratory judgment in which they asked a court to determine whether they had a duty to defend and/or indemnify the NFL. For example, Alterra America Insurance Company ("Alterra"), one of the NFL's insurers, filed a complaint seeking a declaration of relief with respect to both its duty to defend and its duty to indemnify the NFL against ninety-three different lawsuits brought by former players.<sup>27</sup> Alterra contended that since the underlying claims filed by the players alleged that the NFL acted

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procedures" in the CBAs. Paul D. Anderson, *The Almighty CBA*, NFL CONCUSSION LITIG. (Aug. 30, 2012), <http://nflconcussionlitigation.com/?p=1080>. This defense will also be available to the NHL in its upcoming class action. Anderson, *supra* note 7.

<sup>25</sup> Due to the pressure that players feel, fewer concussions are reported because players try to exude toughness and feign feeling healthy. Michael Farber, *The Worst Case*, SPORTS ILLUSTRATED (Dec. 19, 1994), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1006087/index/index/htm>. While many players deny having symptoms when playing, the plaintiffs still blamed the NFL for these attitudes and alleged that the NFL promotes football by glorifying the brutality of the sport and representing that "putting big hits on others is a badge of courage and does not seriously threaten one's health." Plaintiff's Amended Complaint, *supra* note 22, at 11. The plaintiffs' complaint further asserts that the League professed to its players that collisions, regardless of the injuries they lead to, are a normal consequence of football and "a measure of the courage and heroism of players." *Id.* Due to these factors, it can certainly be argued that players intended and/or expected these injuries.

<sup>26</sup> Players would have trouble arguing that they did not intend and/or expect their injuries when players such as Al Toon, a former wide receiver for the New York Jets, who retired from football at age twenty-nine after sustaining his ninth diagnosed concussion stated that "[he] chose the profession and [he] understood the perils of the profession when [he] was playing." William C. Rhoden, *Two Ex-Jets Have Moved On, but Concussion Effects Linger*, N.Y. TIMES (Nov. 20, 2011), [http://www.nytimes.com/2011/11/21/sports/football/concussion-effects-linger-for-two-ex-jets.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/11/21/sports/football/concussion-effects-linger-for-two-ex-jets.html?pagewanted=all&_r=0). See also Plaintiff's Amended Complaint, *supra* note 22, at 13 (Ernest Givens stated, "I get knocked out a lot, I get concussions, I get broken noses, that is part of being a receiver, that's what separates you from being a typical receiver than a great receiver.")

<sup>27</sup> *Alterra Balks at Defending NFL in Concussion Suits*, INSURANCE JOURNAL.COM (Aug. 16, 2012), <http://www.insurancejournal.com/news/east/2012/08/16/259710.htm>.



fraudulently, it should not be required to defend the League against the players' lawsuits.<sup>28</sup> Soon after Alterra filed its motion for declaratory relief, other insurers, including Travelers and Allstate, filed similar pleadings.<sup>29</sup> Allstate also sought declaratory relief in relation to any alleged duty to indemnify, claiming that "any past or future duty to indemnify the NFL Defendants may be limited or precluded by a number of factual or legal defenses."<sup>30</sup>

After these insurers filed declaratory relief motions in New York, the NFL brought a declaratory relief action in Los Angeles Superior Court regarding the coverage duties of thirty-two insurance carriers pursuant to 187 commercial liability policies that were issued over a fifty to sixty year period.<sup>31</sup> The NFL then moved to dismiss the New York lawsuits, which the defendant insurers argued against on forum non conveniens grounds.<sup>32</sup> The Los Angeles Superior Court ordered the California proceeding stayed pending the outcome of the New York actions and, despite the NFL's appeal, this decision was affirmed.<sup>33</sup> As such, the declaratory relief motions are ripe for decision in the Supreme Court of New York.

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<sup>28</sup> *Id.*

<sup>29</sup> Consolidated Reply of Defendants Nat'l Football League and NFL Props., LLC in Support of Motions to Dismiss Claims of TIG Insurers, Travelers Insurers, and Allstate, Discover Prop. & Cas. Co., et al. v. Nat'l Football League, et al., No. 652933/2012 (N.Y. Sup. Ct. Nov. 2, 2012) at 2. Discover Property & Casualty Insurance Company has filed a motion to dismiss or stay on forum non conveniens grounds suggesting that California is an inconvenient and improper forum. *See id.* at 1.

<sup>30</sup> Answer of Defendant Allstate Ins. Co. and Crossclaim for Declaratory Judgment against Defendants Nat'l Football League and Nat'l Football League Props., LLC, Discover Prop. & Cas. Co., et al. v. National Football League, et al., 14, No. 652933/2012 (N.Y. Sup. Ct. Aug. 28, 2012). In its cross claim, Allstate alleges twenty-five factors that may limit or preclude its duty to indemnify including that Allstate's policies do not provide coverage for claims that arise from conduct that is in violation of the law or public policy, the policies do not cover bodily injury which did not take place during the policy period, and the excess insurance policy does not provide coverage for any bodily injury or damage that was expected or intended. *See id.* at 14-15.

<sup>31</sup> Nat'l Football League et al., v. Fireman's Fund Ins. Co. et al., No. B245619, 216 Cal. App. 4th 902, 908 (Cal. Ct. App. May 28, 2013).

<sup>32</sup> *See* Consolidated Reply of Defendants, *supra* note 29, at 25-26; Discover Prop. & Cas. Co. et al., *supra* note 29.

<sup>33</sup> Mem. of Law of Defendants Nat'l Football League and NFL Props. LLC in Support of Motion to Dismiss or Stay Discover Complaint and Counterclaims and

As Allstate's cross-claim illustrates, the insurers' claims are predicated on the merits of the underlying case between the NFL and its players.<sup>34</sup> At the time of this writing, these declaratory relief motions have yet to be decided. However, due to the fact that the court would be required to analyze the underlying claims of the players' lawsuit against the NFL in order to decide these motions, the Supreme Court of New York should refrain from granting the insurers' request for declaratory relief in order to allow the issues to be decided by the proper fact-finders, the jury. If the courts do deny the insurers' motions for declaratory relief, the insurers would likely be required to defend the NFL. Nevertheless, if this case settles and no players choose to opt out of the settlement, these motions become wholly irrelevant.

While there is a strong likelihood that the insurers would have a duty to defend, it is just as likely that they would not be required to indemnify the NFL. The NFL's insurers possess several potential arguments that can nullify their duty to indemnify the NFL. In the event that this case proceeds to trial or players choose to opt out of a settlement and continue to sue the NFL, the NFL's insurers could argue that the NFL intended and/or expected these injuries. The NFL conducted studies of concussions in professional football spanning from 1994 to 2005, examining periods during the 1990s and 2000s.<sup>35</sup> One of the most significant NFL studies was conducted in 1994<sup>36</sup> and was set in motion by then Commissioner of Football, Paul Tagliabue, who formed the Mild Traumatic Brain Injury Committee ("Committee").<sup>37</sup> The Committee's goal was to study concussions (also referred to as mild traumatic brain injuries

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Cross-Claims of TIG Insurers and Allstate at 11-12, *Discover Prop. & Cas. Co. et al. v. Nat'l Football League et al.*, No. 652933/2012 (N.Y. Sup. Ct. Sept. 17, 2012).

<sup>34</sup> Allstate is claiming it does not owe a duty to defend based on the potential of intended and/or expected injury and arguments that injuries did not occur within the policy period which would go to the heart of the trigger issues of the underlying case. *See Answer of Defendant Allstate Ins. Co.*, *supra* note 30, at 15.

<sup>35</sup> *See, e.g.*, Nathan Fenno & Luke Rosiak, *NFL Concussion Lawsuits*, WASH. TIMES (July 19, 2013), <http://www.washingtontimes.com/football-injuries/>.

<sup>36</sup> The concussion problem was a rampant issue as early as 1994. In that year, data supplied by twenty-eight NFL teams demonstrated that from 1989 to 1993, 341 players on the twenty-eight teams in the League had suffered from 445 concussions. Farber, *supra* note 25. This equated to about two and a half concussions for every 1,000 plays. *Id.*

<sup>37</sup> Paul Anderson, *A New Era of Pro Football*, NFL CONCUSSION LITIG. (Oct. 17, 2012), <http://nflconcussionlitigation.com/?p=1194>.

or MTBIs), in professional football and to determine their potential long-term effects.<sup>38</sup>

After fifteen years, the Committee released several studies that are now all considered extremely controversial.<sup>39</sup> One of these studies, “Concussion in Professional Football: Summary of the Research Conducted by the National Football League’s Committee of Mild Traumatic Brain Injury,” refuted the link between concussions and neurodegenerative diseases.<sup>40</sup> The study noted that “arbitrary return-to-play guidelines may be too conservative for professional football . . . [and] many NFL players can safely be allowed to return to play on the day of the injury after sustaining a [M]TBI.”<sup>41</sup>

Based on this and other evidence, the insurers could argue, similar to what the players alleged in their complaint, that the NFL intentionally misled the players about the potential consequences of concussions. If proven, this would bar the NFL from coverage under its CGL policies. The insurers could successfully argue that during the fifteen-year period when the Committee was conducting studies, the NFL concealed and/or misrepresented the long-term effects of concussions from its players and knew that its studies were misleading.<sup>42</sup> The argument that the NFL concealed information, was explored in the October 2009 and January 2010 Judiciary hearings before the House of Representatives. The Committee on the Judiciary (the “Judiciary”) held a hearing to determine the severity of the concussion problem in football and the potential remedies that were available.<sup>43</sup>

At these hearings, the NFL was questioned about a pamphlet dealing with concussions, which it distributed to its players. The pamphlet stated:

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (discussing Elliot J. Pellman & David C. Viano, *Concussion in Professional Football: Summary of the Research Conducted by the National Football League’s Committee on Mild Traumatic Brain Injury*, 21 NEUROSURGICAL FOCUS (2006)).

<sup>41</sup> *Id.*

<sup>42</sup> See Plaintiffs’ Amended Master Admin. Long-Form Complaint, *supra* note 22, at 33.

<sup>43</sup> See *Legal Issues Relating to Football Head Injuries (Pt. I): Hearing Before H. Comm. on the Judiciary*, 111th Cong. 1 (2009) (statement of Rep. John Conyers, Chairman, H. Comm. on the Judiciary).

Question: if I have had more than one concussion, am I at increased risks for another injury? Answer: Current research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly. It is important to understand that there is no magic number for how many concussions is too many.<sup>44</sup>

Thus, the NFL was informing its players that there is “no magic number” of concussions that makes a player more prone to suffer long-term neurological damage at the same time when numerous studies showed a link between any blunt force trauma, such as that occurring in football, and premature death among athletes. This type of questionable behavior lends support to the players’ allegations that the NFL concealed information from them.<sup>45</sup> Similarly, during these Judiciary hearings, the NFL Commissioner, Roger Goodell, would not unequivocally agree that there was proof of a link between concussions and neurodegenerative diseases.<sup>46</sup> One Judiciary member referred to the League’s denial as a blank rejection and accused the League of minimizing the fact that this link existed.<sup>47</sup>

If the NFL concussion litigation does not settle, or some players opt out of the settlement and continue to sue the NFL, courts would be required to analyze these and other defenses to coverage for nearly 200 CGL policies due to the fact that from 1968 to 2012 the NFL was covered by insurance policies issued by thirty-two insurance carriers.<sup>48</sup> Nevertheless, this analysis has yet to occur, as two years after the first players filed their lawsuits against the NFL, the NFL entered into a preliminary settlement with the players for \$765 million. From this settlement amount, \$675 million will

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<sup>44</sup> *Id.* at 115-16.

<sup>45</sup> See Plaintiffs’ Amended Master Admin. Long-form Complaint, *supra* note 22, at 1.

<sup>46</sup> See *Legal issues relating to football head injuries. Pt. I*, *supra* note 43, at 116-18 (2009) (statement of Comm’r of Football, Roger Goodell, H. Comm. on the Judiciary).

<sup>47</sup> *Id.* at 116. (statement of Representative John Conyers, Chairman, H. Comm. on the Judiciary) (statement of California Representative Linda T. Sanchez).

<sup>48</sup> *Fireman’s Fund Ins. Co.*, 216 Cal. App. 4th at 906.

[c]ompensate former players and families of deceased players who have suffered cognitive injury . . . . Other money will be used for baseline medical exams, the cost of which will be capped at \$75 million. The NFL also will fund research and education at a cost of \$10 million . . . . The settlement will include all players (whether they were part of the suit or not) who have retired as of the date on which the court gives preliminary approval . . . . Current players are not eligible. The NFL has [twenty] years to pay the full amount of the settlement, but half of the total must be paid within the first three years and the rest over the next [seventeen] years.<sup>49</sup>

According to ESPN, the compensation program is designed to last for up to sixty years and will allow retired players who later develop neurological diseases or conditions to apply for compensation.<sup>50</sup>

While it appeared as though the NFL concussion litigation was concluding, the judge handling this litigation denied preliminary approval of the settlement, explaining that, “I’m primarily concerned that not all Retired NFL Football Players who ultimately receive a Qualifying Diagnosis or their related claimants will be paid.”<sup>51</sup> This judge commended both sides for arriving at this preliminary settlement,<sup>52</sup> but explained that she was not convinced that the settlement “ha[d] no obvious deficiencies, grant[ed] no preferential treatment to segments of the class, and [fell] within the range of possible approval.”<sup>53</sup> The NFL will likely still arrive at a settlement with its players; however, one attorney explained that he believes that the current settlement does not adequately compensate many of the players and indicated that even if the settlement is approved by the judge, many players may “opt out” of the settlement and continue litigation against the NFL.<sup>54</sup>

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<sup>49</sup> Fainaru-Wada, *supra* note 2.

<sup>50</sup> *Id.*

<sup>51</sup> Mem., In Re: Nat’l Football League Players’ Concussion Injury Litig., *supra* note 3.

<sup>52</sup> Fainaru-Wada, *supra* note 2.

<sup>53</sup> Mem., In Re: Nat’l Football League Players’ Concussion Injury Litig., *supra* note 3 (citing *Cordy v. USS-Posco Indus.*, No. 12-553, 2013 WL 4028627 at \*3 (N.D. Cal. Jul. 31, 2013)).

<sup>54</sup> Fainaru & Fainaru-Wada, *supra* note 6.

Thus, these settlement discussions and the litigation that may follow are only the beginning of the conversation that will take place nationwide about concussions in sports. In fact, in the past three years since the initial lawsuits in the NFL concussion litigation were filed, a new era of professional football has emerged in which players are informed about the risks they face when they step onto the field.<sup>55</sup> In this new era, players no longer make their own medical determinations as to when they obtain a head injury. Instead, independent neurologists decide when concussed players can return to the game.<sup>56</sup> This change has not been limited to the NFL, however, and this leads to the question: how will the numerous issues in the NFL concussion litigation be resolved if this case does not settle? And, how will these questions be answered in the context of the NHL concussion litigation? To evaluate the insurance issues that will arise in the NFL concussion litigation if it proceeds and in the NHL concussion litigation, this Note will focus on the upcoming NHL concussion litigation.

### III. INSURANCE CONTRACT BACKGROUND IN NHL CONCUSSION LITIGATION

One type of insurance policy that the NHL has is a CGL policy that insures the League for injuries that players sustain as long as those injuries are not excluded from coverage. Although the specific policies sold to the NHL by its insurers are not available to the public, the typical CGL policy's terms and provisions will be similar to the clauses of the NHL's CGL insurance policies which the courts will be required to analyze.<sup>57</sup> Like the NFL did, when the NHL defends the newly formed player-led class action, it will likely turn to its insurers for indemnification relying on its "insuring clause" within its CGL policy.<sup>58</sup> A typical insuring clause

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<sup>55</sup> See Anderson, *supra* note 37.

<sup>56</sup> *Id.*

<sup>57</sup> The insurance contracts will only be analyzed if these cases are not subject to mandatory arbitration. The League will argue that the players' claims are subject to mandatory arbitration pursuant to the players' collective bargaining agreements. See Anderson, *supra* note 7.

<sup>58</sup> See *Fireman's Fund Ins. Co. et al.*, 216 Cal. App. 4th at 908; Appellants' Brief, *Nat'l Football League & NFL Props. LLC, v. Fireman's Fund Ins. Co., et al.*, 2013 WL 233176 (Cal. App. 2 Dist.) at 1-2 (internal citations omitted) (The NFL and NFL Properties filed an action in California against thirty-two general liability insurers that issued 187 primary and excess insurance policies to one or

provides that the insurer “will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which [the] insurance applies.”<sup>59</sup> The NHL’s general liability insurers are likely as extensive as the NFL’s insurers in number<sup>60</sup> and as such, these lawsuits coupled with those ongoing in the NFL, will undoubtedly affect how insurers choose to insure any contact sport organization in the future.

In the NHL, this discussion regarding how to cover the League in this concussion era may have already begun in the context of disability insurance. For instance, in 2012, one of the Pittsburgh Penguins’ top players, Sidney Crosby, was sidelined for most of the season due to concussion-related injuries.<sup>61</sup> Since Crosby had been injured and out of the lineup for more than thirty games, the Penguins relied on their disability insurance policy to cover Crosby’s nine million dollar salary. Analysts have suggested, however, that this “security blanket is poised to disappear”<sup>62</sup> because insurance companies may cease to insure these athletes, forcing teams to take on these million-dollar contracts alone.<sup>63</sup> For the Penguins, this is especially troubling because if Crosby, who has one year remaining on his contract, returns to the ice, he will be in line for a new long-term contract for approximately ten million dollars a year. But if no insurance company is willing to insure him against concussions, the Penguins may not be able to afford to retain him.<sup>64</sup>

The chief executive of one New York-based insurer, HCC Specialty, noted that “[r]ight now you’ve got [ten] percent of the [L]eague

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both over a forty-four year period. “The NFL Policyholders sued twelve primary insurers for breach of their duty to defend the NFL Policyholders in underlying tort litigation filed by former NFL players, and sued all 32 insurers for a declaratory judgment that their policies cover any liability that might be incurred in the tort litigation.”)

<sup>59</sup> TODD A. ROSSI & MARK D. MESE, *THE REFERENCE HANDBOOK ON THE COMPREHENSIVE GENERAL LIABILITY POLICY* 109 (Alan Rutkin & Robert Tugander eds., 2010); *See* TOM BAKER, *INSURANCE LAW AND POLICY* 358 (2008).

<sup>60</sup> *Fireman’s Fund Ins. Co. et al.*, 216 Cal. App. 4th at 906.

<sup>61</sup> *See* Rick Westhead, *Concussions Could Ruin NHL Teams If Insurers Pull Coverage*, THESTAR.COM (Jan. 30, 2012), [http://www.thestar.com/sports/hockey/2012/01/30/concussions\\_could\\_ruin\\_nhl\\_teams\\_if\\_insurers\\_pull\\_coverage.html](http://www.thestar.com/sports/hockey/2012/01/30/concussions_could_ruin_nhl_teams_if_insurers_pull_coverage.html).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See id.*

affected by concussions . . . [w]hile I don't know where the breaking point is, at some point, if it keeps trending this way, [insurance] companies are not going to be able to insure NHL players for concussions."<sup>65</sup> Another insurer, Toronto-based Sutton Special Risk, an insurer for "off-ice insurance to more than 400 NHL players," rewrote its insurance application form in order to focus more attention on players' concussion histories and help protect itself from liability for players with past concussions.<sup>66</sup>

Due to the vast number of players who have been sidelined with concussions in the NHL, there is no question that this is one of the most prevalent issues in the League today. Despite the magnitude of the concussion problem in the NHL, the president of Sutton Special Risk professed that it is too early to say that the insurance industry will change the policies that it offers to NHL players because the industry is still evolving.<sup>67</sup> With that said, it is likely a matter of time before this discussion of limiting or revoking the League's insurance for players with concussions transcends the context of disability insurance to that of general liability insurance. Insurers will need to make difficult decisions to protect themselves from this concussion epidemic that will remain at the forefront of contact sports for the foreseeable future. While insurers may decide to take steps to limit their liability through modifying the policies that they offer to their contact sport insureds, insurers will still stand behind their current policies in the upcoming NHL litigation and likely argue that even under their current policies they do not have a duty to defend or indemnify the League.

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<sup>65</sup> *Id.*

<sup>66</sup> *See id.* (Sutton Special Risk's president noted, "[w]e used to have one question asking players their history with cardiac issues and other problems like concussions . . . [n]ow, concussions have their own section. We're asking about frequency, how bad they were and how many games they missed. We know you're not recovered from brain injuries because the symptoms go away. This is not an organ like the liver that can regenerate itself.").

<sup>67</sup> *See NHL concussions put player insurance in question*, CBC SPORTS (Jan. 31, 2012), <http://www.cbc.ca/sports/hockey/nhl/nhl-concussions-put-player-insurance-in-question-1.1132073>. *But see* Westhead, *supra* note 61 (according to one player agent, new contracts will contain concussion exclusions, making it impossible for teams to insure players with past concussions against future brain injuries).



## A. NHL CONCUSSION LITIGATION

In the NHL class action complaint, the players are alleging numerous counts, including fraudulent misrepresentation by concealment, fraudulent misrepresentation by nondisclosure, fraud, negligent misrepresentation, and negligence.<sup>68</sup> The players' claims rest on the growing body of medical evidence linking concussions to long-term injury as well as on evidence that the League knew or should have known of those medical studies but took no remedial action to prevent injury until 1997.<sup>69</sup> The players note that in 1997 the NHL created a concussion program to conduct research about the effects of concussions on players' brains. Despite conducting that research, the players allege that the NHL did nothing to actually *prevent* injury to its players for another fourteen years.<sup>70</sup> Additionally, the players assert that the NHL continues to ignore the extensive medical research linking hockey to brain injuries and fosters violence in the sport by, among other things, "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."<sup>71</sup> Observing that the NHL has an annual gross income of \$3.3 billion,<sup>72</sup> the players argue that the NHL has promoted a culture of violence and "purposefully profits from the violence they promote."<sup>73</sup>

The players contend that the NHL did not make any significant changes to prevent concussions until 2010 when it made body checking with the head a penalty.<sup>74</sup> After 2010, the NHL made other noteworthy safety changes including requiring a doctor, as opposed to a trainer, to examine its players for concussions off the ice and away from the bench<sup>75</sup> and changing its concussion protocols to forbid any concussed player from

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<sup>68</sup> See, e.g., Compl., *supra* note 9, at 36–46.

<sup>69</sup> See *id.* at ¶ 7.

<sup>70</sup> See *id.* at ¶ 11.

<sup>71</sup> *Id.* at ¶ 17; see also *id.* at ¶ 133 (not outlawing fighting and body checks in the NHL is significant because "[o]nly [twenty eight percent] of the reported concussions in the Cusimano report were the result of a called penalty while [approximately sixty four percent] of the total concussions were caused by body checking. A legal body check to the other player's body can still result in the checked player's head hitting the ice, boards or glass, resulting in a concussion.").

<sup>72</sup> *Id.* at ¶ 78.

<sup>73</sup> *Id.* at ¶ 89.

<sup>74</sup> *Id.* at ¶ 112.

<sup>75</sup> *Id.* at ¶ 116.

returning to the game in which they received the concussion.<sup>76</sup> Similar to the allegations in the NFL concussion litigation, the NHL players' overall argument is that "[t]he NHL knew that repetitive head impacts in hockey games and practices created an unreasonable risk of harm to NHL players<sup>77</sup> . . . [but] withheld [and/or concealed] the information it knew about the risks of head injuries in the game from then-current NHL players and former NHL players."<sup>78</sup> Moreover, the players allege in their complaint that the NHL "deliberately delayed implementing the changes to the game it knew could reduce players' exposure to the risk of life-altering head injuries because those changes would be expensive and would reduce its profitability."<sup>79</sup>

Overall, the NHL players' allegations are very similar to those made by the NFL players in their class action lawsuit.<sup>80</sup> For that reason, it is likely the League's insurers will react in a similar way to how the NFL's insurers have acted thus far. Yet, even if the NHL and NFL cases both do not proceed to trial, these two concussion litigation class action lawsuits will motivate insurers to protect themselves from future concussion lawsuits. Hence, regardless of the results of these litigations, insurers must confront the fact that under their current CGL policies, they are possibly responsible for at least defending, and also potentially indemnifying, their insured in the event of a lawsuit based on concussions and related long-term injuries.

Due to their likely liability, insurers may take steps to make it clear in their policies what the trigger is in the event of a concussion. If insurers do attempt to alter their policies, it is possible that they could face push back from individual state insurance regulators, depending on the state. However, because the NHL and NFL are both such large entities, it is possible they will not be required to obtain permission to alter their CGL

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<sup>76</sup> See *id.* at ¶ 118 (a standard that other countries adopted in 2004).

<sup>77</sup> *Id.* at ¶ 170.

<sup>78</sup> See *id.* at ¶¶ 177, 200.

<sup>79</sup> *Id.* at ¶ 201.

<sup>80</sup> *But see* Anderson, *Concussion Litigation Strikes the NHL*, *supra* note 7 ("Although the legal theories are similar [between the NFL and NHL concussion litigation], the factual allegations in the NHL litigation are far less damning than those asserted against NFL. There is no evidence — at least publicly — that shows the NHL created (1) a brain injury committee, (2) headed by a rheumatologist and (3) spent 15-plus years creating false studies."). Additionally, unlike the NFL, the NHL was not questioned for their actions in relations to concussions in their league by Congress and have not denied that their sport can cause brain damage. *Id.*

policies. Additionally, insurers must contemplate how their exclusions for intended and/or expected injuries may assist them in avoiding indemnification and their duty to defend in any continuing litigation.

#### IV. OPEN QUESTIONS AFTER THE NFL CONCUSSION LITIGATION

##### A. TRIGGERS AND OCCURRENCES

An insurance policy comes into effect or is *triggered* when a relevant condition of the policy has occurred; at that time, the insurers' obligations become due.<sup>81</sup> In many insurance cases, the "trigger" of coverage is not at issue.<sup>82</sup> When the cause or the injury itself does not occur at a discrete moment, however, and instead materializes over time, it can be difficult to determine what policies were triggered and exactly when they were triggered.<sup>83</sup>

The conditions that trigger an insurance policy are called occurrences. An "occurrence" is defined as "an accident, including injurious exposure to conditions, which results during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured."<sup>84</sup> A typical CGL policy states that the bodily injury or property damage must be caused by an occurrence that takes place during the policy period.<sup>85</sup> In either sport, it is undisputed that the affected NFL and NHL players sustained bodily injuries, which are defined as "bodily injury, sickness or disease sustained by a person."<sup>86</sup> The bodily injuries at issue are the neurodegenerative disorders and diseases that the plaintiffs sustained due, at least in part, to repeated head traumas while playing NFL football and NHL hockey.

In cases such as these, where harm accrued over a long period of time, coverage will turn on the presence of a trigger. However, the standard CGL policy does not clearly specify which trigger theory is applicable. This is the difficulty with latent harms, or "harms that may not

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<sup>81</sup> ROSSI & MESE, *supra* note 59, at 109.

<sup>82</sup> *See id.*

<sup>83</sup> *See* BAKER, *supra* note 59, at 375.

<sup>84</sup> ROSSI & MESE, *supra* note 59, at 110.

<sup>85</sup> *See* BAKER, *supra* note 59, at 358.

<sup>86</sup> *Id.* at 369.

develop into symptomatic diseases for significant periods of time.”<sup>87</sup> With latent harms, a player is injured, but the injury does not immediately manifest itself. In these instances, a player is arguably injured once they receive a concussion, as their brain may begin to develop a neurodegenerative disease, but these neurodegenerative diseases do not manifest themselves for many years. Thus, in cases presenting latent harms, a court must decide what type of trigger theory to impose.

#### B. TRIGGER THEORIES

Courts typically apply one of three main trigger theories to determine when an insurance contract is triggered: the initial exposure trigger theory, the manifestation trigger theory, or the continuous trigger theory. In the case of latent harms, courts are forced to consider the difficulty of determining the point at which an insured became injured. Courts were faced with similar questions in the asbestos context and considered the unworkability of the initial exposure and manifestation trigger theories and the insured's reasonable expectations. Inhaling asbestos is a type of latent harm because a person who inhales asbestos does not appear ill until a long period of time after exposure, when they begin to exhibit symptoms. While an injured person is not aware that they have been exposed to asbestos, they are still ill from the moment of their initial exposure to the asbestos through the point in time when they exhibit signs of diseases such as mesothelioma.

Consequently, in dealing with asbestos cases, these courts employed a continuous trigger theory, finding that the manifestation trigger theory and the initial exposure trigger theory, which both utilize a discrete moment to trigger insurance policies, were too difficult to apply due to issues of proof regarding the timing of the injuries. While both the manifestation and initial exposure trigger theories were implemented in earlier asbestos cases, more recent cases have applied a trigger theory more akin to the continuous trigger theory.<sup>88</sup>

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<sup>87</sup> Note, *Latent Harms and Risk-Based Damages*, 111 HARV. L. REV. 1505, 1506 (1998).

<sup>88</sup> See, e.g., *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 506 (Pa. 1993); *AC & S, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 973 (3d Cir. 1985); *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1046-47 (D.C. Cir. 1981).

If the NFL and NHL concussion cases proceed to trial, one of the most difficult insurance coverage issues will be determining when the players' injuries actually occurred. Some of the plaintiffs' neurological injuries may have begun before they started playing professional football or professional hockey.<sup>89</sup> There is no feasible way to differentiate which injuries were exacerbated by playing in the NHL or NFL from those which occurred for the first time while playing in the NHL or NFL. Accordingly, it would be nearly impossible to use either an initial exposure theory or a manifestation theory to trigger the insurance policies.

Additionally, neither of these theories would protect the reasonable expectations of the insured, the NHL. "Under the 'doctrine of reasonable expectations,' an insured is entitled to all the coverage he may reasonably expect to be provided according to the terms of the policy."<sup>90</sup> Only "an unequivocally conspicuous, plain and clear manifestation of the [insurer's] intent to exclude coverage will defeat that expectation."<sup>91</sup> In asbestos cases, courts recognized that attempting to confine an injury in cases of latent harm to one discrete moment would undercut the purpose of the insured's policy and ignore the reasonable expectations of the insured.<sup>92</sup> This is due to the fact that insureds purchase policies so that they can be covered for injuries that occur during the policy period. This expectation of coverage is not altered in instances of latent harm where injuries do not occur at finite moments. Thus, if either an initial exposure theory, which covers the injury if the insured is exposed to the cause during the policy period, or a manifestation theory, which covers the injury if it manifests itself during the policy period, is utilized, the insurer would be excused from covering the vast majority of the latent harm.

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<sup>89</sup> Stuart Dean, *Concussion: A Word Not Easily Defined and Why that Spells Trouble for Football*, NFL CONCUSSION LITIG. (Oct. 19, 2012), <http://nflconcussionlitigation.com/?p=1200>.

<sup>90</sup> Ky. Ass'n of Counties All Lines Fund Trust v. McClendon, 157 S.W.3d 626, 634 (Ky. 2005). The reasonable expectations doctrine "calls for an ascertainment of the insured's expectations, followed by a necessarily subjective determination of whether that expectation is reasonable." 2 Couch on Ins. § 22:11.

<sup>91</sup> *McClendon*, 157 S.W.3d at 634.

<sup>92</sup> See *Keene*, 667 F.2d at 1045.

### 1. Initial Exposure Trigger Theory

The initial exposure trigger theory utilizes the date when the insured was first exposed to the harm that caused them to have a bodily injury to trigger an insurance policy.<sup>93</sup> The Sixth Circuit implemented this exposure theory in a 1980 asbestos case due to its conclusion that bodily injury from asbestos began with the first exposure to and inhalation of asbestos.<sup>94</sup> While the injury of neurodegenerative diseases can and often does begin with the initial exposure to MTBIs, 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.<sup>95</sup> Additionally, since there are numerous symptoms of concussions,<sup>96</sup> and these symptoms can be subtle, concussions are often misdiagnosed or entirely undiagnosed.<sup>97</sup>

In view of these problems of proof, there are two major difficulties in ascertaining the timing of a player's injury. First, 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. Second, it would be nearly impossible to conclude that a player who sustained a concussion was in the early stages of developing a neurodegenerative disorder. In fact, all of the hockey and football players who died or committed suicide and were found to be suffering from CTE were not diagnosed until death because, at

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<sup>93</sup> ROSSI & MESE, *supra* note 59, at 116.

<sup>94</sup> *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1218 (6th Cir. 1980).

<sup>95</sup> See Ira R. Casson et al., *Concussion in the National Football League: An Overview for Neurologists*, 26 *NEUROLOGIC CLINICS* 217, 217 (2008); Dan Rosen, *New concussion protocol goes into effect tonight*, NHL.COM (Mar. 16, 2011), <http://www.nhl.com/ice/news.htm?id=556289> (discussing NHL practices prior to protocol change in 2011 for concussion testing after injury).

<sup>96</sup> Symptoms are either (1) somatic, including headaches, dizziness, balance problems, and nausea, (2) cognitive, including memory, concentration and processing speed problems, or (3) affective including anxiety and depression. Suzanne Leclerc et al., *Recommendations for Grading of Concussion in Athletes*, 31 *SPORTS MED.* 629, 634 (2001).

<sup>97</sup> See Collins, *supra* note 13, at 1.

the time of this writing, CTE can only be diagnosed post mortem.<sup>98</sup> Due to this inability to determine the “initial exposure,” an initial exposure trigger theory is not well suited to concussion litigation.

Additionally, the initial exposure trigger theory does not comport with the insured’s reasonable expectations. In *Keene*, the court analyzed the appropriate trigger of coverage for the latent harm of asbestos.<sup>99</sup> The court noted that if exposure was deemed to be a discrete injury that triggered coverage,

[T]he subsequent development of a disease would be characterized best as a consequence of the injury. Future stages of development would not constitute new injuries and therefore would not trigger additional coverage. Under that interpretation, a manufacturer who bought a comprehensive general liability policy would not bear the risk of liability for diseases that occurred due to exposure during a covered period. It would, however, bear the risk of liability for diseases that manifest themselves during the covered period, but that occur because of exposure at a time when the manufacturer held no insurance. As a result, the manufacturer’s purchase of insurance would *not* constitute a purchase of certainty with respect to liability for asbestos-related diseases. The insured would remain uncertain as to future liability for injuries whose development began prior to the purchase of insurance . . . such an exclusion is inconsistent with [the insured’s] reasonable expectations when it purchased the policies.<sup>100</sup>

This same analysis is applicable in this latent harm context. Insureds purchase insurance to obtain certainty that they will be covered for liability. Practically speaking, however, the insurers who issued policies to the League when its players were first exposed to MTBIs are different from the insurers who insured it decades later when the players’ injuries manifested themselves as neurological disorders. Thus, the problem with using an

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<sup>98</sup> See Gary W. Small et al., *PET Scanning of Brain Tau in Retired National Football League Players: Preliminary Findings*, 21 AM. J. GERIATRIC PSYCHIATRY 138, 139 (2013).

<sup>99</sup> *Keene*, 667 F.2d at 1042.

<sup>100</sup> *Id.* at 1044.

initial exposure theory in this context is that an insured, here the League, reasonably expects that if it were liable for damages, such as now when it is being sued by past players, that it would be covered. However, the League would not be covered or would be covered for only a fraction of the time because the players' injuries had been developing for years after the initial exposure.

Due to the latency of the injuries, however, the analysis for determining the trigger of coverage cannot commence until the point of manifestation. Therefore, precisely when the League would expect players' injuries to be covered by the League's insurance policies, when the injuries became apparent, the League would not be covered. Because this would not conform with the NHL's reasonable expectations, the initial exposure trigger theory should not be applied to this litigation.

## 2. Manifestation Trigger Theory

Under the manifestation trigger theory, insurance coverage is triggered when the damage or injury manifests itself or becomes apparent.<sup>101</sup> In a 1982 asbestos case, the First Circuit adopted a manifestation theory on grounds that an injury is not diagnosed or felt until it becomes evident.<sup>102</sup>

Over time, however, the limitations of the manifestation trigger theory have become apparent. A manifestation trigger theory would be exceptionally difficult to implement in the concussion context. In these concussion cases it is difficult to pinpoint at what time the players' neurodegenerative diseases became apparent. For instance, 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? In this type of litigation, where thousands of players' careers are involved, making the determination of when players' injuries manifested would be unworkable. In fact, "[c]ourts in recent years have been moving away from the manifestation trigger because of the difficulty in determining what constitutes manifestation of an injury concluding that this trigger theory is 'inherently unworkable.'"<sup>103</sup>

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<sup>101</sup> ROSSI & MESE, *supra* note 59, at 112.

<sup>102</sup> See *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 19 (1st Cir. 1982).

<sup>103</sup> Gwen M. Rogers, *Medical Monitoring, Trigger of Coverage Analysis, and the Duty to Defend*, 13 GEO. MASON L. REV. 869, 890-91 (2005).



Additionally, limiting the trigger to the one finite moment of manifestation does not fully protect the reasonable expectations of the insured. If manifestation was the sole trigger of coverage, then the insurance companies would only bear a fraction of the insured's total liability due to the fact that harm was occurring long before manifestation.<sup>104</sup> That result would "undermine the function of the insurance policies" because when an insured purchases policies, the insured could reasonably expect to be free of the risk of being liable for injuries that "it could not have been aware prior to its purchase of insurance."<sup>105</sup> If the disease manifested soon after a player sustained a MTBI, these losses would be covered and the insurer would compensate the insured. However, in the case of neurodegenerative diseases that are caused by earlier concussions, insurers would not be liable due to the fact that a long period of time exists between exposure and manifestation.<sup>106</sup>

Therefore, "to accept the argument that *only* manifestation triggers coverage — and allow insurers to terminate coverage prior to the manifestation of many cases of disease — would deprive [the insured] of the protection it purchased when it entered into the insurance contracts."<sup>107</sup> In the latent harm context, the insured purchased a policy believing an injury that occurred during the policy period would be covered and not expecting that only injuries that occurred *and manifested* themselves during the policy period would be covered. As one court explained in the asbestos context:

The fact that a doctor would characterize cellular damage as a discrete injury does not necessarily imply that the damage is an 'injury' for the purpose of construing the policies. At the same time, the fact that an ordinary person would characterize a fully developed disease as an 'injury' does not necessarily imply that the manifestation of the disease is the point of 'injury' for purposes of construing the policies.<sup>108</sup>

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<sup>104</sup> See *Keene*, 667 F.2d at 1045-46.

<sup>105</sup> *Id.* at 1046.

<sup>106</sup> See *id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 984 (N.J. 1994).

This same logic applies in the concussion context: while a doctor may consider a concussion a discrete injury, that does not necessarily imply that the damage of a concussion is an “injury” for purposes of construing an insurance policy. At the same time, the fact that an ordinary person would characterize a fully developed neurological disease as an “injury” does not necessarily imply that the manifestation of the disease is the point of “injury” for purposes of construing the policies.

In the context of concussion litigation, like “the context of asbestos-related disease[s], the term[] ‘bodily injury,’ . . . standing alone, simply lack[s] the precision necessary to identify a point in the development of a disease at which coverage is triggered.”<sup>109</sup> Due to the fact that the general terms of an insurance policy in the latent harm context lack precision, courts are left to rely on the practicality of implementing a trigger theory and determining if that theory comports with the reasonable expectations of the insured. In this context, utilizing the manifestation theory would prove to be unworkable due to the difficulty in ascertaining when the injury is manifested. In order to determine the trigger in the NHL litigation, courts must ask whether the players suffered MTBIs *while* they were playing in the NHL and if the head traumas that occurred during their professional careers caused the neurological damage complained of, as opposed to other head impacts the players sustained in earlier or later time periods. At first glance, this may seem simple to ascertain. However, these players have been playing competitive hockey for years, throughout childhood into middle school and high school and through college all prior to entering the NHL. Consequently, both the initial exposure theory and the manifestation theories are unworkable.

### 3. Continuous Trigger Theory

More recent CGL policies define an occurrence as “an accident, including *continuous or repeated* exposure to substantially the same general harmful conditions.”<sup>110</sup> Policies employing this “occurrence” definition embrace a continuous trigger theory, which entails providing coverage from the date of the initial exposure to the date when the injury manifests itself.<sup>111</sup>

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<sup>109</sup> *Keene*, 667 F.2d at 1043.

<sup>110</sup> *BAKER*, *supra* note 59, at 371 (emphasis added).

<sup>111</sup> *See ROSSI & MESE*, *supra* note 59, at 118.

This theory was formulated because courts concluded that an insured should not be without coverage when they reasonably expected that they would be covered.<sup>112</sup> In the asbestos context, the continuous trigger theory has gained widespread acceptance.<sup>113</sup> In fact, in *Keene*, even when the insurance policy at issue did not utilize continuous trigger language, the D.C. Circuit found that while

The policy language [did] not direct [it] unambiguously to either the ‘exposure’ or ‘manifestation’ interpretation, [i]n the context of asbestos-related disease[s], the terms ‘bodily injury,’ ‘sickness’ and ‘disease,’ standing alone, simply lack the precision necessary to identify a point in the development of a disease at which coverage is triggered . . . . In interpreting a contract, a term’s ordinary definition should be given weight, but the definition is only useful when viewed in the context of the contract as a whole.<sup>114</sup>

Thus, courts in the asbestos context now have guidance from language in insurance policies that use the term “continuous,” and when there is no such language, courts examine the context of the contract as a whole. In other words, while newer insurance policies, which utilize continuous language in defining an occurrence, provide clearer guidance that a continuous trigger theory is appropriate, under older policies the NHL can still rely on its reasonable expectations because the term “injury” does not clearly guide courts to adopt either a manifestation or initial exposure trigger theory.

Another reason courts utilize the continuous trigger theory in the asbestos context is that it is supported by medical research. Medical research has revealed “that bodily injury occurs during the exposure period . . . [and] it continues to occur past the point of manifestation . . . until the

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<sup>112</sup> See *Keene*, 667 F.2d at 1044.

<sup>113</sup> Rogers, *supra* note 103 (citing Robert D. Fram, *End Game: Trigger of Coverage in the Third Decade of CGL Latent Injury Litigation*, 454 PRACTISING L. INST. 9, 15 (1993); *Keene*, 667 F.2d at 1047; *Skinner Corp. v. Fireman's Fund Ins. Co.*, No. C95-995WD, 1996 WL 376657, at \*1 (W.D. Wash. Apr. 3, 1996); *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 703 (Cal. Ct. App. 1996); *Owens-Illinois, Inc.*, 650 A.2d at 995; *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 660 N.E.2d 770, 792 (Ohio Misc. 1995); *J.H. France Refractories Co.*, 626 A.2d at 506-07).

<sup>114</sup> *Keene*, 667 F.2d at 1043.

claimant's death."<sup>115</sup> Asbestos inhalation is a latent harm under the same rationale that concussions are a latent harm — a person who breathes in asbestos but does not become ill for a long period of time is similar to the plaintiffs in this litigation who were *exposed* to MTBIs and were thus in the preliminary stages of neurological disease, but did not know they were injured until symptoms of neurological damage *manifested* at a much later time. Thus, in both cases, a continuous trigger theory provides the greatest possible redress for the victims and for the League.<sup>116</sup>

Moreover, a continuous trigger better suits the NHL concussion litigation because it best addresses the problems of proof, which make the manifestation and exposure theories unworkable. Again, it is nearly impossible to determine when someone is injured due to the latent nature of this harm. These proof problems and the inability of both the manifestation and initial exposure trigger theories to fully cover the plaintiffs' reasonable expectations make the continuous trigger theory the best approach for deciding when the NHL's insurance policies are triggered.

While it would be more beneficial for insurers to control what trigger theory courts implement by adding language into their policies, a continuous trigger theory does have one advantage for insurers. Courts have determined that the term "occurrence" suggests that the policy was intended to cover more than a single accident, and instead, covers continuous or repeated exposure to the same general harm.<sup>117</sup> Typically, insurance policies will contain a provision that explains that continuous exposure to the same harm is one occurrence so that the insurer will only be liable for their policy limits for a single occurrence.<sup>118</sup> This approach benefits the insurers because consolidating all the individual injuries as one "occurrence" would, to some extent, diminish the insurers' liability to its insured. This single occurrence policy limit factor, however, would be a silver lining to a very dark cloud, as judges will likely invoke the continuous trigger theory as the most workable standard limiting insurers' ability to avoid coverage.

Insurers in the NHL and other contact sports are likely to take additional steps in the near future to protect themselves so that they are not liable for the entire span of a player's career when a player develops a

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<sup>115</sup> *Armstrong World Indus., Inc.*, 52 Cal. Rptr. 2d at 702.

<sup>116</sup> See ROSSI & MESE, *supra* note 59, at 118.

<sup>117</sup> PATRICK J. BOLEY, *THE REFERENCE HANDBOOK ON THE COMPREHENSIVE GENERAL LIABILITY POLICY* 75-76, (Alan Rutkin & Robert Tugander eds., 2010).

<sup>118</sup> *Id.* at 76.

neurodegenerative disease from their contact sport career. Insurers have a few options for how to protect themselves. For instance, when insurers issue replacement policies for older policies that have expired, they may be able to change the trigger of coverage or the scope of coverage itself.

As briefly noted above, one option would be to define the trigger of coverage as the first diagnosed concussion or the first diagnosis of a neurological disorder in their insurance policies to avoid leaving the question of the trigger up to a judge. Additionally, insurers could add concussion exclusions into their policies to avoid covering players with histories of concussions. This may result in pushback from individual NHL teams as well as the press and the public at large, however, if the NHL's insurers turn their backs on players who have been in the League for a number of years. Another option that insurers have would be to put pressure on the NHL to change its policies about fighting and other safety measures in order to insure the League for concussion-related injuries. This would likely reduce the number of concussions, as many of the NHL players who had CTE in their brains were termed the "NHL enforcers,"<sup>119</sup> players known for their aggressive fighting in the League. At a minimum, insurers will likely expand their underwriting of concussions by asking more thorough and extensive questions about a player's concussion history so they can properly assess and price the risk. While insurers could take an even bigger step to protect themselves and stop insuring the NHL and its players, since the NHL, a multi-billion dollar industry,<sup>120</sup> is a real profit center, it would be very difficult for insurers to walk away from it.

## V. EXPECTED AND/OR INTENDED INJURIES

Aside from alleging that its insurance policies were not triggered due to a particular trigger theory, insurers can also argue that the League expected and/or intended its players' concussions. While the insurers could raise this defense to coverage, they may find it difficult to persuade a court that the League intended and/or expected that the players would have long-term neurological diseases. There is ample evidence that physical injuries in contact sports are expected, but courts have yet to draw a parallel between physical injuries, which are expected and/or intended, and cognitive or neurological injuries.

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<sup>119</sup> Branch, *supra* note 17.

<sup>120</sup> See Compl., *supra* note 9, at ¶ 78.

A. EXPECTED INJURIES ARE NOT "OCCURRENCES."

In order for an event to be covered under a CGL insurance policy, it must also take place by chance.<sup>121</sup> If the policyholder has control over the risk, the event may not be considered an "occurrence."<sup>122</sup> Under the typical CGL policy, for "bodily injury" to be covered, it must occur during the policy period and cannot, prior to the policy period, be known to have occurred by any insured.<sup>123</sup> Under this provision, if players knew they had sustained MTBIs prior to entering the NHL, the insurer may not be liable.

The argument that the League expected and/or intended these injuries may be difficult to sustain, however, because not all concussions lead to neurodegenerative diseases. Additionally, not all players who previously sustained concussions knew that they had been injured. Moreover, the League was unlikely to have access to information about players' injuries prior to them entering the League.

Despite these obstacles, the insurers could still allege that the League expected that the players might sustain long-term neurological injuries due to the violent nature of the game of hockey. Under this theory, the insurers could argue that they do not have a duty to indemnify the League because CGL policies contain an exclusion for intended or expected injury. This provision provides that, "'bodily injury' or 'property damage' expected or intended from the standpoint of the insured" is excluded from coverage.<sup>124</sup> Expected injury typically requires that the insured "knows or reasonably anticipates" that there is a high probability that the insured's conduct will cause harm.<sup>125</sup> Therefore, the insurers may be able to show that the NHL had knowledge about the risks that the players were facing by playing professional hockey and thus knew, or at least reasonably anticipated, that they were more prone to suffering from long-term cognitive injuries.

Additionally, the League could be liable for failing to inform its players of these health risks if the insurers can show that the League possessed information about the seriousness of MTBIs and remained silent.

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<sup>121</sup> JOEL R. MOSHER, *THE REFERENCE HANDBOOK ON THE COMPREHENSIVE GENERAL LIABILITY POLICY* 52 (Alan Rutkin & Robert Tugander eds., 2010).

<sup>122</sup> *Id.* at 53.

<sup>123</sup> *See id.* at 57.

<sup>124</sup> CHARLES PLATTO, *THE REFERENCE HANDBOOK ON THE COMPREHENSIVE GENERAL LIABILITY POLICY* 147 (Alan Rutkin & Robert Tugander eds., 2010).

<sup>125</sup> *Id.* at 151.

Moreover, if the League engaged in intentional misconduct by fraudulently concealing information, as the players allege, the League's conduct could be excluded from coverage.<sup>126</sup>

Thus, the question of what injury the League expected or intended is central. Absent evidence to the contrary, it is likely that the League expected that its players could sustain short-term physical injuries but not long-term neurological harms. However, this distinction between the types of injury that players would experience may not be enough to secure coverage.<sup>127</sup> The *Evans* test, which some courts utilize, requires that the insured intended its conduct and intended some kind of injury, but once these requirements have been met, it is "immaterial that the actual harm caused is of a different character or magnitude from that intended" by the insured.<sup>128</sup> Under the *Evans* test, if the insurers proved that the League intended or expected that the players would be injured, it would be immaterial if the League intended or expected eventual neurological harm, and therefore these claims would not be covered under the NHL's insurance policies. Courts applying the *Evans* test rationalize its implementation by explaining that this test is consistent with both parties' reasonable expectations and is aligned with public policy.<sup>129</sup> Thus, under the *Evans* test, a court may find that the League expected or intended to act in a way that would result in some type of injury to the players and therefore its claims would be not covered by its insurance policies.

One notable difference about this argument in the NFL context is that there is no condoned physical fighting in the NFL. As the hockey players' complaint alleges:

For decades, the NHL has been aware or should have been aware that multiple blows to the head can lead to long-term brain injury, including but not limited to memory loss, dementia, depression, and CTE and its related symptoms.

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<sup>126</sup> See ROSSI & MESE, *supra* note 59, at 109-10 (An "occurrence" must be accidental, resulting "in bodily injury or property damage neither expected nor intended from the standpoint of the insured," and thus if the insured acted intentionally it would not be an occurrence.).

<sup>127</sup> See ERIC MILLS HOLMES, 21 HOLMES' APPLEMAN ON INSURANCE 2D § 132.2[B][2] (2002) (citing *Tenn. Farmers Mut. Ins. Co. v. Evans*, 814 S.W.2d 49, 55 (Tenn. 1991)).

<sup>128</sup> *Evans*, 814 S.W.2d at 55; see also *Ohio Cas. Ins. Co. v. Henderson*, 939 P.2d 1337, 1343 (Ariz. 1997).

<sup>129</sup> *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn. 1978).

Indeed, since the NHL has permitted bare-knuckle, on-ice fighting from its inception to the present, the NHL knew or should have known that the nearly century-old data from boxing was particularly relevant to professional hockey.<sup>130</sup>

Boxing was one of the first sports to conduct research on the dangerous impacts of multiple blows to the head.<sup>131</sup> Due to that widely known research, the insurers have a strong argument that the League intended and/or expected the players' injuries by allowing and supporting fighting.<sup>132</sup> From the prospective of the insurers, due to the fighting in the NHL the insurers could invoke the exclusion to avoid indemnifying the League. Nevertheless, this does not mean that the League's insurers will be able to avoid their duty to defend.

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<sup>130</sup> Compl., *supra* note 9, at ¶¶ 98, 99.

<sup>131</sup> See Robert A. Stern et. al., *Long-term Consequences of Repetitive Brain Trauma: Chronic Traumatic Encephalopathy*, 3 PM&R S460, S461 (2011) (“[I]t has been known for some time that contact sports may be associated with neurodegenerative disease. In 1928, Martland described a symptom spectrum in boxers, which he termed ‘punch drink,’ that appeared to result from the repeated blows experience in the sport, particularly in slugging boxers who took significant head punishment as part of their fighting style.”).

<sup>132</sup> The League can also argue that pursuant to the doctrine of assumption of the risk that “a person who voluntarily participates in a sporting activity generally consents, by his or her participation, to those injury-causing events, conditions, and risks which are inherent in the activity.” *Cotty v. Town of Southampton*, 64 A.D.3d 251, 253 (N.Y. App. Div. 2009). “Inherent risks in a sport are those that are “known, apparent, natural, or reasonably foreseeable consequences of the participation.” *Id.* at 253-54. Some jurisdictions have limited their application of assumption of risk, and the doctrine's application has become one of the most unsettled areas of tort law. DAVID HORTON, *Extreme Sports and Assumption of Risk: A Blueprint*, 38 U.S.F. L. REV. 599, 601 (2004). However, even if this doctrine is inapplicable, this doctrine is a subset of the intended/expected injury doctrine, which the insurers and the League can still utilize. Nonetheless, this note is focusing on the insurers arguments against the League and not the League's arguments against the players.



## VI. RAMIFICATIONS FOR THE DUTY TO DEFEND

Under a CGL policy, the insurer is obligated to defend and indemnify its insured.<sup>133</sup> These two duties are integrated because the insurer will have a stronger incentive to defend fully if it will be held financially responsible through a duty to indemnify if it loses the case. Courts have viewed the duty to defend as broader than the duty to indemnify.<sup>134</sup> Because an insurer's obligation to defend is broader, an insurer may be "contractually bound to defend despite not ultimately being bound to indemnify."<sup>135</sup> This situation often arises when it comes to light during litigation that the insured is not factually or legally liable or that the occurrence is outside the policy's coverage.<sup>136</sup> Specifically, an insurer could be required to defend its insured throughout litigation and at the conclusion of trial obtain a ruling that provides that the claims are outside of the policy's coverage, and thus the insurer would not be required to indemnify its insured.

## A. DUTY TO DEFEND

The typical language establishing the insurer's duty to defend in a CGL policy provides,

We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which the insurance does not apply. We may, at our discretion, investigate any occurrence and settle any claim or "suit" that may result . . . .<sup>137</sup>

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<sup>133</sup> LAURIE E. DUGONITHS, *THE REFERENCE HANDBOOK ON THE COMPREHENSIVE GENERAL LIABILITY POLICY* 231 (Alan Rutkin & Robert Tugander eds., 2010).

<sup>134</sup> *Id.* at 234. This duty to defend is broader because the insurer may be required to defend a claim even though it is not actually covered by the insured's policy, but the insurer will only have to indemnify if the asserted claim is covered by the policy. *Litz v. State Farm Fire & Cas. Co.*, 695 A.2d 566, 570 (Md. 1997).

<sup>135</sup> *Fulton Boiler Works, Inc. v. Am. Motorists Ins. Co.*, 828 F. Supp. 2d 481, 488 (N.D.N.Y. 2011).

<sup>136</sup> *See, e.g., id.*

<sup>137</sup> DUGONITHS, *supra* note 133, at 231.

The scope of the insurer's duty to defend depends on the nature of the allegations set forth in the complaint and not on the ultimate basis of the liability of the insured.<sup>138</sup> Typically, the duty to defend is determined by the "eight-corners" rule.<sup>139</sup> Under the eight-corners rule, when an insured is sued by a third party, the insurer must determine its duty to defend from the terms of the policy and the pleadings of the third-party claimant.<sup>140</sup> Most courts do not allow insurers to examine evidence outside the four corners of these two documents.<sup>141</sup> Thus, looking exclusively at the allegations that the players have made against the NHL, since there is a claim for negligence, the insurers will likely be required to defend.

This conclusion is also supported by the Supreme Court of California's decision in *Gray*, in which the court held that an insurer had a duty to defend its insured despite the fact that the complaint stated that the insured intentionally caused bodily injury.<sup>142</sup> In *Gray*, the court focused on the specific CGL policy in which the insurer made two promises:

[1.] To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage, and [2.] the company shall defend any suit against the insured alleging such bodily injury or property damage and seeking damages which are payable under the terms of this endorsement, even if any of the allegations of the suit are groundless, false, or fraudulent.<sup>143</sup>

The Court in *Gray* concluded that without further clarification, the insured would reasonably expect that the insurer would defend him against lawsuits seeking damages for bodily injury, whatever the alleged cause of the injury, whether intentional or inadvertent.<sup>144</sup>

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<sup>138</sup> *Id.* at 234-35.

<sup>139</sup> *Id.* at 236.

<sup>140</sup> *Id.*

<sup>141</sup> See *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 307 (Tex. 2006).

<sup>142</sup> *Gray v. Zurich Ins. Co.*, 419 P.2d 175, 179 (Cal. 1966).

<sup>143</sup> *Id.* at 173.

<sup>144</sup> *Id.* But see DUGONITHS, *supra* note 133, at 241 (A minority of jurisdictions permit insurers to consider evidence outside of the complaint and the policy in evaluating the duty to defend.) However, even in those jurisdictions examining

A minority of jurisdictions permit insurers to consider evidence outside of the complaint and the policy in evaluating the duty to defend.<sup>145</sup> However, even in those jurisdictions, examining outside information would likely prove insufficient in persuading a court to determine that the insurers do not have a duty to defend the League.

#### B. INSURERS' DECLARATORY JUDGMENTS

Theoretically, the insurer is not forced to defend the insured if the insurer believes the claims alleged against it would not be covered under the insured's policy. One option the insurer possesses is to deny its duty to defend. If the insurers refused to defend in the case at bar, the NHL would have two options. First, it could settle the cases to avoid the risk of potentially losing an exorbitant amount of money at trial. Second, the NHL could litigate the case. In the first hypothetical situation, if any of the insurers refused to defend the NHL and a judgment was rendered against the NHL, the insurer would no longer have the ability to re-litigate any factual issues.<sup>146</sup> Moreover, if the NHL could demonstrate that it made a reasonable settlement in good faith and its insurers wrongfully refused to defend it, then the insurers would be required to compensate the League for that settlement.<sup>147</sup> In the second scenario, if the League could prove that the insurers wrongfully refused to defend it, the insurer would also be required to compensate the League for the verdict and the cost of litigation.<sup>148</sup>

Since these methods of refusing to defend are precarious, insurers typically file a motion for declaratory judgment in which they ask a court to determine whether they have a duty to defend. Nevertheless, courts typically will not grant declaratory relief if the issues giving rise to the conflict between the insured and insurer are entangled with the issues that will ultimately determine whether the insurer is liable to the

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outside information would likely prove insufficient in persuading a court to determine that the insurers do not have a duty to defend the League.

<sup>145</sup> DUGONITHS, *supra* note 133, at 241.

<sup>146</sup> Gallagher v. Dupont, 918 So.2d 342, 348 (Fla. Dist. Ct. App. 2005).

<sup>147</sup> *Id.*

<sup>148</sup> Adam M. Smith & Caroline L. Crichton, *Bad Faith under a Commercial General Liability Policy*, in THE REFERENCE HANDBOOK ON THE COMPREHENSIVE GENERAL LIABILITY POLICY 311, 317 (Alan Rutkin & Robert Tugander eds., 2010); DUGONITHS, *supra* note 133, at 255.

policyholder.<sup>149</sup> Just as many insurers filed motions for declaratory judgment in the NFL concussion litigation, it is likely that the NHL's insurers and the hockey teams' individual insurers will file similar motions seeking to avoid defending and/or indemnifying the League or the teams.

## VII. CONCLUSION

It is likely that in the near future other contact sport organizations will follow the lead of the NFL and NHL players, as many participants in other popular American sports such as wrestling, rugby, soccer, and lacrosse “all risk exposure to brain injur[ies] that range from asymptomatic subconcussive blows to symptomatic concussion[s] to more moderate or severe traumatic brain injur[ies].”<sup>150</sup>

Regardless of what contact sport organizations engage in concussion litigation, however, all of the insureds will likely turn to their insurers to both defend and indemnify them. While it will behoove insurers insuring contact sport organizations that have yet to bring this type of concussion litigation to be proactive in amending their policies, insurers in the current NHL concussion litigation will not necessarily be required to indemnify the League. One of the main reasons the League may be able to avoid indemnification is due to the fighting that takes place in the League. Insurers may be successful in demonstrating that the League intended and/or expected that its players were at a heightened risk to suffer from neurodegenerative diseases and be able to avoid indemnifying the League against the players since bare-knuckle fighting has been part of the sport since its inception.<sup>151</sup> If the League's insurers were able to avoid indemnification and the League was required to pay for this litigation by itself, it could conceivably self-insure due to its vast revenues.<sup>152</sup> Nonetheless, depending on how large of an award the players received, this

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<sup>149</sup> See *Gendron v. Delpozso*, No. 04-0907, 04-0999, 2005-0027, 2007 WL 4471053, at \*7-9, \*11 (R.I. Super. Ct. Dec. 7, 2007).

<sup>150</sup> See Stern et. al., *supra* note 131, at 460.

<sup>151</sup> *Class Action Compl., Leeman, Aitken, et. al. v. Nat'l Hockey League & NHL Bd. of Governors*, No. 1:13-cv-01856, 22 (D.D.C. Nov. 25, 2013).

<sup>152</sup> See *id.* at 19. This would have also been the case in the NFL concussion litigation and will still be the case if the NFL's insurers are not required to assist the NFL in the settlement. Glenn M. Wong, *SN Concussion Report: NFL Could Lose Billions in Player Lawsuits*, SPORTING NEWS.COM (Aug. 22, 2012), <http://aol.sportingnews.com/nfl/story/2012-08-22/nfl-concussion-lawsuits-money-bankrupt-players-sue-head-injuries>.

litigation could be very problematic for the League as the game of hockey could become less profitable after this litigation if it eliminates or largely limits the fighting that fans have come to expect.

Conversely, if the insurers are required to indemnify the League, it will be costly for the insurers, especially in the event that a continuous trigger theory is used, which will trigger more policies. Despite potentially costing insurers more, courts should implement this trigger theory, as it is the most appropriate trigger for these cases presenting latent harm as it best comports with the League's reasonable expectations and addresses the difficulty of ascertaining the timing of the players' injuries. In the future, contact sport insurers, including the NFL's and NHL's insurers, who wish to avoid a court implementing a continuous trigger may modify their policies to identify a specific trigger in relation to concussions or include additional language to clearly limit their liability to a discrete moment.

While the League's insurers may avoid indemnifying it, since the underlying complaint alleges negligence and other claims that could be covered by the insurance policies, it appears likely that the League's insurers will be required to defend it. But it is also likely that both the NHL's and NFL's concussion cases will settle.

Although it is likely that both of these concussion cases may fail to ever reach trial, these two lawsuits will have an undeniable impact reaching past insurance law and touching on all contact sports in the United States. Parents now consider football and hockey more dangerous for their children than ever before, and players now realize that there are serious long-term risks that could affect their quality of life associated with playing these sports. Thus, while this litigation will greatly affect insurers and their relationship with contact sport organizations, it will also change two of the most popular American sports for generations to come.