

A hand is visible in the foreground, pointing with a pen at a specific area on a grid of brain MRI scans. The scans are arranged in a grid pattern, with technical data and patient information overlaid on each image. The background is a solid blue color.

SPORTS-RELATED HEAD TRAUMA

John Gilfillan, Esq. - Partner, Kennedys Law LLP

September 11, 2019

Kennedys

Agenda

Sports-Related Head Trauma

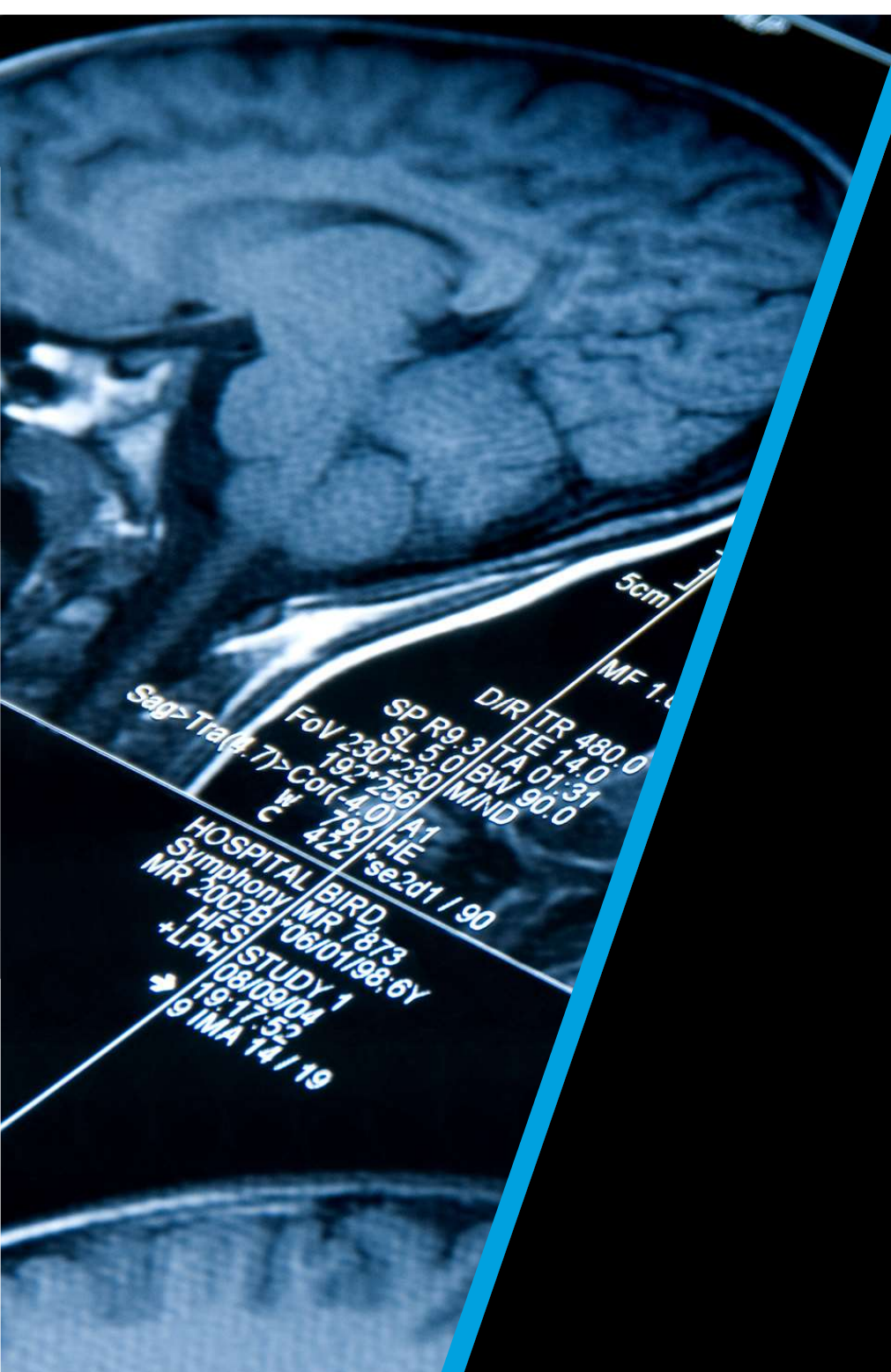
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Part A: Head Trauma Litigation & The Science

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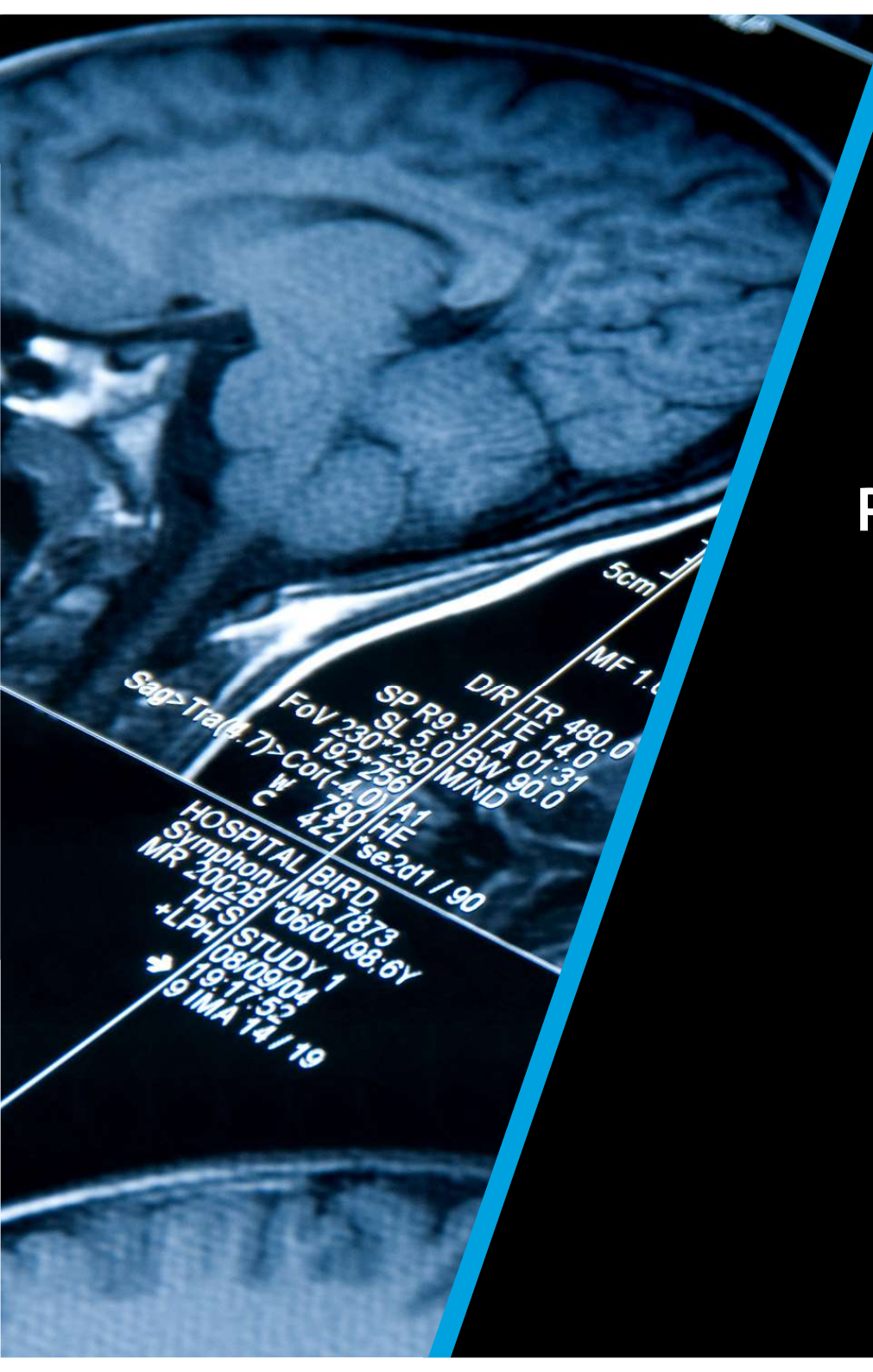
Part B: Potential Coverage Issues & Potential Concerns for Underwriters

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SPORTS-RELATED HEAD TRAUMA

5cm
MF 1.5
DIR TR 480.0
SL TE 14.0
SP R9.3 TA 01:31
FoV 230*230 M/N/D
192*256
Sag-Tra(4.7)-Cor(-4.0) A1
C 190 HE
W 422 *se2d1 / 90
HOSPITAL BIRD
Symphony/MR 7873
MR 2002B *06/01/98.6Y
HFS
+LPH STUDY 1
08/09/04
19:17:53
9 IMA 14 / 19



PART A: HEAD TRAUMA LITIGATION & THE SCIENCE

Concussion Litigation

- Since 2011, thousands of former athletes - including their spouses, families, and estates - have filed individual and class action lawsuits throughout the United States (and elsewhere) against various professional and amateur sports leagues, teams, conferences, medical providers, doctors, and helmet manufacturers, including the NFL, the NCAA, the NHL, WWE, Riddell, and many others.
- All of these suits, generally speaking, allege that the defendant entities breached duties to warn and protect athletes from the long-term risks of concussions and multiple “sub-concussive” mild traumatic brain injuries, and/or to provide adequate protective equipment. In most cases, the plaintiffs seek a declaration of liability, injunctive relief, medical monitoring and financial compensation for the alleged long-term chronic injuries, financial losses, expenses and intangible losses suffered by plaintiffs and their spouses as a result of the defendant’s alleged intentional/fraudulent misconduct, intentional misrepresentation and negligence. Some lawsuits even include allegations of civil conspiracy.

Concussions in the Media

- **Over the past several years, awareness about the potential dangers of concussions have become wide-spread.**
 - January 27, 2013: President Obama comments on the growing concern regarding concussions and long-term brain injuries associated with football:

I'm a big football fan, but I have to tell you if I had a son, I'd have to think long and hard before I let him play football. I think that those of us who love the sport are going to have to wrestle with the fact that it will probably change gradually to try to reduce some of the violence...

I tend to be more worried about college players than NFL players in the sense that the NFL players have a union, they're grown men, they can make some of these decisions on their own, and most of them are well-compensated for the violence they do to their bodies.
 - In 2015, Sony releases the major film *Concussion*, starring Will Smith, Alec Baldwin, and Albert Brooks.
 - Notwithstanding its vehement, and even continuing, statements to the contrary, in 2016 a senior NFL executive conceded in public testimony before a Congressional panel the existence of a “link” between football and Chronic Traumatic Encephalopathy (CTE).

Medical Issues

Concussions

- *Sport related concussion (“SRC”) is a traumatic brain injury induced by biomechanical forces.*
 - *SRC may be caused either by a direct blow to the head, face, neck or elsewhere on the body with an impulsive force transmitted to the head.*
 - *SRC typically results in the rapid onset of short-lived impairment of neurological function that resolves spontaneously. However, in some cases, signs and symptoms evolve over a number of minutes to hours.*
 - *SRC may result in neuropathological changes, but the acute clinical signs and symptoms largely reflect a functional disturbance rather than a structural injury and, as such, no abnormality is seen on standard structural neuroimaging studies.*
 - *SRC results in a range of clinical signs and symptoms that may or may not involve loss of consciousness. Resolution of the clinical and cognitive features typically follows a sequential course. However, in some cases symptoms may be prolonged.*
 - *The clinical signs and symptoms cannot be explained by drug, alcohol, or medication use, other injuries (such as cervical injuries, peripheral vestibular dysfunction, etc.) or other comorbidities (e.g., psychological factors or coexisting medical conditions). International “Consensus Statement on Concussion”*
- In 2000, the direct and indirect costs of traumatic brain injuries involving not only athletes, but military personnel, auto accident victims and others in the United States, were estimated to be \$77 Billion. Univ. of California, San Francisco, ***TBI Endpoints Development Initiative.***

Medical Issues

Chronic Traumatic Encephalopathy (“CTE”)

- CTE is a progressive degenerative brain disorder sometimes found in individuals with a history of multiple brain injuries.
 - **Symptoms:** disorientation, headaches, impaired speech, tremors, memory loss, depression, aggression.
 - Researchers continue to study the relationship between both concussive and sub-concussive impacts and the development of CTE.
 - CTE has been at the center of the discussion on head injuries in sports. Notable cases of CTE confirmed in deceased athletes include: NFL players Chris Henry and Junior Seau; NHL player Reggie Flemming; and professional wrestler Chris Benoit.
- Following the death of Chris Henry, it was reported that neither the NFL (where Henry played only 5 seasons) nor West Virginia University (where Henry played college football for 4 years) had any record of Henry sustaining a single concussion.

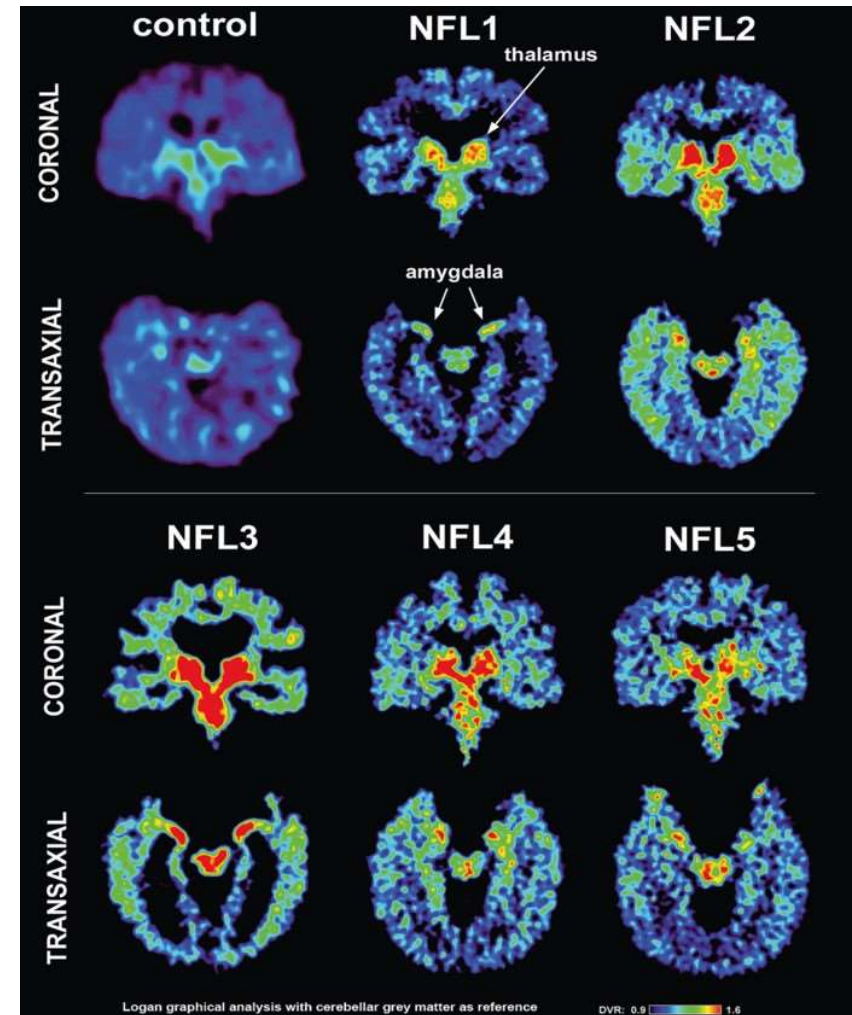
Medical Issues

Chronic Traumatic Encephalopathy (“CTE”)

- **Post-Mortem Diagnosis:** Most researchers currently believe CTE is identifiable only through an autopsy.
 - The publicity surrounding the recent Concussion Litigation may result in inaccurate or misleading reports. For example, articles addressing the prevalence of CTE may lead a reader to believe that more athletes, and others who have experienced head trauma, have been diagnosed with CTE than actually have. Because CTE technically can only be identified post-mortem, the disease cannot be confirmed in any living person regardless of their symptoms.
- **January 22, 2013:** ESPN reports the preliminary findings of a pilot study of 5 living former NFL players conducted at UCLA. Brain scans conducted as part of the study revealed images of proteins that contribute to development of CTE, a potential claimed breakthrough in identifying CTE in living patients.
 - This study describes itself as “preliminary.” However, a proven method of diagnosis of CTE in living patients who previously participated in sports or have an unrelated history of concussions could lead to a notable increase in concussion-related claims.

UCLA Study

- “Tau” or “tau proteins” are proteins that function to stabilize certain “microtubules” in the brain. They are abundant in the human central nervous system. However, abnormally high levels of tau in the brain are linked to poor recovery after head trauma.
- While much about tau protein is still unknown, it is believed that tau exists in healthy brains and even helps to stabilize cell structure. However, when tau builds up, it forms what are referred to as “tangles,” and may contribute to degeneration of brain tissue.
- Researchers created and injected a chemical marker to identify tau “tangles.” Colored areas suggest the presence of tau deposits, a protein linked to CTE.
- Brain scans conducted on the former athletes suggest increased levels of the tau protein, compared to the lower levels found in the 5-person control group.



Other Notable Studies

Center for BrainHealth at The University of Texas at Dallas January 7, 2013 -
Neuropsychological status of former NFL players

- **Significant Findings:** cognitive deficits and depression are more common among retired players than in the general population.
- **Also significant because of what it did not find:** evidence of cognitive impairment in the majority of ex-players.
- Dr. John Hart Jr., Medical Science Director, Center for BrainHealth and Director of the BrainHealth Institute for Athletes:
 - “Many former players who took part in our study, even those with extensive concussion histories, are healthy and cognitively normal....In 60% of our participants - most of whom had sustained prior concussions - we found no cognitive problems, no mood problems and no structural brain abnormalities.”

Other Notable Studies

Dr. Ann McKee's Research

- Dr. McKee, chief neuropathologist for Boston University's Alzheimer's Disease Center and the Center for the Study of Traumatic Encephalopathy, is the most zealous advocate for the detection of CTE in football players.
- Her initial studies found signs of CTE in over 70 deceased athletes' brains, almost 80% of those she has examined throughout her study of CTE.
- 2017 publication in *The Journal of the American Medical Association*: Dr. McKee examined the brains of 202 deceased football players. Of the 202 players, 111 played in the NFL, and 110 of those were found to have CTE.
- Interviewed by the New York Times in July 2017, Dr. McKee stated: "It is no longer debatable whether or not there is a problem in football - there is a problem." (*But see Consensus Statement above*).

Litigation Against The Leagues



Status of the NFL Concussion Litigation Settlement

Settlement of Underlying MDL Class Action:

- **Terms:** \$75 million Baseline Assessment Program; \$10 million brain injury research fund; and an *uncapped* Monetary Award Fund to compensate former players with a qualifying diagnosis.
- **May 8, 2015:** Judge Anita Brody (U.S. Dist. Ct. E.D.Pa.) granted final approval of Class Settlement of over 20,000 potential members (with only 137 opt-outs).
- **April 18, 2016:** Third Circuit affirmed.
- **Appeals:** Objectors' request for rehearing *en banc* was denied, and certain objectors filed petitions for certiorari to the U.S. Supreme Court, which were also denied.
- **August 2019** - As of this date, 20,500 class members registered to the settlement (approx. 80%) and over \$660 million has been paid for 875 claims. Only 4 opt-out claims remain in the MDL Action.

Statements Made by the NFL

Notwithstanding its acquiescence to the class action settlement, the NFL and its experts challenge the science

- “Research from independent scientists demonstrates *considerable uncertainty* about the role that concussions play in later-life impairment” and that while “*mild repetitive traumatic brain injury may be a risk factor for later developing one of the Qualifying Diagnoses, [] it has not been shown to be a cause of those conditions.*”
- “[Claimants] face enormous challenges proving both general causation - *whether concussions and repetitive head trauma are capable of causing long-term neurocognitive impairments in the first place* - and specific causation - whether his specific concussion(s) actually caused his long-term injury and whether the NFL’s alleged conduct substantially contributed to that injury.”
- “[I]n light of the *uncertainty surrounding the causal relationship between mild repetitive TBI and the Qualifying Diagnoses*, establishing to a reasonable degree of medical certainty that a mild TBI, or series of mild TBIs, from NFL play *caused* a developed condition would be exceedingly difficult in my opinion—both on a general population basis and even more so on a specific basis with respect to an individual player.”
- “It remains a challenge with an individual patient to discern whether or not these symptoms are a consequence of a head injury or associated with comorbidities (e.g., preexisting stress and social difficulties, learning disabilities, alcohol or drug abuse, etc.)”

Key Quotes from Judge Brody's Approval Order

In approving the untapped MDL settlement, Judge Brody also challenged the science

- “Class Members also face *serious hurdles establishing causation*. Though there has been widespread media coverage and speculation regarding the late-life or post-retirement risks of cognitive impairment in athletes who engaged in sports involving repetitive head trauma . . . [T]here has been very little in the way of peer-reviewed scientific literature involving data that suggests any such risk.” P. 69
- “[T]he available research is not nearly robust enough to discount the risks that Class Members would face in litigation. The scientific community has long recognized the existence of multiple categories of traumatic brain injury. However, *investigation into repetitive mild TBI, typical of Retired Players, is relatively new*.” P. 69-70.
- “[A] battle of the experts would be all but certain.” P. 71
- “The study of CTE is nascent, and the symptoms of the disease, if any, are unknown.” P. 79

The NCAA Concussion Litigation

- Since 2013, hundreds of lawsuits have been filed by former college athletes regarding the NCAA's alleged failure to adequately warn its athletes about the known dangers of concussions.
- The majority of these lawsuits were consolidated into a MDL action in the Northern District of Illinois.
- **July 2016:** The Court granted preliminary approval of a Second Amended Class Settlement, which settles the claims of the Class, but allows single-school/single-sport class actions to proceed. A Motion for Final Approval of the settlement was due August 25, 2017.

Other Class Actions Against the NCAA, Colleges, and Collegiate Athletic Conferences

- **Since Preliminary Approval of the NCAA MDL Settlement:** Hundreds of separate class actions haven been filed against various colleges, and athletic conferences, including:
 - Big 12
 - PAC 12
 - Ohio Valley Conference
 - Conference USA
 - American Athletic Conference (Big East)
 - Atlantic Coast Conference
 - Gulf Coast Conference
 - Southeastern Conference (SEC)
 - Various colleges (i.e., Vanderbilt, Penn State, Syracuse, Duke, Stanford, Wake Forest, and many more)
- While most of these “mini” class action lawsuits concern football, some include claims of former collegiate athletes from other sports (e.g., soccer, lacrosse, field hockey).

The NHL Litigation

- Numerous class action lawsuits against the NHL and the NHL Board of Governors brought by various retired NHL players on behalf of a proposed class of all retired NHL players who suffered a traumatic brain injury, have currently been consolidated in the U.S. Dist. Ct. for the District of Minnesota. Damages are sought for both Fraudulent and Negligent Concealment of information related to concussions.
- **NHL's Position:** Unlike the NFL's acknowledgement, the NHL continues to deny a link between repetitive head trauma and neurodegenerative diseases such as CTE.
- **On July 13, 2018** - The Court denied plaintiffs' motion for class certification. The repercussions of this recent substantive ruling remain to be seen as each of the approximately 150 individual plaintiffs – many of whom do not possess an actual diagnosis of (and are not symptomatic of) any actual neurocognitive condition – must determine whether he will pursue a stand-alone personal injury suit against the NHL.
- **Settlement** - The NHL and Plaintiffs reached a settlement where the NHL will pay approximately \$19 million plus neuropsychological testing (est. approx. \$1 million), and provide an Additional Payment Fund and a Common Good Fund (collectively totalling approx. \$3.35 million).

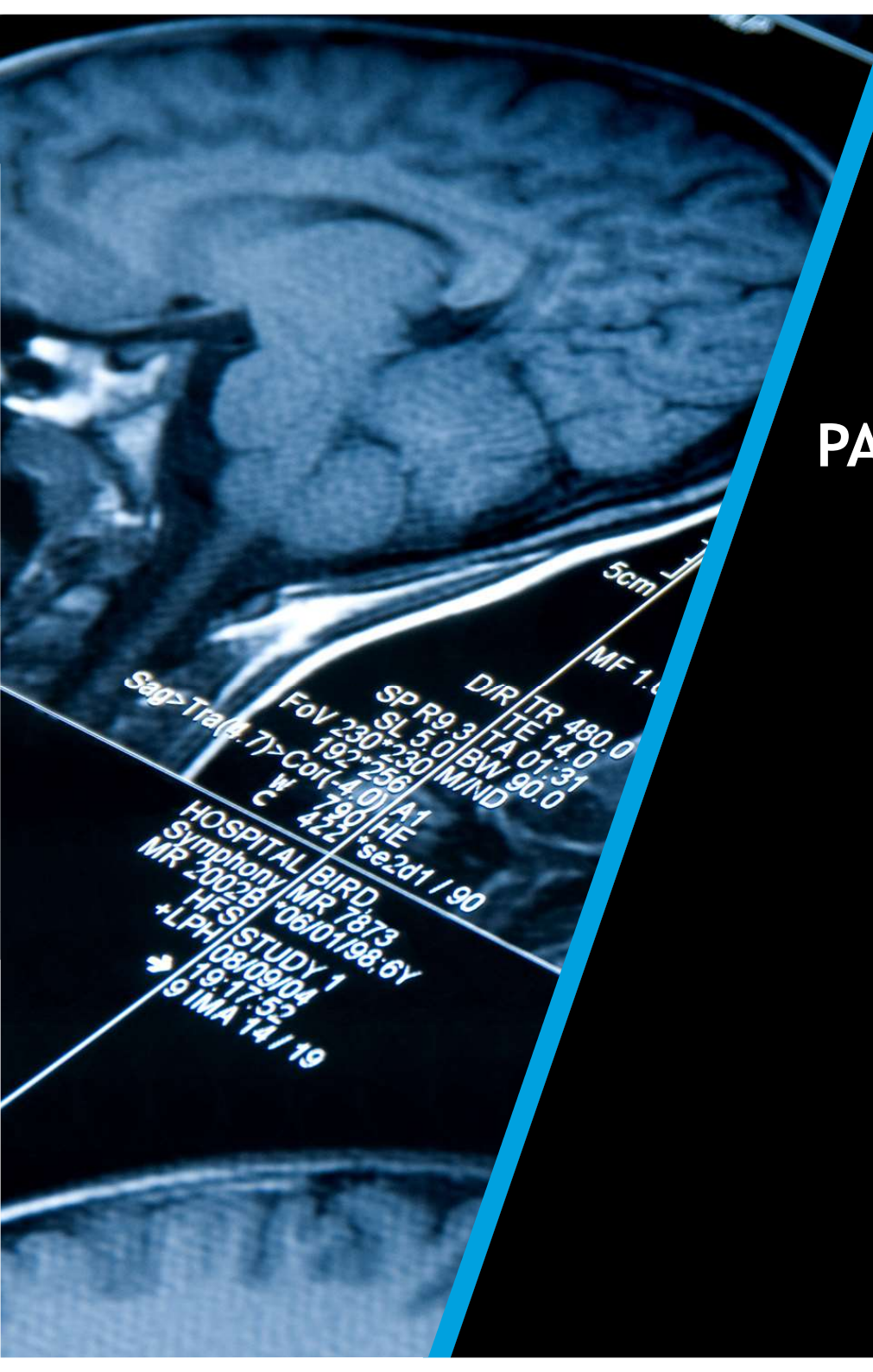
Litigation Against Medical Professionals

- *Merril Hoge v. John Munsell*
 - **In 2000:** Jury awarded former Chicago Bears running back Merrill Hoge \$1.55 million in a lawsuit alleging that the Chicago Bears team doctor, John Munsell, failed to properly treat a concussion Hoge sustained during a preseason game in August of 1994. Hoge further alleged that Munsell negligently cleared him to play and, as a result, was forced to retire after sustaining a second concussion in October of 1994. Ultimately, Hoge and Munsell reached a settlement.
- *James McManus v. Newcastle Knights*
 - **In February 2017:** Former Australian rugby player sued his former team (Newcastle Knights), alleging that the team and its doctors (although not sued) negligently treated concussions he sustained during his career and ultimately caused his playing career to end prematurely.

Other Pending and Potential Concussions Lawsuits (cont.)

- Other organizations including professional, amateur and youth amateur leagues, may be sources of plaintiffs and potentially liable insureds:

- CFL
- USFL
- AHL
- ECHL
- WCHL
- MLB
- NBA
- WNBA
- MLS
- MISL
- NLL: National Lacrosse League
- MLL: Major Lacrosse League
- WLS: Womens League Soccer
- Little League
- Pop Warner
- NASCAR
- INDYCAR
- Formula One
- EPL: English Premier League
- AFL: Australian Rules Football
- NRL: National Rugby League
- Youth Soccer League
- Police Athletic League
- Safety equipment users in various industries: athletics, construction, demolition, mining, engineering, utilities, etc.



PART B: POTENTIAL COVERAGE ISSUES & POTENTIAL CONCERNS FOR UNDERWRITERS

Types of Insurance Implicated

A broad array of insurance policies may potentially be implicated by future concussion-related suits, including:

- General liability: primary, umbrella and excess
- Workers' Compensation and Employers' liability
- Professional liability (trainers, physicians, etc.)
- Product liability (equipment manufacturers)
- Directors & Officers liability
- Long-Term Care

Potential Coverage Issues

There are a number of potential coverage issues that arise out of claims involving concussions and other head injuries, including:

- Is there an occurrence/expected or intended
- Number of occurrences
- Timing of bodily injury (“Trigger”)
- Allocation
- Notable Endorsements: Athletic participants; designated events; medical trainer coverage; new concussion/head trauma exclusions

Potential Coverage Issues

Is there an “occurrence”?

- **Definition:** CGL policies define “occurrence” as “an accident including continuous or repeated exposure to substantially the same general harmful conditions.”
- Injury in contact sports is not unexpected or a fortuitous event.
- However, it is alleged that many leagues (NFL, NHL, NCAA, etc.) “defrauded” players by concealing information about the long-term risks of head trauma.
- Even where allegations in the underlying complaint are vague as to whether there is an “occurrence” (or other terms of the insuring agreement are satisfied), a defense will generally be owed.

Potential Coverage Issues

Number of Occurrences

- **How many “occurrences”???**
 - If a former athlete, or any other plaintiff, alleges bodily injury related to repeated head trauma over the course of a career, how many “occurrences” are there?
- **Grouping:**
 - Is there any policy language suggesting an intent to aggregate claims?
 - Many courts consider factors such as the temporal and spatial relationship between incidents giving rise to injury.
- **What is the “occurrence”?**
 - The “course of conduct” in failing to warn or to take proper precautions?
 - Is it each athlete’s alleged head trauma (per hit, game, or season)?

Potential Coverage Issues

Timing of Bodily Injury

- **CGL** policy language generally requires that “bodily injury” occur during the “policy period.”
- Many athletes (especially in the NCAA context) are bringing lawsuits alleging “bodily injury” years or even decades after their playing careers.
- Especially important when multiple carriers have insured the same risk over time.
- Determining when the alleged “bodily injury” takes place, and when it stops, is difficult given the current scientific data.

Potential Coverage Issues

Timing of Bodily Injury

- **New York:** In cases involving claims of continuing injury resulting from exposure to a potentially harmful condition, New York courts generally apply the “injury-in-fact” trigger theory. Uniroyal, Inc. v. Home Ins. Co., 707 F.Supp. 1368 (E.D.N.Y. 1988); Cont’l. Cas. Co. v. Employers Ins. Co. of Wausau, 871 N.Y.S. 2d 48 (1st Dep’t. 2008) (Keasbey).
- **Keasbey:** Hundreds of claims were brought by claimants alleging long-term exposure to asbestos. The Appellate Division applied the injury-in-fact trigger theory, finding that no coverage exists unless it is shown by the claimant that actual bodily injury occurred during the policy period and that it is the claimant’s burden to establish that this is the case.
 - This test “rests on when the injury, sickness, disease or disability actually began.”
 - The court found that the claimants “offered no evidence whatsoever that any of them sustained an injury-in-fact in any one of the [allegedly implicated] policy periods” and that medical evidence established that it could take “20 to 40 years after exposure for actual impairment of bodily functions to develop.”

Potential Coverage Issues

Allocation

Allocation: The method of determining which policies, to what extent, and in which sequence, are liable for the policyholder's damages. There is no uniform approach to allocation among the states.

- **New York**
 - **Historically Applies “Pro Rata” Approach:** Each insurer shall bear a share of liability directly proportionate to its time on the risk. Serio v. Public Service Mutual Insurance Co., 304 A.D.2d (2d Dep't. 2003); Consolidated Edison Co. of N.Y. v. Allstate Ins. Co., 98 N.Y.2d 208 (2002).
 - **May Apply “All Sums” Approach:** An insurer chosen by the policyholder will be fully liable, up to the policy limits, for the entire sum of damages (“all sums”) owed by the policyholder during a particular policy period. In the Matter of Viking Pump, Inc. and Warren Pumps, LLC, 27 N.Y.3d 244 (2016)

Potential Coverage Issues

Athletic Participants Exclusion

- **General Language:** *The insurance does not apply to bodily injury to any person while practicing for or participating in any contest or exhibition of an athletic or sports nature sponsored by the named insured.*
- Although the language of the exclusion is seemingly **broad**, there is some debate regarding certain terms.
 - Do the terms “contest” or “exhibition” refer to one game or an entire season or tournament?
 - What is the meaning of the term “sponsored”?

Potential Coverage Issues

Concussion & Head Trauma Exclusion

- As a result of the recent onset of concussion-litigation and the escalating risk of same, certain Insurers have started to draft “Concussion” and “Head Trauma” related exclusions.
 - Example 1: Insurance does not apply for concussion-related claims, *unless risk-management controls, such as mandatory coach concussion training and other types of due diligence, are put in place.*
 - Example 2: Insurance does not apply for “brain injuries” sustained by a “player” arising out of or in any way related to participation in any sports or athletic game, contest, event, exhibition or practice.
 - Example 3: Insurance does not apply for “brain injuries” sustained by a “specified player” [listed in a Schedule] arising out of or in any way related to participation in any sports or athletic game, contest, event, exhibition or practice.
 - The term “brain injuries” includes “concussions, chronic traumatic encephalopathy or any other injury to the brain and any symptoms, conditions, disorders and diseases resulting therefrom.”
- Requires policyholders to incorporate enhanced monitoring and prevention standards into their various sports programs.

Potential Coverage Issues

Designated Events Exclusion

- **General Language:** Insurance does not apply to any “bodily injury” or “property damage” arising out of or attributable to certain events specifically identified in a Schedule.
 - The exclusion can also apply to “personal and advertising injury.”
- **Types of Commonly Excluded Events:** Championship games, Super Bowl, All-Star Games, oversea games, and events involving fan participation.
 - Insurers may offer a separate insurance policy covering the risks associated with the excluded “Designated Event.”

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