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Football programs could face dearth of concussion insurance

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Colleges and high schools may face the prospect of no — or very expensive — insurance coverage for football-related concussion risks, which could endanger all but the wealthiest programs, experts say.

Expected policy exclusions could leave college and high school teams without critical coverage if former players claim long-lasting injuries from concussions suffered while they were players, according to experts.



In addition, given the issue's long-tail nature, insurers may have to worry about policies they have written in the past, even if they provide exclusions in their policies going forward.

On the professional level, the National Football League reached a [major settlement](#) in 2015 with former players who sued the league after experiencing head trauma during their football careers that resulted in brain injuries.

Meanwhile, coverage litigation stemming from a putative class action lawsuit filed by a former college football player who says he suffers from memory loss and other symptoms [could be headed for settlement](#), according to papers filed in federal court last week.

In *Great American Assurance Co. v. Conference USA*, filed in U.S. District Court in Dallas in May, Cincinnati-based Great American filed litigation against Irving, Texas-based Conference USA seeking a declaration it had no duty to defend or indemnify the conference in a putative class action lawsuit filed by former college football player Willie Johnson.

Last week, the insurer indicated in court filings the matter may be settled.

The underlying lawsuit in the case, which was filed in U.S. District Court in Indianapolis on Aug. 31, 2016, states that Mr. Johnson, who played football from 2003 to 2005 at the University of Louisville as an outside linebacker, defensive end and occasional special teams player, "sustained repetitive concussive and subconcussive hits" in practices and games, and each time an incident occurred he recalls "shaking it off" and being put back into the game.

He states the defendants did not implement adequate concussion management safety protocols or return-to-play guidelines during his time at the university.

Mr. Johnson says he now suffers from memory loss, mood swings, headaches and anxiety, among other issues.

The lawsuit charges the defendants with negligence, fraudulent concealment, breaches of express and implied contract and unjust enrichment.

In addition to Conference USA, other defendants in the case are the New York-based Big East Conference, a collegiate athletic conference, and the Indianapolis-based National Collegiate Athletic Association. Conference USA is an intercollegiate athletic conference in Division I of the NCAA.

The case has been transferred to become part of the *In Re: National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, which is multidistrict litigation now in U.S. District Court in Chicago.

In the coverage litigation filed in Dallas, Great American states it issued a primary commercial general liability policy to Conference USA that was in effect from February 2004 to November 2004, when it was canceled.

The combined specialty primary policy included a “limited event coverage endorsement,” which said bodily injury coverage only applies to occurrences in a list of sports that do not include football, according to the Great American lawsuit.

The issue of insurance in these cases “is very unsettled right now,” said Michael S. Levine, a partner with Hunton & Williams L.L.P. in Washington.

Pointing to football’s absence in the Great American policy’s list of covered sports, Mr. Levine said: “Policyholders need to be mindful of endorsements” such as these “and not allow them to be put in their policy in the first place.”

Nicholas A. Secara, an associate with Baker & McKenzie L.L.P. in New York, said, however, there may be more football policy exclusions in the future. “This is going to continue to be an issue until the science is going to be able to catch up with it,” he said.

“I think (insurers) are going to try to carve it out and maybe address it separately with separate coverage,” so it is not necessarily a matter of insurers not insuring it but of being profitable in doing so, he said. The insurers may want to “address it separately under more precise, tailored language.”

Right now, insurers are not charging for the risks they assume in college and high school programs, but when they do, those charges will “ripple through the system” and could make football programs unaffordable for colleges and high school, said Ronald S. Katz, of counsel at GCA Law Partners L.L.P. in Mountain View, California.

Marc Edelman, a law professor at the Zicklin School of Business at Baruch College in New York, said: “If you’re not a big-time college football program, such as a University of Michigan and Notre Dame, that profits immensely from offering football, it may make sense to either drop the football program altogether or to require athletes to sign a very detailed waiver that explains in earnest all of the risks related to playing football, “including concussions, stating “that the players are willing to incur those risks, with reasonable full disclosures.”

“Irrespective of what insurance companies should do moving forward, or are beginning to do now, there are likely many insurance policies that predate the recent flurry of concussion litigation,” he added.

He said it is not possible to predict “whether college losses related to concussion settlements are covered by a particular insurance policy without reading the fine print.”