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The Policyholder Law Firm



Insurance for Concussion Liability: Likely Flashpoints

By Mark Garbowski

Concussions have become a substantial concern in multiple industries: medical, athletic, educational and inevitably legal. As our knowledge and understanding of the hazards and damage caused by concussions grows, sports leagues, equipment manufacturers and educational institutions — as well as their medical professionals — must all consider themselves potential targets for lawsuits and claims related to concussions. Just as claims come as a result of injuries, insurance disputes can be expected to follow claims.

The litigation of concussion insurance claims is in its infancy, but already certain issues are coming to the forefront, including the trigger of coverage, the number of occurrences, allocation of losses, and whether the injuries are expected or intended by the policyholders.

Trigger of Coverage: When Did Damage Occur?

The first logical issue to arise is which policies are triggered by any given claim. General liability policies usually require either that bodily injury take place during the policy period, or that an accident or other incident take place during the policy period. For the accident-type policies, the trigger analysis would seem simple, except that a claimant

might have received numerous blows to the head causing one or more concussions over the course of several years. When injuries and claims develop years later, a factual record of those injuries and concussions will provide a road map, and sometimes grounds for dispute, to determine which policies potentially respond.

For those policies that require that bodily injury take place during the policy period, we can expect even more uncertainty. It took years for a legal consensus to develop as to the medical facts to determine when bodily injury occurs for asbestos claims, for example. With concussions, there is the initial head injury and concussion, which then allegedly leads to additional injuries and conditions sometimes years later. Policyholders, insurance companies and courts will need to determine whether the injuries are continuous during all times in-between or whether they follow some other pattern.

Then, once the policy or set of policy years that respond is determined, the issue of occurrences comes into play to determine how many limits are available and how the damage gets apportioned between them. The occurrence analysis is again very dependent upon policy language, and will focus on the particular grouping or batching language

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contained in each policy. Occurrence definitions that simply reference “substantially the same general conditions” are least likely to end up grouping multiple concussion claims into a single occurrence. At the other end of the spectrum are policies that specifically state that injuries arising out of a single type of product or activity shall be collected into a single occurrence.

Allocation: Who Pays What?

Following up on the number of occurrences will be allocation: how will claims be allocated among triggered policies and their respective limits. As an initial presumption, we should expect that courts will follow existing allocation law for long-term claims such as asbestos or environmental damage. States that have committed to all sums, pro rata by time, or the Carter-Wallace formula of pro rata by both time and limits, will likely maintain such precedents. Still, policyholders and insurance companies both can be expected to test that assumption until it is determined. In addition, several states still have not had a determinative decision in their highest court to settle this issue even for asbestos and environmental claims.

Expected or Intended: What Did the Policyholder Know, and When?

Finally, insurance companies can be expected to assert several exclusions to negate coverage. One likely candidate is the “expected or intended” exclusion. Many of the claims allege intentional activity and fraudulent concealment. Insurance companies can be expected to hold the position that the injuries alleged to have resulted from such claims were expected and/or intended by their policyholders. Once again, reference to asbestos and environmental claims is instructive, and gives reason for hope to policyholders. The insurance industry argued the expected or intended exclusion applied to bar those claims, which often have been based upon similar allegations, without long-term success. While nothing is certain, policyholders should prevail regarding the applicability of that exclusion.

This short analysis necessarily covered these issues in summary fashion, and omitted several other potential issues. Policyholders who face or expect to face concussion-based claims should undertake a more careful analysis of their specific policies and the particular nature of the claims they face to determine the likelihood of receiving coverage. ▲

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