

SPORTS-RELATED CONCUSSION LITIGATION

Developing a Legal Strategy



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Past and Current Litigation

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Professional Sports

- NFL → *In re NFL Players' Concussion Litigation*
 - Negligence; Fraud; Medical Monitoring
 - NFL has moved to dismiss on labor preemption grounds
- NHL → *Boogard v. NHLPA; Boogard v. NHL*
 - NHLPA (dismissed as time-barred)
 - Breach of the Duty of Fair Representation; Breach of Fiduciary Duty
 - NHL (pending)
 - Wrongful death action with various claims related to negligence and failure to act with regard to prescription drugs, concussions, and CTE
 - Attempts to circumvent preemption argument – linking causes of action to prescription medication
- MLS → *Namoff, et al v. D.C. Soccer LLC*
 - Various causes of action related to negligence and failure to act with regard to concussions
 - Motion to dismiss denied (based on Worker's Compensation bar)
- To date, no player-filed, concussion-related lawsuits brought against the NBA or MLB
 - Concussions still frequently occur (e.g., Brandon McCarthy; George Hill)

Amateur Sports (College)

- NCAA
 - Various individual suits against schools
 - *E.g., Plevretes v. La Salle Univ.*: \$7.5 MM settlement
 - Class Action: *Arrington v. NCAA*
 - Breach of Contract
 - Negligence
 - Fraud
 - Unjust Enrichment
 - Medical Monitoring

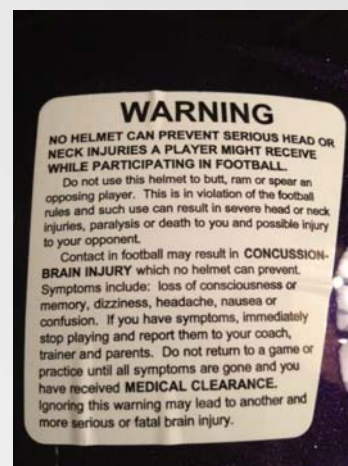
Amateur Sports (Youth Sports)

- Various individual actions but no class actions or mass torts to date
- Typical Causes of Action
 - Negligence
 - Failure to Promulgate Rules
 - Civil Rights Violations -- Invasion of Bodily Integrity
 - State and Federal
 - Failure to Accommodate Post-Injury
 - Rehabilitation Act
 - Americans with Disabilities Act
 - Civil Rights Act

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Other Concussion-Related Litigation

- Equipment Manufacturers
 - In 2013, Riddell found negligent for failure to warn about concussion dangers
 - Total award of \$11.5 MM, with Riddell liable for \$3.1 MM
- Insurance
 - NFL involved in litigation with its insurers over alleged failure to defend NFL and NFLP in concussion suits



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Litigation Hurdles

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Litigation Hurdles

- Duty
- Standing
- Assumption of Risk
- Collective Bargaining Agreement
- Workers' Compensation
- Minors
- Waivers
- Immunities
- Concussion Statutes

Workers' Compensation

- Exclusive tort recovery for workplace injuries
 - *Stringer v. Minn. Vikings FC LLC* 30 (Minn. 2005)
 - NFL concussion litigation: only one instance where NFL Clubs named as defendants
- Exception to bar on tort recovery: intent
 - *Depiano v. Montreal Baseball Club*
- Employment relationship; WC insurance coverage
 - *Namoff v. D.C. Soccer LLC, et al.*

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Standing: Breach of Contract

- Express Contract and Implied Contract
 - Likely not viable
- Express Contract as a 3rd Party Beneficiary
 - *Bloom v. NCAA*
 - NCAA constitution, bylaws, and regulations have clear intent to benefit SAs, non-parties to agreement
 - *Hall v. NCAA*
 - NCAA role as “gatekeeper” supports SAs’ standing as 3rd party beneficiary
 - Still Need to Show Material Breach

Youth Concussion Statutes

- Forty-nine states (all but Mississippi) have passed or have pending youth concussion legislation
 - Most based on Zackery Lystedt Law
 - Three components: (1) Education; (2) Removal; (3) Return-to-play
 - Twenty statutes expressly state that there is independent liability while twenty-nine are completely silent

- No statement on liability for coaches, e.g., Zackery Lystedt Law, may lead to increased liability
 - Greater opportunities to make assessments
 - Advances theories of liability
 - Negligence per se

Negligence Per Se

- Only one known concussion plaintiff has brought a negligence per se claim – *Newman v. Highland School District*, 12-2-03162-1, Yakama Sup. Ct., Wash. (filed Sept. 13, 2012)
- Restatement (Second) of Torts § 286
 - Court has discretion to adopt as the standard of care the requirements of a statute or regulation with the purpose to protect certain classes of individuals and interests
 - “[I]n rare instances it may merely prohibit certain conduct, and contain no provision for any liability at all. In such cases the initial question is whether the legislation or regulation is to be given any effect in a civil suit. Since the legislation has not so provided, the court is under no compulsion to accept it as defining any standard of conduct for purposes of a tort action.” § 286, Cmt. (d)
 - Will require courts to look at legislative history of statute
- Analogous Statutes

Concluding Remarks

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