

RISK MANAGEMENT

DESPITE FOOTBALL CONCUSSION SETTLEMENT, INSURERS ROLE IN PAYING NFL COSTS UNCLEAR

The \$765 million pact doesn't halt players' work comp claims

BY SHEENA HARRISON

The National Football League's tentative \$765 million settlement for concussion-related liability claims will cover more than 18,000 retired professional football players, whether or not they sued the league over brain injuries, but may not stop workers compensation claims already in play from these athletes.

Sol Weiss, co-lead counsel for plaintiffs in the NFL concussion litigation, said the settlement will apply only to players who have retired as of the date the settlement receives final judicial approval. U.S. District Court Judge Anita B. Brody in Philadelphia is expected to hold a hearing about the tentative settlement by the end of this month.

Retired players who have filed concussion-related workers comp claims in various states may choose to go forward with the claims, Mr. Weiss said. Some players, he said, could opt to drop their comp claims in states where the NFL settlement would reduce a workers comp benefit award, or where their portion of the settlement could be subject to subrogation from insurers.

"The overwhelming number of players I've spoken with have been very favorable and appreciative of the settlement, and they hope it goes through," said Mr. Weiss, who is a Philadelphia-based senior partner at law firm Anapol Schwartz.

The NFL announced on Aug. 29 it had reached a multimillion-dollar settlement agreement with more than 4,500 retired players who had sued the league over con-



AP PHOTO

Jim McMahon, former quarterback for the Chicago Bears, is one of 18,000 retired NFL players potentially covered by the league's settlement of concussion litigation.

TOP 10 INJURIES

U.S. high school sports injury diagnoses, 2012-2013 school year

Head/face concussion	21.3%
Ankle strain/sprain	14.3%
Hip/thigh/upper leg strain/sprain	7.6%
Knee strain/sprain	7.5%
Other knee injury	4.8%
Other shoulder injury	3.8%
Hand/wrist fracture	3.3%
Shoulder strain/sprain	2.8%
Other lower leg injury	2.1%
Trunk strain/sprain	2.1%

Source: Pediatric Injury Prevention, Education and Research Program, Colorado School of Public Health

High school concussions could be next asbestos

BY RODD ZOLKOS

Concussions among high school athletes and schools' concussion protocols have been a frequent topic of discussion between school districts and their insurers during summer renewals, and some brokers say the discussions will intensify.

With the National Football League's settlement of a group of concussion-related suits and the National Collegiate Athletic

See **SCHOOLS** page 32

HEALTH COVERAGE

Most employers already offer their group health plans to same-sex couples.

90% Offer coverage for legally married same-sex couples

87% Offer coverage for same-sex domestic partners

79% Offer coverage for same-sex civil unions.

Source: ERISA Industry Committee

EMPLOYEE BENEFITS

Feds clarify same-sex benefits

IRS guidance grants tax equality

BY MATT DUNNING

Federal regulators have given employers much-needed clarity regarding changes to their group benefits plans made necessary by the U.S. Supreme Court's recent partial overturn of the Defense of Marriage Act.

Late last month, the U.S. Department of the Treasury and Internal Revenue Service issued rules that all legally married same-sex couples will be entitled to the same rights and benefits as opposite-sex couples under the U.S. Tax Code, regardless of the state in which they live.

Prior to the Supreme Court's historic June ruling striking down Section 3 of DOMA, marriage was defined strictly as the union between a man and a woman for all federal purposes.

After two months of deliberation, IRS and Treasury officials said

See **SAME SEX** page 33

See **NFL** page 32

INTERNATIONAL

Country profile of Belgium. Global capital available to underwrite reinsurance reaches record

PAGE 10

U.S. MID-MARKET

Employers using medical stop-loss captives must commit to health risk management to ensure success

PAGE 8

RESEARCH & DATA

Top 25 U.S. ocean marine insurers; Direct written U.S. ocean marine premiums

PAGE 23



MARINE MARKET REPORT

Abundant capacity limits rate hikes; shippers fight back against piracy; marine underwriters scrutinized as sanctions target insurance; security rules stemming from 9/11 help improve cargo security; human error causes most accidents.

PAGE 14

SCHOOLS

Continued from page 1

Association facing concussion suits by former players, the risk that concussions might impair brain function later in life could be the next asbestos, one insurance broker said.

If insurers pay a significant portion of the NFL settlement, it “could set off a firestorm” of insurers looking to include concussion exclusions in schools’ insurance policies, said Michael McHugh, area senior executive vice president at Arthur J. Gallagher & Co. in Itasca, Ill. “I think concussion is going to be what asbestos was 30 years ago in our world,” he said.

“It was definitely an active topic of discussion at renewals, and I would suspect it would become a more active topic,” said Daniel Howell, senior executive vice president and managing director of the public entity practice at Alliant Insurance Services Inc. in San Francisco.

One major underwriter “was leaning toward mandating concussive injury exclusions at July (renewals)” for NCAA Division I accounts, Mr. Howell said. “We did

not see that from other markets.”

Both brokers said that football is at the top of many people’s minds when thinking of concussion risks. But the risk of concussion “can come from any sport a child plays,” Mr. McHugh said.

Across the country, there’s great diversity in the way high schools approach concussion risks. “So much has changed in the last few years that now we have a very wide disparity in how well protected athletes are in two schools that are down the block from each other,” said Christopher Nowinski, co-founder and executive director of the Sports Legacy Institute Inc., Waltham, Mass., and co-director of the Boston University Center for the Study of Traumatic Encephalopathy.

“The reality is there’s no single step that schools can take to keep their athletes safe. It’s a long list, and the reality is very few are doing everything,” Mr. Nowinski said.

The institute provides its own list of steps that schools should take to reduce concussion risks at www.concussionchecklist.org. But schools also should be training coaches, teachers, athletes and parents about concussion issues, Mr. Nowinski said.

Schools also need to have return-to-play and return-to-school policies, he said, and should have an athletic trainer on the sidelines and, better still, a doctor.

“We have to recognize the value of a medical infrastructure,” Mr. Nowinski said. “If you could have a physician on the sidelines, you’d diagnose even more concussions.”

Mr. Nowinski said he hopes the insurance issue might help promote a more thorough approach to addressing student athletes’ concussion risks, though it hasn’t thus far.

“We’ve tried to push the insurance argument to try to motivate folks to upgrade policies for years,” he said. “It hasn’t worked historically. We do think it’s a great carrot for people to implement standards.”

Insurer, state guidance

Connie Telfeyan, risk/safety manager at Omaha Public Schools in Omaha, Neb., said the district’s concussion protocols are shaped largely by guidance provided by its insurer, United Educators Insurance, a Reciprocal Risk Retention Group. In addition, “We have a state law that we have to follow, and it’s very similar to what Unit-

ed Educators asks us to do.”

The Omaha district’s student athletes take cognitive ability tests before participating in sports to provide a comparative baseline should they suffer an injury. “Our schools even follow the concussion protocol in (seventh- and eighth-grade) flag football,” she said.

Michael Fox, risk analyst at Miami-Dade County Public Schools, said the Florida district has an extensive approach to addressing concussion risk. Student athletes in impact sports are given a cognitive ability baseline test prior to participation through KidZ Neuroscience Center at the University of Miami, which also does testing after an injury.

Each school has a licensed athletic trainer, and the district has a doctor on-site at every football game. The district also has a relationship with a concussion specialist at the University of Miami and refers students to her if needed.

Once a student is treated for a concussion, none is cleared to participate in a sport until they’ve been cleared by the cognitive test.

The district also has a football helmet reconditioning program under which the head gear can be reconditioned, if needed, each year for five years before being retired.

Kurt Gibson, associate executive director of the Illinois High School Association, said that under IHSA rules, athletes displaying signs of a concussion must be removed from a practice or competition and may not return until cleared by a medical professional. Under the Illinois rules, either a licensed physician or certified athletic trainer must clear the athlete to return to play.

“We ask our officials in Illinois any time they are working a game and they send a player out for a head injury to write a special report for us,” Mr. Gibson said. The report, providing a brief description of the incident and indicating whether the athlete returned to competition, is forwarded to the athlete’s school to follow up on the student’s condition and any necessary treatment.

Mr. Gibson said the IHSA’s sports medicine advisory committee has discussed requiring baseline cognitive tests for all student athletes, but decided not to do so.

“We would certainly tell anyone if the school district has the resources to do that, certainly do so,” he said, but the district IHSA has sought to avoid mandates that not all schools would have the resources to meet.

NFL

Continued from page 1

concussion-related brain injuries. In court filings, the players alleged the league misled them about the dangers of concussions, and said they suffer from various neurological and cognitive problems related to head injuries suffered while playing in the NFL.

The settlement “does not represent, and cannot be considered, an admission by the NFL of liability, or an admission that plaintiffs’ injuries were caused by football,” according to the tentative settlement agreement posted on the league’s website.

The settlement amount includes \$75 million for baseline medical exams for the retired players, \$675 million to compensate players and the families of players who suffered brain injuries, a \$10 million fund for concussion research and education, and the payment of legal fees for the players, according to the tentative agreement.

The NFL plans to pay 50% of the settlement in the next three years, and the balance during the next 17 years. The league could add up to \$37.5 million to the players’ injury compensation fund, if the \$675 million is insufficient to pay claims, the agreement said.

The amount of money paid to retired players “will be based upon the specific diagnosis, as well as other factors including age, number of seasons played in the NFL and other relevant medical conditions,” according to the agreement. The diagnoses will be made by independent doctors working with



AP PHOTO

Future claims from current NFL players, such as San Francisco 49ers quarterback Alex Smith, would be subject to provisions of the collective-bargaining agreement should a player later develop concussion-related problems.

a court-appointed settlement administrator.

“We thought it was critical to get more help to players and families who deserve it rather than spend many years and millions of dollars on litigation,” NFL Executive Vice President Jeffrey Pash said in a statement. “This is an important step that builds on the significant changes we’ve made in recent years to make the game safer, and we will continue our work to better the long-term health and well-being of NFL players.”

While the NFL denies wrongdoing, it’s likely the league settled to

avoid a potentially costly legal process and uphold its reputation with football fans, said Steve Smith, a Colorado Springs-based partner in the sports law practice at Bryan Cave LLP.

“Even if the NFL were to win the case, the court of public opinion would probably be very upset with what happened to these players and would be very sympathetic to them, so the win would be very hollow and would probably come at great cost in the media,” Mr. Smith said.

In a statement to *Business Insurance*, the National Football League

Players Association said, “All of the plaintiffs involved are part of our player community and we look forward to learning more about the settlement.”

Ronald S. Katz, Los Angeles-based partner and chair of the national sports law practice at Manatt, Phelps & Phillips L.L.P., said the concussion litigation and settlement agreement could hinder similar future lawsuits from current players.

“Future claims in court would be more difficult because the risks of concussions are well-known now and current players are assuming

these risks when they play in the NFL,” Mr. Katz said.

“However, if a team physician, for example, was negligent in the future, there could still be a claim in court.”

Mr. Weiss said future claims from current players would be subject to provisions in the collective-bargaining agreement, such as a program established in 2011 that provides at least \$3,500 in benefits a month for players who suffer neuro-cognitive disabilities. Retired players also can receive those benefits without reducing payments they would receive under the concussion settlement, he said.

It’s unclear what role insurers will play in the concussion settlement. Last year, the NFL sued 32 insurers in California and New York state courts over 187 commercial general liability policies that were issued within the past 60 years.

The NFL claimed the insurers — including Fireman’s Fund Insurance Co., Travelers Cos. Inc., American International Group Inc., XL Group P.L.C., and Chubb Corp. — breached their duty to defend the NFL against concussion-related liability claims. Fireman’s Fund and Travelers declined comment, while AIG, XL and Chubb did not return a reporter’s calls last week about the NFL litigation settlement.

In May, California’s 2nd District Appellate Court upheld a ruling from the Los Angeles County Superior Court, which halted the lawsuit pending the outcome of litigation in New York.

A hearing was set to be held last week in New York Supreme Court for the parallel case in that state.