SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

----------X

ALTERRA AMERICA INSURANCE COMPANY,

Plaintiff,

- v -

NATIONAL FOOTBALL LEAGUE, NFL PROPERTIES, LLC,TIG INSURANCE COMPANY, NORTH RIVER INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, CENTURY INDEMNITY COMPANY, CHARTIS PROPERTY CASUALTY COMPANY, DISCOVER PROPERTY & CASUALTY INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, GREAT NORTHERN INSURANCE COMPANY, GUARANTEE INSURANCE COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, ONE BEACON AMERICA INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY, ILLINOIS UNION INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, ARROWOOD INDEMNITY COMPANY, CHARTIS SPECIALTY INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, CONTINENTAL INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, MUNICH REINSURANCE AMERICA, INC.,NEW ENGLAND REINSURANCE CORPORATION, ST. PAUL PROTECTIVE INSURANCE COMPANY, TRAVELERS CASUALTY & SURETY COMPANY, TRAVELERS INDEMNITY COMPANY, TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, VIGILANT INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY, XL INSURANCE AMERICA, INC, FIREMAN'S FUND INSURANCE COMPANY (3RD PARTY DEFT.), AMERICAN GUARANTEE AN LIABILITY INSURANCE COMPANY (3RD PARTY DEFT.), CHARTIS SELECT INSURANCE COMPANY (3RD PARTY DEFT.), and CHARTIS EXCESS LTD. (3RD PARTY DEFT.),

Defendants.

----------X

INDEX NO. 652813/2012

MOTION DATE --

MOTION SEQ. NO. 030

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 030) 779, 780, 781 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The issue in these two actions is whether the NFL is entitled to insurance coverage of the NFL's settlement of litigations brought by the NFL Players for sustained long-term neurological injuries caused by concussive impacts during their football-playing careers; the insurers oppose such coverage on a variety of grounds.

The *Alterra America Ins. Co. v National Football League* (Index No. 652813/2012) (*Alterra*) action and *Discover Prop. & Cas. Co. v National Football League* (Index No. 652933/2012) (*Discover*) action were commenced in 2012 to determine the rights and obligations of the National Football League (NFL) and NFL Properties, LLC (NFL Properties) (collectively, NFL Parties) and more than 30 insurance companies with respect to coverage for numerous lawsuits filed by former professional football players (Players), their representatives, or family members against the NFL Parties, claiming that the Players sustained long-term neurological injuries caused by concussive and sub-concussive impacts during their football-playing careers in the NFL. (S*ee Alterra*[1] Amended Complaint, NYSCEF Doc. No. [NYSCEF] 4; *Discover* Amended Complaint, NYSCEF 280.) The allegations in the underlying head injury lawsuits are detailed in the Players' complaint, while the backgrounds for the two actions are set forth in the Joint Statement of Undisputed Facts and prior decisions. (*See Discover* NYSCEF 665, Joint Statement of Material Facts; NYSCEF 277, October 28, 2016 Decision and Order; NYSCEF 574, October 4, 2019 Decision and Order. *See Alterra* NYSCEF 5, Players' Amended Master Administrative Long-Form Complaint; NYSCEF

[1] Citations to *Alterra* are to documents in the NYSCEF file for Index No. 652813/2012, while citations to *Discover* are to documents in the NYSCEF for file Index No. 652933/2012. The index numbers will not be repeated for each citation.

661, Joint Statement of Material Facts; NYSCEF 403, October 28, 2016 Decision and Order; NYSCEF 502, Referee's Memorandum and Order.)

In *Alterra*, the NFL Parties move, pursuant to CPLR 3212, for partial summary judgment against TIG Insurance Company, The North River Insurance Company (North River), United States Fire Insurance Company (US Fire) (collectively, TIG), and American Guarantee & Liability Insurance Company (AGLIC) and for declaratory relief (mot. seq. no. 030).[2]

[2] Motion seq. no. 030 by the NFL Parties is for partial summary judgment against TIG and, where indicated, AGLIC: (1) "declaring that any reasonableness-of-settlement defenses to coverage fail, and dismissing any such defenses asserted by TIG or AGLIC"; (2) "declaring that TIG denied coverage, thereby releasing the NFL Parties from any requirement to obtain TIG's consent to the underlying settlements as a condition of obtaining coverage, and dismissing TIG's consent-related cross-claims and affirmative defenses"; (3)(a) "declaring that, for purposes of establishing trigger of coverage, the players' causation allegations in the underlying Head Injury Lawsuits are assumed"; (b) "declaring that based on that predicate, each individual player's bodily injury should be deemed to have occurred from the date of first NFL play and to have continued through to the earlier of his death or underlying lawsuit, thereby triggering coverage under all policies in effect during that period"; and (c) "dismissing TIG and AGLIC's 'trigger' cross-claims and affirmative defenses"; (4)(a) "declaring that the underlying head injury claims allege bodily injuries that are caused by an 'occurrence' and are not subject to any 'expected or intended' exclusions," and (b) "dismissing TIG and AGLIC's corresponding cross-claims and affirmative defenses"; (5) "declaring that each claim by or on behalf of an individual player in the underlying head injury litigation constitutes at least one separate 'occurrence' for purposes of any per-occurrence policy limits, and dismissing any TIG defense or cross-claim to the contrary"; (6) "declaring that the underlying head injury claims are not subject to any aggregate limits applicable only to 'products-completed operations' under TIG's policies, and dismissing TIG's corresponding affirmative defenses"; and (7)(a) "declaring that the 2000-2002 policies sold by TIG obligate TIG to pay for bodily injuries that occur during and continue after those policy periods (rather than paying on a pro rata, time-on-the-risk basis)," and (b) "dismissing TIG's corresponding affirmative defenses." (*Alterra* NYSCEF 779, Notice of Motion.)

In *Discover*, the NFL Parties move, pursuant to CPLR 3212, for partial summary judgment against TIG and AGLIC and for declaratory relief (mot. seq. no. 033).[3] TIG and AGLIC (together, Insurers) move, pursuant to CPLR 3212, for summary judgment declaring that they are not obligated to indemnify the NFL Parties in the underlying head injury lawsuits, and for summary judgment dismissing the cross-claims of the NFL Parties, as well as summary judgment in favor of TIG on its cross-claims against the NFL Parties (mot. seq. nos. 034,[4] 036,[5] 037,[6] 038[7]).[8]

Legal Standard

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Failure to make such prima facie showing "requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citation omitted].) Once such

---

[3] Motion seq. no. 033 by the NFL Parties is for partial summary judgment against TIG and, where indicated, AGLIC, and seeks the same relief as *Alterra* motion seq. no. 030. (*Discover* NYSCEF 960, Notice of Motion.)

[4] Motion seq. no. 034 is (1) by TIG and AGLIC "declaring that Insurers do not owe any obligation to indemnify [the NFL Parties] in connection with Underlying Lawsuits and dismissing the NFL Parties' Cross-Claims" (*Discover* NYSCEF 328); and (2) granting summary judgment on TIG's cross-claims against the NFL Parties (*Discover* NYSCEF 709; *Alterra* NYSCEF 706). (*Discover* NYSCEF 827, Notice of Motion.)

[5] Motion seq. no. 036 is by TIG and AGLIC and seeks the same relief as motion seq. no. 034. (*Discover* NYSCEF 942, Notice of Motion.)

[6] Motion seq. no. 037 is by TIG and AGLIC and seeks the same relief as motion seq. no. 034. (*Discover* NYSCEF 942, Notice of Motion.) (*Discover* NYSCEF 948, Notice of Motion.)

[7] Motion seq. no. 038 is by TIG and seeks the same relief as motion seq. no. 034. (*Discover* NYSCEF 954, Notice of Motion.)

[8] This decision resolves motion seq. no. 030 in *Alterra* (652813/2012) and motion seq. nos. 033, 034, 036, 037, and 038 in *Discover* (652933/2012).

proof has been offered, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. (*See Zuckerman*, 49 NY2d at 562.) In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. (*See Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007].) "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment. (*Zuckerman*, 49 NY2d at 562 [citations omitted].)

Generally, an insured has the initial burden of establishing coverage under an insurance policy. (*See Consol. Edison Co. of NY v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002].) Once coverage is established, an insurer bears the burden to defeat coverage. (*Id*.) "[P]olicies of insurance, drawn as they ordinarily are by the insurer, are to be liberally construed in favor of the insured." (*Miller v Continental Ins. Co.*, 40 NY2d 675, 678 [1976] [citations omitted].) When "an insurer wishes to exclude certain coverage from its policy, it must do so in 'clear and unmistakable' language." (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984] [citation omitted].) Exclusions "are not to be extended by interpretation or implication but are to be accorded a strict and narrow construction." (*Id*. [citations omitted].) "Where the provisions of the policy are 'clear and unambiguous, [the provisions] must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement.'" (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986] [citations omitted].) "The policy must, of course,

be construed in favor of the insured, and ambiguities, if any, are to be resolved in the insured's favor and against the insurer." (*Id*. [citations omitted].)

Timeliness of Notice of Claim

The TIG and AGLIC policies contain provisions requiring the NFL Parties to notify the insurers "as soon as practicable" of an occurrence or an offense which may result in a claim. (*Alterra* NYSCEF 667, TIG Primary Policy at 22/91.) It is undisputed that the retired Players began filing head injury lawsuits against the NFL Parties on July 19, 2011, and that the NFL Parties notified TIG and the other general liability insurers of the first head injury lawsuits 20 days later, on August 8, 2011. (*Alterra* NYSCEF 661, Joint Statement of Undisputed Facts ¶¶1, 40.)

"Where, as here, an insurance policy requires that the insured provide notice as soon as practicable, such notice must be provided within a reasonable time under all the circumstances of the case," and "the question of reasonableness is normally a factual issue for a jury." (*Natl. Interstate Ins. Co. v Interstate Indem. Co.*, 215 AD3d 593, 594 [1st Dept 2023] [citations omitted].) By contrast, whether a particular document constitutes a "claim" that would require notice to an insurer is typically a question of law. (*Evanston Ins. Co. v GAB Bus. Servs., Inc*., 132 AD2d 180, 184-85 [1st Dept 1987].) In New York, a notice delay of less than three months has been held "unreasonable as a matter of law and discharged insurers of coverage obligations." (*Minasian v IDS Prop. Cas. Ins. Co.*, 676 Fed Appx 29, 31 [2d Cir 2017] [collecting cases]; *see also Juvenex Ltd. v Burlington Ins. Co*., 63 AD3d 554, 554 [1st Dept 2009] [two-month delay]; *Am. Home Assur. Co. v Republic Ins. Co*., 984 F2d 76, 78 [2d Cir 1993] [36-day delay], *cert denied* 508 US 973 [1993]; *Safer v Govt. Employees Ins. Co.*,

254 AD2d 344, 345 [2d Dept 1998] [more than one-month delay]; *Winstead v Uniondale Union Free Sch. Dist*., 201 AD2d 721, 723 [2d Dept 1984] [one-month delay].) No showing of prejudice is required. (*See Freeway Co., LLC v Tech. Ins. Co., Inc*., 138 AD3d 623, 624 [1st Dept 2016].)

The Insurers contend that the NFL Parties breached their contractual obligation to provide timely notice of the claims in the head injury lawsuits, and further failed to provide a reasonable excuse for the delay. The Insurers seek a declaration that they are not obligated to indemnify the NFL Parties for the multidistrict litigation (MDL) settlements since the NFL Parties submitted an untimely notice of claim.

The NFL Parties contend that they timely notified the Insurers of the underlying head injury lawsuits, and that the Insurers either expressly denied coverage or asserted multiple proposed coverage defenses and reserved the right to deny coverage. Thus, the NFL Parties maintain that they were not required to obtain the consent of the Insurers to enter the MDL settlements. Nonetheless, the NFL Parties further assert that they provided the Insurers with regular updates regarding the underlying head injury lawsuits, including settlement negotiations and agreements. Finally, the NFL Parties argue that the Insurers waived their late notice by their delays, but that was not noticed as a basis for the NFL's motion for summary judgment.

The Insurers argue that the NFL Parties knew of the claims well before the *Maxwell* class action was filed in July 2011. (*Discover* NYSCEF 964, *Maxwell* Complaint.) The Insurers point to many facts such as injuries the Players sustained prior to November 20, 2000 and research funded by the NFL. (*Discover* NYSCEF 833, Paul Tagliabue depo tr; NYSCEF 834, Dr. Elliot Pellman depo tr; NYSCEF 836, Paul

Hicks depo tr; NYSCEF 845, Summary of 88 Plan; NYSCEF 835, Roger Goodell depo tr; NYSCEF 846, Sep. 10, 2009 NFL Retired Player Study; NYSCEF 848, Boston University April 20, 2010 Press Release.) However, with these motions, the Insurers focus on three events to establish the NFL Parties' prior knowledge of the claims. First, on October 28, 2009, the NFL Commissioner testified before a Congressional Committee about head injuries, including concussions, sustained in the NFL. (*Discover* NYSCEF 847, Excerpt from 2009 Congressional Hearing.) Second, on October 29, 2010, the NFL Parties' outside counsel received a two-page chart from the law firm Seegard Weiss LLP (Seegard Weiss), a well-known personal injury firm (Seegard Chart), which was forwarded to the NFL. (*Discover* NYSCEF 854, Oct. 29, 2010 email from Brad S. Karp[9] to Lyle Jeffrey Pash[10]; *Discover* NYSCEF 837, Pash depo tr at 135:16-140:5; 140:8-144:8; 145:7-146:22; 147:17-160:24; 161:4-163:20; 157:19-160:10; 160:11-160:24.) The Seegard Chart is entitled "NFL Claims," and lists ten anonymous players with five columns entitled "current benefits & employment," general health "complaints" (such as headaches, depression, and similar conditions), and a summary of "concussions/head injuries." (*Discover* NYSCEF 854, Chart.) It also references health "benefits." (*Id*.) On December 5, 2011, Seeger Weiss brought a personal injury litigation against the NFL, more than 13 months after it sent the Seegard Chart to Karp and nearly five months after *Maxwell* was filed. (*Finn v Natl. Football League*, No. 2:11-

[9] Karp of Paul, Weiss, Rifkind, Wharton & Garrison LLP was the NFL's outside counsel. (*Discover* NYSCEF 837, Pash depo tr at 145:7-20.)
[10] Pash was the NFL's general counsel. (*Discover* NYSCEF 837, Pash depo tr at 20:7-9.)

cv-07067 [D.N.J].) Third, on November 4, 2010, Paul Hicks[11] sent an email to the NFL Commissioner Roger Goodell with a 29-page PowerPoint presentation titled "Strategic Communications Review" "The Gathering Storm" "November 5, 2010." (*Discover* NYSCEF 857, PowerPoint; NYSCEF 841, Peter Abitante[12] depo tr at 141:15-143:3; 144:8-146:20; 147:17-149:18.)

As to the Seegard Chart, the NFL Parties argue that the Insurers fail to identify any specific "demand for money or services" that was asserted against the NFL before *Maxwell* was filed. The court agrees that the chart is insufficient to constitute a claim because it does not make a pre-suit "demand for money or services," which is a necessary element of any "claim" that would trigger an insured's obligation to notify its insurers. (*In re Ancillary Receivership of Reliance Ins. Co.*, 55 AD3d 43, 47 [1st Dept 2008] [counsel's letter not a "claim" where it lacks "a demand for money or services" or even "an assertion of legally cognizable damage" (internal quotation marks and citations omitted)], *affd* 12 NY3d 725 [2009]; *see also Andy Warhol Found. for Visual Arts, Inc. v Fed. Ins. Co*., 189 F3d 208, 215-16 [2d Cir 1999] [collecting cases defining "claim" as "a demand by a third party against the insured for money damages or other relief" and concluding that "the letter fails to meet the requirement of a claim because it lacks a request to the insured for damages" by injured party].) The Insurers fail to cite authority otherwise.

[11] Hicks was NFL's Executive Vice President of Communications and Public Affairs. (*Discover* NYSCEF 1066, Hicks aff ¶1.)
[12] Abitante was NFL's Vice President of Special Projects. (*Discover* NYSCEF 841, Abitante depo tr at 11:19-12:11.)

A notice obligation is triggered by identifying a specific individual asserting a "claim" against the insured. (*See e.g. Scharf v Generali - U.S. Branch*, 259 AD2d 349, 349 [1st Dept 1999] [duty to notify insurer of even a "potential claim" was not triggered where the "particular" party injured was not specified in the communication]; *Pub. Serv. Mut. Ins. Co. v AYFAS Realty Corp.*, 234 AD2d 226, 227-28 [1st Dept 1996] [notice obligation for "potential liability" was not triggered where "the person affected" was not specified in the communication], *lv denied* 90 NY2d 844 [1997].) However, the Seegard Chart, on which the Insurers rely, lists ten anonymous players which is insufficient to trigger an obligation to give notice. Therefore, the Seegard Chart is not a claim. Otherwise, the Insurers raise issues of reasonableness which are for trial. (*See Natl. Interstate Ins. Co.*, 215 AD3d at 594.)

TIG's Response/Consent

TIG insists that it has no duty to indemnify the NFL Parties for the settlements in the underlying head injury lawsuits since the NFL Parties entered the settlements without TIG's consent. The NFL Parties counter that TIG's disclaimer of coverage relieved them of any obligation to obtain consent prior to settling the head injury claims. TIG denies that it disclaimed coverage.

A notice of disclaimer should be "unequivocal [and] unambiguous written notice, properly served." (*Norfolk & Dedham Mut. Fire Ins. Co. v Petrizzi*, 121 AD2d 276, 277 [1st Dept 1986], *lv denied* 68 NY2d 611 [1986].) An insurer's denial of liability under an insurance policy justifies the insured's settlement of those claims without the insurer's consent. (*See J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 151 AD3d 632, 633 [1st Dept 2017].) Furthermore, an insurer's unreasonable delay in dealing with an insured's claim

under an insurance policy constitutes a denial of coverage under the policy that justifies an insured's settlement of those claims without the insurer's consent. (*Id*.) In addition, an insurer's commencement of pre-settlement coverage litigation constitutes a repudiation of liability under the policy for the claims against the insured, relieving the insured of its obligation under the policy to obtain the insured's consent before agreeing to pay for those claims. (*See Century Indem. Co. v Brooklyn Union Gas*, 170 AD3d 632, 633 [1st Dept 2019].)

Here, a review of the submissions reveals nothing to conclusively establish that TIG gave the NFL Parties an unequivocal and unambiguous written notice of disclaimer of all the claims in the underlying head injury actions. The submissions indicate that in January 2012, in response to the NFL Parties' tender, TIG wrote, in part, that "[a]lthough TIG's coverage investigation is ongoing, it nevertheless agrees to defend the NFL Defendants to connection with the five pending Player Concussion Suits. TIG's defense is subject to the terms set out in this letter and to TIG's full reservation of rights, including the rights reserved in this letter." (*Discover* NYSCEF 863, Jan. 11, 2012 TIG letter at 3/28; *see* NYSCEF 865, Jan. 25, 2012 TIG letter at 3/31.) The submissions also reveal that TIG declined to defend certain player concussion lawsuits that had been dismissed (*Discover* NYSCEF 863, Jan. 11, 2012 TIG letter at 3/28; NYSCEF 865, Jan. 25, 2012 TIG letter at 3/31) and disclaimed "any obligation to provide coverage under any of its policies to compensate the NFL … for intentional wrongdoing." (*Discover* NYSCEF 863, Jan. 11, 2012 TIG letter at 21/28; NYSCEF 865, Jan. 25, 2012 TIG letter at 23/31.)

TIG maintains that its reservation of rights and preservation of its coverage defenses do not constitute a denial of coverage. However, as noted, in addition to asserting a reservation of TIG's rights, the response to the NFL Parties' tender contains certain disclaimers of coverage. Furthermore, a letter from an insurer to its insured that contains a reservation of the insured's right to disclaim coverage under its policy "has no relevance to the question whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage." (*Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029 [1979] [citation omitted], *rearg denied* 47 NY2d 951 [1979].) "The purpose of a reservation of rights is to prevent an insured's detrimental reliance on the defense provided by the insurer." (*Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 37 [1st Dept 2006].) A reservation of rights letter is relevant only to rebut a claim that the insurer waived the right to disclaim by defending the insured. (*See Hartford Ins. Co.*, 46 NY2d at 1029 [1979].)

TIG also insists that its active engagement with the NFL Parties regarding the underlying head injury lawsuits and payment of approximately $20 million in defense costs do not amount to a denial of coverage. However, an offer to defend may nevertheless constitute a disclaimer, where the insurer reaffirms that it would not indemnify the insured. (*See DeSantis Bros. v Allstate Ins. Co.*, 244 AD2d 183, 184 [1st Dept 1997], *lv denied* 91 NY2d 808 [1998].) The filing of cross-claims in the *Alterra* and *Discover* actions in August 2012 seeking declaratory relief as to its duty to indemnify the NFL in the underlying head injury actions (*Alterra* NYSCEF 8; *Discover* NYSCEF 20), and reaffirmed upon amendment (*Alterra* NYSCEF 409; *Discover* NYSCEF 305), coupled with TIG's failure to provide any indemnity to date, at the very least raises a

triable issue of fact as to whether TIG repudiated liability under its policies for the claims against the NFL Parties. (*See Century Indem. Co.*, 170 AD3d at 633.) Thus, the request for summary judgment based on lack of the Insurers' consent is also denied.

Coverage Under the Policies

The NFL Parties argue that TIG and AGLIC must indemnify them for the settlements in the underlying head injury actions since the head injury claims trigger coverage during all the TIG policy periods. The duty to indemnify "is determined by the actual basis for the insured's liability to a third person" and is not measured by the allegations of the pleadings. (*Servidone Const. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985].) The party seeking coverage under an insurance policy bears the burden of establishing the existence of a covered claim. (*See Consolidated Edison Co. of NY*, 98 NY2d at 218.)

In the TIG policies, the insurer agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damages'" that "is caused by an 'occurrence'" and that "occurs during the policy period." (*Alterra* NYSCEF 667, TIG Policy at 15/91.) The Players in the underlying head injury actions essentially allege that they sustained long-term neurological injuries caused by concussive and sub-concussive impacts during their football-playing careers. (*See Alterra* NYSCEF 4, Amended Complaint; *Discover* NYSCEF 280, Amended Complaint.)

Generally, New York courts apply the "'injury-in-fact'" rule to determine what "constitutes 'bodily injury' sufficient to trigger coverage" under a commercial general liability insurance policy, "where latent injury is caused by prolonged exposure" to a harmful condition. (*See Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640,

650-51 [1993].) In continuous exposure cases, an insurance policy is triggered by the onset of the disease, whether discovered or not. (*See Greater NY Mut. Ins. Co. v Royal Ins. Co.*, 238 AD2d 261, 261 [1st Dept 1997].) Where the underlying complaint does not preclude the possibility that the injury-in-fact occurred during the subject policy period, the policy is triggered. (*See United States Liab. Ins. Co. v Farley*, 215 AD2d 371, 372-73 [2d Dept 1995].)

The NFL Parties assert that under the "injury-in-fact" trigger rule, TIG and AGLIC are required to indemnify them for the settlements in the underlying head injury actions. The NFL Parties counter that head injury claims alleged in the underlying actions trigger coverage during the periods of the policies issued by TIG and AGLIC. The NFL Parties insist that where the claimants suffered long-term progressive diseases, all policies in effect along the continuum from the injurious exposure up through the earlier of death or date of lawsuit are triggered.

The NFL Parties also assert that under the "injury-in-fact" rule, the subject "bodily injury" need not have been diagnosed or even manifested through symptoms during a policy period to trigger coverage. Rather, the NFL Parties maintain that when dealing with progressive diseases, latent, cellular-level injuries, shown later to have existed during the policy period, are sufficient.

The NFL Parties further argue that the insured is not required to prove that it caused the bodily injuries alleged by the claimants in an underlying action to trigger coverage in the context of settled claims. Rather, the NFL Parties assert that for purposes of coverage, the factfinder assumes the truth of the allegations in the underlying action that the insured's conduct caused injury to the claimants.

In addition, the NFL Parties assert that at most, the insured must show the timing of when the bodily injury occurred to trigger the policies. The NFL Parties also assert that the insured need not have to establish the timing with absolute certainty, and that the policy's coverage is triggered as a matter of law so long as there is evidence that the injury more likely than not occurred during a particular policy period.

The NFL Parties counter that undisputed evidence concerning the timing of the Players' alleged injuries conclusively establish that coverage under the TIG and AGLIC policies is triggered based on the assumption that the Players' allegations are true. To support their position, the NFL Parties rely on the expert report of Jonathan Rosand, M.D., M.S.C. (*See Discover* NYSCEF 1131, Rosand Report.)

Dr. Rosand states:

> "I understand that plaintiffs (former professional football players and their families) in now settled concussion litigation filed against the National Football League alleged that head impacts the plaintiff players sustained while playing professional football caused their claimed neurodegenerative diseases—which in most cases were not diagnosed until years or decades after their playing careers ended. While there remains uncertainty regarding whether, and to what extent, different events, conditions, or behavior can contribute to the development and progression of these diseases, there is increasing support in the medical literature for an association between repetitive head impacts and subsequent neurodegenerative illness." (*Id*. at 6/49.)

He further states:

> "Repetitive head impacts are now widely acknowledged to be associated with subsequent neurodegenerative disease. In this report, however, I offer no opinion as to whether any individual's participation in professional football involved head impacts that were the factual cause of that individual's subsequently diagnosed neurodegenerative disease. Rather, as previously stated, the opinion that I am offering in this report is different and more limited. I have assumed, as I have been asked to do, the truth of the plaintiff's allegations of a causal link between repetitive head impacts sustained in professional football and their subsequently diagnosed neurodegenerative illnesses. Based on that assumption, my opinion is that plaintiff players necessarily would have experienced injurious physical processes that either began or were exacerbated

> during the time they played professional football, and that continued progressively thereafter—up through and including clinical manifestation of diseases and continuing until death." (*Id*. at 35-36/49.)

In opposition, however, TIG and AGLIC contend that the NFL Parties cannot satisfy the burden of proving that each claimant for which the NFL Parties seek coverage sustained bodily injury caused by an occurrence during one or more of the policy periods as required to trigger coverage under the policies. The Insurers concede that the liability of the NFL Parties may be assumed for insurance coverage purposes, but they dispute the assertion that the "injury-in-fact" rule absolves the NFL Parties from proving bodily injury caused by an occurrence during the policy periods in order to trigger coverage. The Insurers insist that the basic tenets of insurance coverage require the NFL Parties to prove each of the requirements of the insuring agreement in order to establish a right to coverage, even when there has been a settlement. The Insurers contend that the NFL Parties fail to present scientific evidence to establish that the injury of each claimant in the underlying head injury actions took place during the policy periods. They further argue that the existing body of medical science does not support the claim that the diseases and conditions for which the NFL Parties settled in the underlying head injury actions commenced on the first date of play in the NFL and continued progressively thereunder until diagnosis.

To support their position, the Insurers offer the expert reports of Rudolph J. Castellani, M.D. (*Discover* NYSCEF 928, Castellani Report), William B. Barr, Ph.D. (*Discover* NYSCEF 930, Barr Report), and Christopher Randolph, Ph.D. (*Discover* NYSCEF 931, Randolph Report). Dr. Castellani states:

> "1. Alzheimer's disease (AD), Parkinson's Disease ([PD]), and amyotrophic lateral sclerosis (ALS) are neurodegenerative diseases.

> 2. Major risk factors for AD, PD, and ALS are age and genetics – some having pathogenic mutations (genetic cause).
> 3. The cause of neurodegenerative diseases is otherwise unknown.
> 4. No environmental cause (such as 'sports exposure'), or any kind, has been shown for AD, PD, or ALS.
> 5. There is no established or accepted science upon which any expert could base an opinion with a reasonable level of medical certainty that there is a defined process or progression from exposure to contact sports or any other environmental factors to 'manifestation' or diagnosis of AD or any other neurodegenerative disease." (*Discover* NYSCEF 928, Castellani Report at 4/59.)

Dr. Barr opines:

> "While investigations on football exposure, CTE, and other neurological conditions including AD, PD, ALS and Neurocognitive impairment are ongoing, the results of these investigations are considered preliminary in nature within the scientific community leaving one unable to make any reliable conclusions. Based on a detailed review of the current state of the science, no credible expert could say with a 'reasonable degree of certainty' that there is evidence from empirical studies indicating a causal relationship between playing football in the NFL and the development later in life of any one of the Qualifying Diagnoses listed in the Settlement." (*Discover* NYSCEF 930, Barr Report at 10/22.)

Dr. Randolph states:

> "The long-term consequences of repetitive sub-concussive head trauma or concussions in contact sports, if any, are unknown due to lack of appropriately controlled studies; but retired NFL Dr. Castellani states, in part: players (a cohort with arguably the highest level of exposure to repetitive head injuries) do not appear to exhibit any type of identifiable or unique chronic or progressive neurological disease." (*Discover* NYSCEF 931, Randolph Report at 7-8/24.)

> "[E]ven in the cases of negotiated settlements, there can be no duty to indemnify

unless there is first a covered loss." (*Servidone Constr. Corp.*, 64 NY2d at 423.) Here, the court simply cannot conclude from the submissions that coverage has been established as a matter of law. The report of the NFL Parties' expert does not definitively establish bodily injuries caused by an occurrence during the policy periods. In fact, the expert expressly states that he offers no opinion as to whether any of the Player's participation in professional football involved head impacts that were the factual

cause of that individual's subsequently diagnosed neurodegenerative disease. (*Discover* NYSCEF 1131, Rosand Report at 6/49.)

Furthermore, summary judgment is not appropriate where the parties offer conflicting medical expert opinions. (*See Getselvich v Ornstein*, 219 AD3d 1493, 1494 [2d Dept 2023].) Thus, the competing requests for summary judgment on the issue of whether the head injury claims in the underlying actions trigger coverage under the Insurers' policies are denied.

Reasonableness of Settlement

The parties also dispute the reasonableness of the MDL settlements. A party who voluntarily settles a claim must demonstrate that it was "legally liable to the party whom [it] paid and that the amount of the settlement was reasonable to recover against an indemnitor." (*Jemal v Lucky Ins. Co.*, 260 AD2d 352, 353 [2d Dept 1999] [citations omitted].) At the very least, the conflicting expert reports above demonstrate that triable issues of fact exist as to whether the NFL Parties are legally liable to the claimants in the underlying head injury actions.

Similarly, a triable issue of fact exists as to the reasonableness of the amount of the settlements. The NFL Parties offer an expert report from Professor Tom Baker, essentially stating that the settlements of the underlying injury claims were reasonable. (*See Discover* NYSCEF 1076, Baker Report at 36/73 ¶59.) On the other hand, TIG submits an expert report from James M. Campbell, Esq., who opined that "the MDL Settlement was not reasonable in terms of the NFL Parties' potential liability for tort damages." (*Discover* NYSCEF 1087, Campbell Report at 48/58.) The court simply cannot determine whether the settlements were reasonable as a matter of law based on

the submissions. Thus, the requests for summary judgment as to the reasonableness of the MDL settlements are denied.

Products-Completed Operations Hazard ("PCOH") Aggregate Limits

AGLIC seeks summary judgment essentially arguing that the 2001-2002 TIG Primary Policy $1 million PCOH aggregate limit does not apply to the underlying head injury claims. The NFL Parties agree but assert that future claims may trigger the policy. TIG argues that the aggregate limit applies since the court determined that the repeated head impacts leading to the Players' injuries "constitute multiple occurrences." (*Discover* NYSCEF 1050, Decision and Order at 13 [mot. seq. no. 026].)

The TIG Primary Policy defines PCOH to include "all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' except: (1) Products that are still in your physical possession …" (*Discover* NYSCEF 671, TIG Primary Policy at 25/91.) The term "your product" is defined as "[a]ny good or products, other than real property, manufactured, sold, handled, distributed or disposed by (1) You; (2) Others trading under your name; or (3) A person or organization whose business or assets you have acquired; and … Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products." (*Id*. at 26/91.) The TIG Primary Policy further states that "Your product" includes "a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your product'; and b. The providing of or failure to provide warnings or instructions." (*Id*.) In addition, the TIG Primary Policy states that "'Your product' does not include vending machines or other property rented to or located for the use of others but not sold." (*Id*.)

AGLIC and the NFL Parties argue that the language of the provision forecloses the application of the PCOH to intangible products. The court previously determined that the ordinary meaning of the term "product" encompasses intangible items, and that NFL football games are products that the NFL markets as a commodity. (*See Discover* NYSCEF 1050, Decision and Order at 21 [mot. seq. no. 026].) However, the parties advance no arguments for the court to determine whether the PCOH aggregate limits apply. Thus, the court cannot conclusively determine whether the NFL parties suffered $51 million in covered losses. As such, the request for summary judgment on the inapplicability of the PCOH aggregate limit is also denied.

The court has considered the balance of the parties' argument and concludes that such arguments are either without merit or do not affect the outcome.

Accordingly, it is

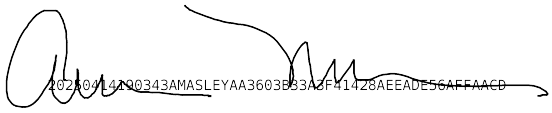
ORDERED that the motions for summary judgment by defendants the National Football League and NFL Properties LLC are denied; and it is further

ORDERED that the motions for summary judgment by defendants TIG Insurance Company, The North River Insurance Company, and United States Fire Insurance Company, and American Guarantee & Liability Insurance Company are denied; and it is further

ORDERED that the parties shall appear for a trial scheduling conference on May 21, 2025 at 9:30 a.m.; and it is further

ORDERED that motions in limine are due June 9, 2025, otherwise waived; and it is further

ORDERED that parties shall review the Part 48 Trial Procedures.



4/14/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**		X	**NON-FINAL DISPOSITION**		
		GRANTED	X **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**