



LAW & ORDER

US brain injury litigation threatens future of American football

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The foundation of American football is under attack by a new legal claim that, during 2013, generated tens of millions of dollars in legal fees, hundreds of millions of dollars in proposed settlements, and an eruption of pounding headaches for insurers.

This legal claim is premised upon newly discovered brain injuries that develop over time in athletes who suffer multiple head impacts. The litigation resulting from these claims has already spread from football to soccer, hockey and lacrosse, and promises to continue to deepen its impact both on American sports and on the insurance industry in the year ahead.

The brain injury is chronic traumatic encephalopathy (CTE), believed to result when athletes suffer blows to their head that cause the brain to move violently within the cranial fluid. This results in progressive degeneration of brain tissue, including the build-up of an abnormal protein called tau. Because the injury is progressive, many athletes experience, years after retirement, memory loss, confusion, impaired judgment, aggression, depression

and dementia. The first football player to be diagnosed with CTE was regarded as among the best ever to play his position. After being inducted into the football hall of fame in 1997, his life tragically ended in 2002 after living for years in his pick-up truck, public train stations and suffering the torment of constant pain and dementia. In the following years, many former football stars were diagnosed with CTE, with three such diagnoses coming after the players killed themselves with guns, careful to shoot themselves in the chest, thereby preserving their brains for study to explore the devastating impact of CTE.

In July 2011, the first of a series of class action lawsuits was filed against the National Football League (NFL) by former players and their families. The claimants alleged the NFL failed to train its teams and staff to properly treat head injuries and that the NFL even manipulated data to downplay the link between CTE and football. On August 29, 2013, after all such suits were combined into a single proceeding, the NFL reached a preliminary settlement for more than \$900m. On January 14, the court denied preliminary approval of the settlement on account of concern its compensatory awards were insufficient. The parties plan to

resubmit the settlement with actuarial analysis supporting the adequacy of its terms. In the meantime, class action lawsuits continue against the helmet manufacturer for the NFL.

New lawsuits have been filed by hockey players who allege they were not properly protected by their league or teams from similar head injuries. Class action lawsuits have been filed against the National Collegiate Athletic Association (NCAA), arguing college athletes also suffered from head injuries because of the NCAA's failure to adopt proper protocols for detecting and treating such injuries. High school athletes have also

begun to file similar suits. We expect more of these brain injury suits in 2014.

The suits present a wave of insurance issues: If a player played from 1995 to 1998, but was diagnosed with CTE in 2012, then which policies are triggered? Should the 1995 to 1998 policies respond, as would be the case if the player was in a car accident during those years? Or, should all policies from 1995 to 2012 respond, as if the player's brain was being injured by a toxic disease like asbestosis? If a sports team or league failed to implement proper rules to help protect against head injuries, is that really an "occurrence" that directly caused damage within the meaning of a general liability policy? If millions of dollars are paid to conduct "medical monitoring" to test athletes for CTE, then can these costs really be said to constitute covered "damages" on "account of" bodily injury, as would be necessary for coverage to exist?

As CTE becomes more easily diagnosable, insurers can expect the number of such claims, and their costs, to rise. Of course, CTE suffered by an athlete may not be far removed from CTE arising from a car accident or a fall at a grocery store. In this regard, the insurance coverage battles arising from the CTE sports claims in 2014 are destined to have significant and far-reaching implications for the insurance industry. ■



An American football NFC Championship game earlier this month
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Integration, integration, integration



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A company's reputation for success can grow exponentially while deals are being done but in 2011 the *Harvard Business Review* found more than 70% of corporate acquisitions failed to create the value expected by the buyer, largely because buyers either did not integrate the companies they bought or in trying to integrate them

destroyed whatever advantage had made the target worth buying.

How can today's crop of successful buyers and those who wish to join them ensure their recent acquisitions really are successful and deliver on their promises of value? Here are five things to think about.

1) It is a people market – make sure you have a clear strategy to retain the target's key people post-acquisition. Plan for succession at the due diligence (pre-contract) stage and do not rely on "natural wastage" to reduce

headcount – your most ambitious and talented employees are the ones most likely to get up and go;

2) Legacy systems can destroy synergy value but migration must be done well – make sure it is fully factored into your valuation and reflected in your purchase price;

3) Outsourcing anything material takes time to deliver savings and is vulnerable to the same integration risks as the acquisition itself. Until these projects truly end in they are more likely to

worsen your combined ratio than improve it;

4) Corporate culture is not what is written on your website, it is the repetition of behaviours people see in their managers and peers as leading to reward. This is not something you can leave to chance or to a series of orientation workshops for your new colleagues – transparent management and leadership throughout the merged corporate group is essential; and

5) An integration plan is as important as due diligence to ensure

you get what you pay for. The two processes can complement each other: a good due diligence report will include recommendations that form part of the integration process and an integration plan will highlight areas for the due diligence team to investigate.

It is very easy to get caught up in the process of acquiring the target and lose sight of what happens once the contracts are signed, but integration appears to be essential to a deal's ultimate measure of success, namely the creation of shareholder value. ■