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**Nationwide**

## CTE: LEGAL AND INSURANCE ISSUES

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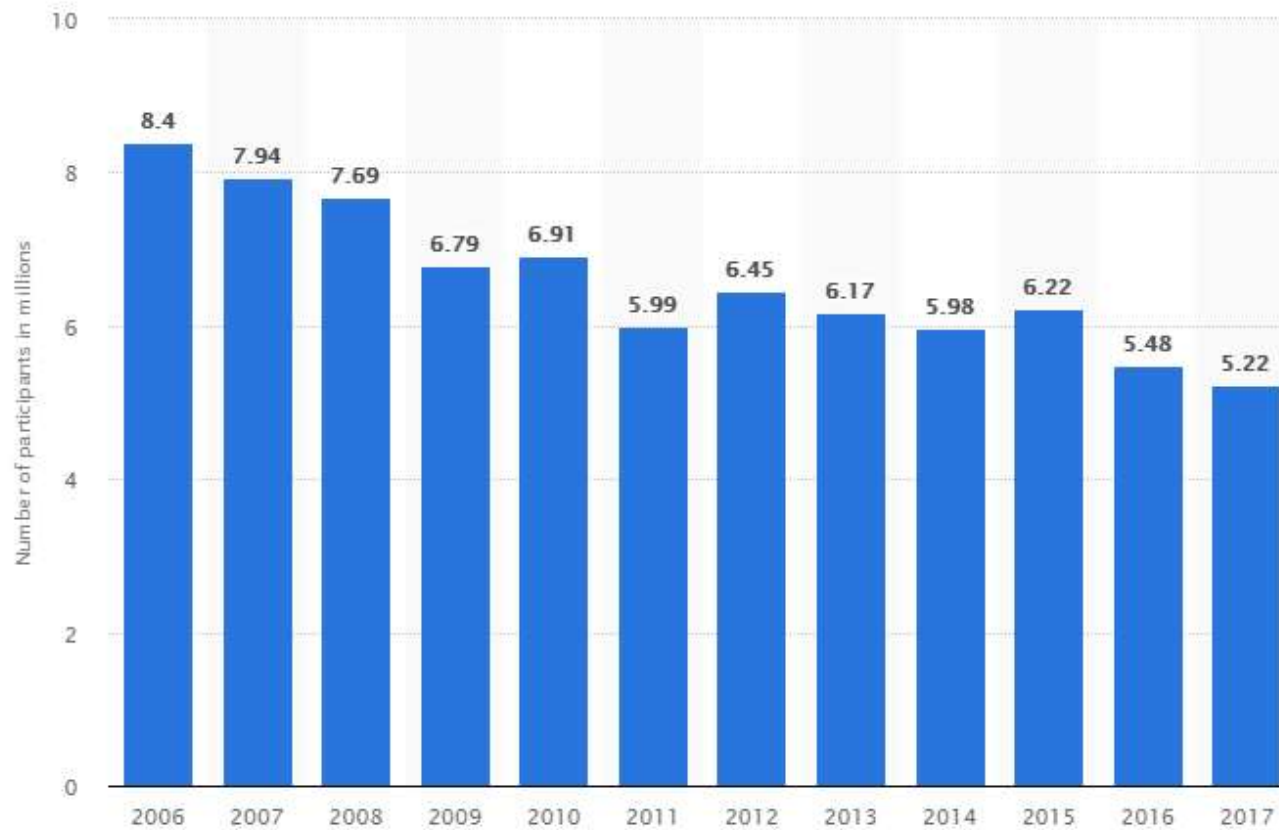
# Outliers

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Recently, the plaintiffs' bar has sought to bring class action litigation and other high dollar claims for exposures unrelated to a defined injury event and historically not thought to be covered by commercial general liability ("CGL") policies.

- ❖ The risk exposure occurs when a group of injured athletes sues an athletic organization, such as the NFL or a youth sports league.
- ❖ The defendant organization then seeks defense coverage and indemnification from its insurer(s).
- ❖ This is not the traditional class action risk commonly experienced by insurers (e.g. class action directly against the insurer for ambiguous policy language, improper claims handling procedures, flawed rates, etc.).

## Number of participants in tackle football in the United States from 2006 to 2018 (in millions)



Data visualized by  + a b l e a u

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Chicago Tribune

## Youth football participation declines as worries mount about concussions, CTE



# General Liability Insurers

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Defendants look to general liability insurers for defense or for reimbursement of defense costs associated with such litigation and/or indemnification for the losses they incurred.

- ❖ The proliferation of these cases and increased scope of potential liability raise a multitude of liability and coverage issues for insurers who issue CGL or other policies to sports and/or education organizations.

# Liability under CGL Policy

## Standard Policy Language

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Bodily Injury is defined in the ISO Commercial General Liability Coverage Form as:

- ❖ “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

Occurrence is defined in the ISO Commercial General Liability Coverage Form as:

- ❖ “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

# Methods for Making Recoveries

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- Class Action

- ❖ Must share common issues

- Individual Lawsuits

- ❖ If Class Action pending, must “opt out” of class

# Problems/Benefits with Class Action

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- Benefits for Both Sides
  - ❖ NFL Experience
- Reason to Fight Class Certification
  - ❖ NHL Experience
- Problems with Class Action
  - ❖ NCAA Experience



NHL

## Judge: No Class-Action Status for Ex-NHLer Concussion Case



**The New York Times**

**NCAA'S \$75M Concussion Settlement On Hold After Notice Glitches**



# Medical Monitoring Cases

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- Medical Monitoring
- What are the arguments that trigger a claim?

# Individual Litigation

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- Multiplicity of Defenses
- Allocation of Liability
- Sports played at different levels  
High School, college, professional
- High Profile Recent Cases
  - ❖ Junior Seau
  - ❖ Aaron Hernandez

**The New York Times**

***Family of Junior Seau  
Settles Case Against N.F.L.***



The former N.F.L. linebacker Junior Seau with his daughter Sydney in 2011. He committed suicide a year later. Denis Poroy/Associated Press

**The New York Times**

***Aaron Hernandez's Family Drops  
C.T.E. Suit Against N.F.L., for Now***



The former N.F.L. tight end Aaron Hernandez in March at his trial in the killings of two men in Boston.  
Pool photo by Elise Amendola



# Mitigating Strategies

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The following strategies may mitigate the risks associated with concussions and other youth athletic injuries:

- ❖ adoption of policy exclusions;
- ❖ modification of coverage limits;
- ❖ ensuring that rates consistently reflect updated rate indications based on actuarially supported loss and expense experience;
- ❖ product modification to offer buy back coverage at an appropriate and additional rate; and
- ❖ aggressive and affirmative defense of claims.

The duty of any insurer to defend and/or indemnify is likely to vary based on the facts and circumstances of each case, the type of policy, and the specific terms, scope of coverage and limitations of each specific underlying policy.

# Defenses

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Insurers have raised a number of defenses regarding liability for these claims to the extent the injuries:

- 1) occurred outside of policy periods;
- 2) do not constitute “bodily injury” as defined in the policies;
- 3) do not constitute an “occurrence” as defined in the policies;
- 4) were caused by the intentional conduct of the insured organization;
- 5) were or should reasonably have been expected or intended by the insured organization; or
- 6) constitute known losses, pre-existing conditions, losses in progress, and/or that were otherwise non-contingent and non-fortuitous.



# Future Issues

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- Safety Factors
- Impact of Real Time Testing
- Assumption of Risk
- Threat to Viability of Contact Sports

## The New York Times

### *Ivy League Football Saw Large Reduction in Concussions After New Kickoff Rules*



Columbia University waiting to take the field against Dartmouth in a matchup in Hanover, N.H., last season. A study has found that a change in kickoff rules for the Ivy League has resulted in a reduction in concussions. John Tully for The New York Times

## **Summary of Big Ten - Ivy League Concussion-Related Initiatives**

The Ivy League has been a leader in addressing issues regarding concussions in intercollegiate athletics, including conducting several sport-specific studies, adopting changes designed to promote student-athlete safety, and supporting ongoing and future research.

### **I. Ivy League Sport-Specific Concussion Studies and Actions**

Between 2010 and 2012, the Ivy League conducted six separate studies regarding concussions in the following sports: football, men's and women's lacrosse, men's and women's ice hockey, and men's and women's soccer (combined study as the rules are the same for men's and women's soccer). A special concussion committee, which oversaw these studies, was chaired by two Ivy League presidents who are medical doctors and included Ivy League team physicians, athletic trainers, administrators and expert consultants.

The Ivy League Council of Presidents adopted all of the recommendations as presented, with the caveat that as information and research regarding concussion remain evolving areas, the Ivy League will continue to monitor the research, data, best practices and other information regarding concussions and cumulative head trauma to determine if any of the adopted recommendations need to be revisited in the future.

All of the studies included an enhancement of existing education of student-athletes and coaches regarding the signs and symptoms of concussions, emphasizing the potential long-term risks of repetitive brain trauma and stressing the need to report and not play with any symptoms of a concussion.

Based on the preliminary analysis of the data, beginning with the 2013-14 academic year, wrestling and rugby were also identified as sports with a high incidence of concussion. Accordingly, reviews of rugby and wrestling were conducted in 2015-16 and recommendations went into effect for the 2016-17 academic year.

## II. Research Collaboration with the Big Ten Conference

In June of 2012, the Big Ten and the Ivy League, in conjunction with the Big Ten Committee on Institutional Cooperation (CIC), began a co-sponsored, cross-institutional research collaboration to study the effects of head injuries in sports. This historic collaboration between the Big Ten and the Ivy League will extend and enhance the work already undertaken by both conferences over the past several years in their prior and ongoing efforts to address issues regarding concussions in intercollegiate athletics.

Participants in the collaboration include researchers and medical professionals from all Ivy League and Big Ten schools. The world-class academic and research capabilities of the institutions will help to promote a collaborative and collegial atmosphere to address a burgeoning issue impacting the welfare of athletes at all levels of sport. Through academic research and shared resources, the collaboration will promote positive and constructive change for injury assessment and improved long-term outcomes.

In July 2013 through 2017 summits involving participants from each Ivy League and Big Ten school provided an opportunity to review the current clinical and research efforts that exist on each campus and allowed the group to identify short and long-term areas of emphasis to address as the collaboration progresses.

# Q&A/Conclusion

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