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Trial Court Holds Insurers Have Pro Rata Duty to Defend in NHL Concussion Suits

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In the recent case of *NHL v. TIG Ins. Co.*, 2022 NY Slip Op 22213 (N.Y. Sup. Ct. June 24, 2022), Justice Melissa A. Crane of the New York Supreme Court held that insurers for the National Hockey League ("NHL") from 1982 to 2014 had a duty to defend the NHL, with counsel of the NHL's choosing, against concussion litigation brought against the league by a putative class of all retired NHL players.

The concussion lawsuits were filed beginning in November 2013 and were transitioned into a multi-district litigation in August 2014. The NHL provided notice of the litigation to its insurers in late 2013 to front the defense costs under a reservation of rights, and made partial payments of almost $20 million. The NHL brought the suit to recover the unpaid portions of its defense costs. The NHL argued that the insurers have a duty to pay reasonable defense costs and also sought a declaration that the insurers may not allocate any defense costs to NHL's self-insured years (i.e., before 1982 and after 2014). The insurers argued that summary judgment was not appropriate because the NHL should have tendered its defense to the insurers instead of retaining counsel and requesting reimbursement.

The court rejected the insurers' argument, noting that the insurers waived their right to control the NHL's defense in the concussion action by failing to disclaim coverage timely and by making partial payments towards the NHL's independent counsel over the course of several years. Further, because of the defendants' reservations of rights, the NHL was entitled to counsel of its choosing in any event.

As to allocation of defense costs, Justice Crane held that allocation to self-insured years is appropriate because the policies at issue only apply to injury that occurs during each policy period. Justice Crane noted that the NHL did not carry insurance for approximately 57 of the 97 years that the concussion litigation addressed. The court adopted a pro rata allocation but did not determine which pro rata method to apply. Justice Crane thus denied the motion as to method of allocation, without prejudice to a new motion by the insurers to determine which pro rata approach to apply.

This case illustrates the concepts of waiver by payment, as well as the risk organizations take in becoming self-insured for certain policy years. Due to the NHL's decision to not obtain insurance for approximately 60% of the years at issue in the lawsuit, it appears to be on the hook for more than half of its defense fees.