

Insurance Coverage Update

Prior Notice Exclusion Applies to Class Actions Filed Eight Years Apart

Two lawsuits filed eight years apart involving different plaintiffs, defendants, class periods and legal theories alleged sufficiently related wrongful acts to trigger application of a Prior Notice Exclusion barring coverage, according to an Indiana appellate court. *National Collegiate Athletic Association v. Ace American Insurance et al.*, Case No. 19A-PL-1313 (July 15, 2020).

The NCAA is an unincorporated association of U.S. colleges and universities with a basic purpose of maintaining athletics as an integral part of the educational program and the athlete as an integral part of the student body. To achieve its objective, the NCAA promulgates rules to retain a “clear line of demarcation between intercollegiate sports and professional sports.” Before 2006, the NCAA permitted schools to offer students athletic scholarships, or grants-in-aid (GIA), that covered tuition and fees, room and board, and required books. Student-athletes were not reimbursed for the actual cost of attendance, however, as GIA did not include supplies, transportation and other expenses.

A class action was filed against the NCAA (*White Lawsuit*) in 2006 on behalf of male college football and basketball players who received GIA from February 17, 2002, through the date of judgment. The plaintiffs alleged that NCAA Bylaw 15 violated anti-trust laws (Sherman Act) by imposing an artificial cap on the GIA available for student-athletes, an amount below the actual cost of attendance. The case settled, the NCAA amended its rules to narrow the gap between available aid and the actual cost of attendance, and judgment was entered on August 5, 2008.

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On March 17, 2014, another class action was filed against the NCAA and five of its major conferences (*Jenkins* Lawsuit) contesting as illegal under the Sherman Act all NCAA rules limiting remuneration players could receive, including those imposed by NCAA Bylaws 12 (amateurism; prohibiting payments from boosters), 13 (recruiting), 15 and 16. *Jenkins* was filed on behalf of men's football and basketball players who received, or were offered, GIA between the date the complaint was filed and the date of the judgment.

The NCAA tendered the *Jenkins* Lawsuit to its insurers that issued claims made and reported policies effective between 2012 and 2014. The insurers denied coverage in reliance on a Prior Notice Exclusion that precluded coverage for claims "alleging, arising out of, based upon or attributable to the facts alleged, or to the same or Related Wrongful Act alleged or contained, in any Claim which has been reported...under any other policy of which this policy is a renewal or replacement or which it may succeed in time." The insurers contended, successfully at the trial court level, that the *White* Lawsuit and the *Jenkins* Lawsuit both challenged the limitation on benefits provided to Division I men's football and/or basketball players, which is less than the full cost of attendance, and that the NCAA unlawfully agreed with other entities to cap financial aid. Because the two cases involved the same or related Wrongful Acts and/or Wrongful Acts that arise from a common nucleus of facts, coverage was barred by the Prior Notice Exclusion.

The NCAA argued that the exclusion was overly broad and would negate virtually all coverage under the policy. Defining "related" as "associated; connected" would mean that every act by the NCAA is "associated" or "connected" with every other act because the NCAA committed them all. It also argued that, even if the exclusion was not ambiguous, the *White* and *Jenkins* cases allege acts that are unrelated and coverage therefore falls within the 2012-2014 Policy Period. The plaintiffs and class periods were different and the *Jenkins* case, unlike the *White* case, included the Power Five Conferences as defendants. The gist of the two actions also differed, as *White* focused on the "Cost of Attendance Gap" while *Jenkins* focused on the "Compensation Cap" and targeted several Bylaws that were not the subject of the *White* litigation. *Jenkins* also sought only injunctive relief while *White* sought money damages in addition to injunctive relief.

The Indiana appellate court agreed with the insurers and affirmed summary judgment entered by the trial court in their favor. The court acknowledged the *White* case centered on the cost of attendance gap whereas *Jenkins* also attacked those rules restricting what boosters can offer in the form of endorsements and direct payments. However, both cases essentially focused on the anti-trust scheme constructed under Bylaw 15 and, therefore, are connected as they stem from a common nucleus of facts. Both cases also sought injunctions. Although the actions were pursued by different plaintiffs, the definition of Related Wrongful Acts allowed for different claimants, and the actions were pursued by the same type of plaintiffs – football and men's basketball players. Because the 2005-2006 Policy allows subsequent but related claims to relate back to its policy period, the court rationalized that its finding would not result in a finding of no coverage but "merely places coverage under the original policy period in which the claim was first made."

Comments

Actually, placing the *Jenkins* Lawsuit in the 2005-2006 policy period might have resulted in no coverage because, according to the NCAA's brief, the 2005-2006 policy limit was exhausted. An important

provision in the court's analysis was the Related Wrongful Acts definition, which provided that "Claims can allege Related Wrongful Acts regardless of whether such Claims involve the same or different claimants, Insureds or legal causes of action." This language permitted the insurers to more easily overcome the NCAA's arguments that the matters were unrelated in that they involved different plaintiffs, defendants and legal theories.

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