Sports insurance: Avoiding coverage pitfalls

Tricky terms include 'spectators,' 'participants'

BY KIRK PASICH AND VERED YAKOVEE

FORUM
Analysis and insight from the community

Owners of sports teams and facilities often encounter a question that courts have addressed in various contexts for decades: Do their insurance policies cover claims by spectators and participants?

Many policies issued to sports entities are designed to insure claims by spectators but not participants, while others are designed to insure claims by participants but not spectators. Therefore, a key issue that frequently arises is whether an injured person is a participant or a spectator. The answer is not as simple as it might seem.

The issue often arises when members of an event's audience are invited to participate in a special contest. One example is when an attendee at a basketball game enters the court at halftime to participate in a contest whereby he or she attempts to make a long shot to win a prize. If that person is injured and files a claim against the team, league or venue, and a relevant insurance policy excludes injury to "participants," does that exclusion bar coverage for injuries to the shooter?

While courts do not appear to have addressed this question in the context of basketball, they have addressed it with respect to other sports. For example, in *Zurich Reinsurance (London) Ltd. v. Remaley*, 2000 U.S. App. LEXIS 1261 (10th Cir., 2000), the insured had sponsored a rodeo competition. During the competition, the announcer invited audience members to participate in a "Money the Hard Way" contest by entering the arena and attempting to remove a ribbon from a bull's horn in order to win a $50 cash prize. When one spectator attempted to remove the ribbon, the bull head-butted him. The insurer filed suit to determine its duties to its insured and the injured spectator.

The court held that the policy's exclusion for injury suffered by any person "participating in any sports or athletic contest or exhibition" applied to bar coverage. It noted that when the spectator entered the arena for the contest, "his status changed from spectator to an active participant."

PARTICIPANTS EXCLUDED

Courts also have addressed the "spectator" versus "participant" question with respect to those attending events who are involved in some aspect of the event. For example, in *Interstate Fire Insurance Co. v. Harmon*, 580 F.2d 184 (5th Cir. 1978), a photographer covering a motorcycle event was injured when a motorcyclist attempting to jump 30 cars fell short, crashing into the photographer. The court applied the basic rules governing insurance exclusions to hold that coverage for the photographer's injuries was not barred by the policy's exclusion for claims by participants and persons employed on or about the premises. The court held that the exclusion only applied to participants and persons having a working relationship to the track. These would naturally include pit attendants, mechanics, stewards, other officials and all employed by the track or dragway. But a professional photographer employed by a third party was found to have nothing to do with the participants and their employees or the track and its employees.

A question about insurance coverage can arise even when a policy covers "participants" and it is clear that the injured person is a "participant."

Another court reached a similar conclusion with respect to cheerleaders. In *Garcia v. St. Bernard Parish School Board*, 576 So. 2d 975 (La. 1991), the court held that a policy exclusion barring coverage for those participating in an athletic exhibition did not bar coverage for a claim by a cheerleader who had been injured while performing an acrobatic stunt during a football game. The court reasoned that the risks normally encountered in a sports contest which the policy provision clearly intended to exclude were injuries sustained in the football game itself.

None of the cases the *Garcia* court reviewed from other jurisdictions involved an injury in an exhibition ancillary to the principal contest sponsored by the insured.

"While a school board typically sponsors additional activities incidental to football contests, such as performances by cheerleaders, bands, pep squads, flag squads, drill teams and the like, these groups are not participants in the football contest, and an injury to a member of these groups during a football game is not clearly within the contemplation of the policy provision."

A PREMIUM QUESTION

Courts also have considered the premium paid for the insurance in determining the scope of the coverage in the sports context. In *Ducks Hockey Club, Inc. v. Mount Vernon Fire Insurance Co.*, 331 N.Y.S.2d 743 (1972), the insurer issued a liability policy to the lessee of the Long Island Arena. An ice skater who was injured while skating in the rink sued the lessee. The insurance policy stated that it covered "athletic contests and all undertakings operated by the insured — Spectator Liability."

The court held that this lan-

See **FORUM** *on page 9*

ABOUT THE AUTHORS

Kirk Pasich is a partner and **Vered Yakovee** is an associate in the Los Angeles office of Dickstein Shapiro. Both are founding members of the firm's sports initiative and represent insureds in complex coverage disputes.

Forum

Continued from page 8—

guage precluded coverage because the policy manifested an intent to insure only that liability resulting from spectators being present in the building for exhibitions, athletic contests or any other undertaking operated by the insured — not for the risk of the participatory sport of ice skating.

The court also noted that the premium paid for the policy had been set under a New York insurance manual based on a code for spectator liability, while participants using skating rinks were categorized under a different code.

A question about insurance coverage also can arise even when a policy covers "participants" and it is clear that the injured person is a "participant." For example, some policies are issued to cover players in a specific league. The question that sometimes arises is not whether the injured person is a "participant" but rather whether the coverage for a "player" in that league means a player who is on the roster for the whole year, one who comes up to the big leagues for a few games, one who plays continuously for a minor league team or one who only makes it to the practice squad of any team.

In *Kelly v. Stratton*, 1985 WL 725 (N.D. Ill., 1985), a player on a National Hockey League minor league team sought coverage under a policy issued to the NHL "in respect of (1) 504 players and (2) 50 officials." The player, whose contract was owned by the Edmonton Oilers, argued that the policy extended to him because he was an NHL player and a member of the NHL Players Assn. The insurer argued that the player was not an NHL player under the policy because he did not play in the NHL during the season and was not included in the calculation of the 504 NHL players.

The court did not answer the question, instead finding that "it is not clear whether a hockey player playing under a contract with an NHL team and injured during a minor league hockey game is an 'insured.' "

Debates also have arisen based on when a sports participant is injured during an event or at other times. In *Rudolph v. Miami Dolphins, Ltd.*, 447 So. 2d 284 (Fla. 1983), three National Football League players sought coverage under the Miami Dolphins' worker's compensation insurance, which contained a statutory exclusion for injury to "professional athletes."

There was a dispute over whether the NFL players were "professional athletes" because they had sustained preseason injuries and did not play in any regular season games. However, they had been paid under their NFL contracts with the team before being terminated.

The court held that coverage was barred as to all three players because the professional athlete exclusion does not become operative only upon achieving a permanent position on the club's roster; rather, it is applicable at all times a player participates in training and other athletic endeavors required of him in his efforts to make the team roster, as long as the player is under contract and being compensated for his services during such training activity.

The court so held, even though it stated that "the worker's compensation act should be liberally construed so that every doubt is to be resolved in favor of coverage and every exclusion is to be given limited scope by restrictive interpretation."

Similar reasoning was used by another court, only this time to reverse summary judgment for the insurer. In *Zoller v. State Board of Education*, 278 So. 2d 868, 869 (1973), the issue was whether mandatory, off-season weight training under the supervision of coaches was considered "practicing" for purposes of an exclusion that barred coverage for "injury to any person while practicing for or participating in any contest or exhibition of an athletic or sports nature."

When coverage issues do arise, the outcome might be determined by whether the policy provision in dispute is an exclusion. Courts long have held that exclusions must be conspicuous, plain and clear to be effective against the insured.

The court concluded that there were at least two reasonable interpretations of the policy, and it was ambiguous. Therefore, the court found in favor of coverage, stating: "Exclusionary clauses in an insurance policy are strictly interpreted. ... Limitations and exceptions to coverage of the policy must be clearly expressed, and in case of doubt are construed unfavorably to the insurer who drafted the policy."

EXCLUSION OR NO EXCLUSION

When coverage issues do arise, the outcome might be determined by whether the policy provision in dispute is an exclusion. Courts long have held that exclusions must be conspicuous, plain and clear to be effective against the insured. *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862 (1962). A restriction on coverage is not sufficiently conspicuous unless it is "positioned in a place and printed in a form which would attract a reader's attention." *Ponder v. Blue Cross*, 145 Cal. App. 3d 709 (1983).

Furthermore, coverage exclusions and limitations are strictly construed against the insurer and liberally interpreted in favor of the insured. Similarly, exceptions to exclusions are construed broadly in favor of the insured. An insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. The burden rests on the insurer to phrase exceptions in clear and unmistakable language. *Meraz v. Farmers Ins. Exch.*, 92 Cal. App. 4th 321, 322 (2001).

However, even though the general rules of insurance policy interpretation typically favor coverage, this does not mean that an insured can ignore the wording of its policy. Some courts require that an insured review its policy. As one New York court has held: "(C)laimed ignorance of coverage, even if genuine, cannot avail (insureds) absent a showing that they made reasonably diligent efforts to ascertain whether coverage existed ... i.e., contacted the primary insurer directly when they received its policy excluding coverage that they had requested and believed they had." *Hartford Fire Ins. Co. v. Baseball Office of the Commissioner*, 236 A.D. 2d 334, 334 (N.Y.S. 1997).

By reviewing policies and, if necessary, considering how policy language has been construed previously by courts, an insured might be able to better assure coverage when it is needed. If the policy does not provide a clear answer, then ambiguities generally will be resolved in favor of coverage. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822 (1990).

Therefore, in spite of exclusions, coverage often is available. The key is for insureds to look carefully at their policies and not too readily accept denials of coverage. ◁