

New York Court Rules That Insured Is Responsible For Costs Allocated To Self-Insured Periods (Insurance Law Alert)

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A New York trial court ruled that a policyholder was responsible for its pro rata share of defense costs attributable to self-insured periods. *National Hockey League v. TIG Ins. Co.*, 2022 WL 2733210 (N.Y. Sup. Ct. New York Cnty. June 24, 2022).

In the underlying multidistrict litigation, a putative class of retired hockey players sued the NHL, alleging repetitive concussive injuries during their careers. The NHL provided notice of the litigation to its insurers, who agreed, pursuant to a reservation of rights, to front defense costs for the independent counsel that NHL had retained. In the present action, the NHL sought to recover the unpaid portions of its defense costs.

The insurers argued that they had no obligation to reimburse those costs because the NHL never tendered the defense of the underlying action to them and instead retained independent counsel. Additionally, the insurers argued that to the extent defense costs must be reimbursed, allocation to the NHL is warranted because it was uninsured for almost 60 of the 95 years at issue in the underlying litigation.

The court rejected the insurers' tender argument, emphasizing that they were notified of the litigation, aware of the NHL's selection of counsel, and agreed to fund the defense costs in part without disclaiming coverage or demanding to control the defense. As to allocation, the court held that policy language limiting the insurers' obligations to losses or occurrences "during the policy period" requires pro rata allocation of indemnity costs. Further, the court held that pro rata allocation of defense costs, with pro rata apportionment to the NHL for uninsured periods, was appropriate.

Authors and Contacts

[Bryce Friedman](#)

Partner

bfriedman@stblaw.com

+1-212-455-2235

