Collegiate Collisions on the Field and in the Courtroom: Will Labor Peace Save Student-Athletes from Further Injury?

Anthony R. Caruso

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/jbtl

Recommended Citation

Available at: http://digitalcommons.law.umaryland.edu/jbtl/vol10/iss1/3

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
Anthony R. Caruso*

Collegiate Collisions on the Field and in the Courtroom: Will Labor Peace Save Student-Athletes from Further Injury?

Introduction

Sports concussions have long concerned both participants and spectators.¹ In recent years, as safety equipment has improved and athletes’ sense of power and invincibility has grown, midair sports collisions have attracted even greater attention.² Lest we forget that competition has cranked up several notches, in step with athletes’ ever-rising potential to earn multi-million dollar professional salaries.³

As money poured into the sports industry, one would think sports leagues would have developed plans to minimize on-field dangers.⁴ Their reluctance to do so

© 2015 Anthony R. Caruso

The facts and opinions expressed in the articles published in this Journal are solely those of the authors and do not represent the views of the editors, the editorial board, or the University of Maryland Francis King Carey School of Law.

¹ J.D. 1985, Seton Hall University School of Law; B.S. 1982, Rutgers University. Anthony R. Caruso Esq. is a business transactions attorney whose practice emphasizes sports and entertainment-related matters. Caruso regularly appears in the media and provides commentary on current legal issues. He is a NFLPA-licensed contract adviser, he co-founded a professional indoor lacrosse league and served as its legal counsel and acting commissioner, and he serves on the adjunct faculty at New York University. The author would like to thank Brianne Kovach, a law student at the University of South Carolina Law School, and his son A.J. Caruso, an honors student and member of the Boston College football team, for their valuable research and editorial comment.


4. See Mihir Bhagat, Do Professional Athletes Get Paid too Much Money?, BLEACHER REP. (Mar. 21, 2010), http://bleacherreport.com/articles/366793-do-athletes-get-paid-too-much-money (claiming that “Alex Rodriguez earns the same amount of money as it would take to feed the nation’s poor for a year”).

Collegiate Collisions on the Field and in the Courtroom

makes particularly little sense in collegiate sports, where athletes’ primary charge is to earn a degree, not win a championship. Against this backdrop, any discussion about sports concussions must focus on realistic avenues for change. This Article considers three such paths: first, new technologies that improve concussion-treatment, diagnosis, and on-field safety; second, laws, litigation, and rules that expand athletes’ rights, protect players, and recover damages; and third, sports organizations’ provision of health benefits and financial support to current and former players.

First, new treatment, diagnosis, and equipment technologies promise to reduce the incidence and impact of sports concussions. Medical research has revealed not only concussions’ cause and effect, but also misdiagnosis’ long-term consequences. New technologies improve concussion treatment, minimize head impacts, and train young athletes to position their bodies to avoid dangerous blows.

Second, a wave of medical developments and litigation have compelled the National Collegiate Athletic Association (“NCAA”), National Football League (“NFL”), and other sports organizations to implement long-overdue policies to safeguard players. For too long, players and coaches in contact-sports have viewed reentry into play immediately following head injuries as a rite of passage. Although

5. See discussion infra, Parts IV.A–B.
6. See discussion infra, Parts I, II, III.A, III.B.
7. See discussion infra, Parts IV–V.
9. See Joseph Nordqvist, Concussions Cause Long-Term Effects Lasting Decades, MED. NEWS TODAY (Feb. 18, 2013), http://www.medicalnewstoday.com/articles/256518.php (asserting that misdiagnosed or undiagnosed concussions can result in chronic traumatic encephalopathy, a condition found in former professional athlete Ryan Freel and Junior Seau’s brains after they committed suicide); see also Kevin M. Guskiewicz, et al., Cumulative Effects Associated with Recurrent Concussion in Collegiate Football Players, 290 J. AM. MED. ASS’N 2549, 2552 (2003) (finding that football players who have sustained a concussion are three times more likely to sustain another one).
11. See generally Jon Solomon, College Football and Concussions: A Talk with the NCAA’s Chief Medical Officer, AL.COM (Oct. 9, 2013), http://www.al.com/sports/index.ssf/2013/10/ncaa_and_concussions_a_talk_whi. html (critiquing the NCAA’s hesitant response to concussion research).
sports culture has long portrayed an athlete who presses on after having his “bell rung” as a symbol of toughness and courage, doctors and sports leagues have come to appreciate the unequivocal dangers associated with this perception. To promote athletes’ health, safety, and welfare, sports leagues must inform the public’s misunderstandings about sports concussions. The time has come to adopt a safety-first approach, particularly at the youth level.

Perhaps the most promising avenue for change, and the easiest to achieve in the short-term, involves the provision of health benefits and other financial cushions to student-athletes, without regard to “amateurism” and other archaic principles. This Article will expose the NCAA’s failures to prioritize concussion safety and appreciate concussions’ long-term consequences. After all, young athletes’ welfare should override any principle that would limit their access to health benefits.

Unsurprisingly, the NCAA considered rule changes only after litigation challenged its long-established “college model.” Plaintiffs have contested everything from college athletes’ employee status to the NCAA’s refusal to

13. See id. (observing that “fringe” pro players hit other players as hard as possible in practice to prove their toughness, though such hits produce painful headaches that led one player to contemplate suicide); Susan Jeffrey, AAN Releases New Sports Concussion Guidelines, MEDSCAPE (Mar. 18, 2013), http://www.medscape.com/viewarticle/780973.

14. See, e.g., Dan Diamond, President Obama Puts NCAA on Notice: Protect Your Student-Athletes, FORBES (Jan. 27, 2013), http://www.forbes.com/sites/dandiamond/2013/01/27/president-obama-puts-ncaa-on-notice-protect-your-student-athletes/ (explaining that the President has criticized the NCAA’s inadequate efforts to protect student-athletes’ health).


compensate players for its use of their names, images, and likenesses.\textsuperscript{20} Although many believe the NCAA had every opportunity to prepare for these challenges, it chose not to adapt until litigation arose.\textsuperscript{21}

For the most part, American student-athletes no longer are “book-toting” students who happen to dabble in sports.\textsuperscript{22} Rather, particularly in Division I team-sports, modern collegiate athletes are semi-professionals who happen to attend school.\textsuperscript{23} Endless practice hours, team meetings, travel time, and game play dominate student-athletes’ lives.\textsuperscript{24} No matter the outcome of pending legal challenges, student-athletes’ futures seem poised to change forever.\textsuperscript{25} This prospect begs the question whether impending changes will be for the better.

The NCAA is a membership-driven organization whose mission is to safeguard student-athletes’ well-being and equip them with skills to succeed on the playing field, in the classroom, and throughout life.\textsuperscript{26} Since March 31, 1906, the NCAA has integrated athletics and higher education, and encouraged learning through sports.\textsuperscript{27} NCAA members—not only colleges and universities, but also conferences and affiliated groups—collaborate to establish rules for fair and safe competition, which NCAA national office staff administer.\textsuperscript{28} The NCAA also provides resources to support 450,000 student-athletes and the schools they attend.\textsuperscript{29} These resources include more than $2.4 billion in athletic scholarships each year, access to medical care, academic support services, and first-class training opportunities.\textsuperscript{30}

\begin{thebibliography}{99}
\bibitem{23} See Cutting, supra note 22.
\bibitem{24} Id.
\bibitem{25} Kevin Trahan, \textit{Forecasting the Future of College Sports, If O’Bannon Beats the NCAA, SB NATION} (May 14, 2014), http://www.sbnation.com/college-football/2014/5/14/5710652/obannon-trial-ncaa-future-changes (asserting that the O’Bannon case likely will upend the NCAA’s amateurism policies).
\bibitem{26} \textit{Who We Are}, NCAA, http://www.ncaa.org/about/who-we-are (last visited Oct. 4, 2014).
\bibitem{27} \textit{About}, NCAA, http://www.ncaa.org/about (last visited Sept. 6, 2014).
\bibitem{28} \textit{Core Purpose and Values}, NCAA, http://www.ncaa.org/about/ncaa-core-purpose-and-values (last visited Sept. 6, 2014).
\end{thebibliography}
Anthony R. Caruso

Notwithstanding the NCAA’s proud origins, it often forgets its roots. At the NCAA’s founding, the sport of football faced extinction. During the 1905 season, 18 college and amateur players died and more than 150 suffered injuries, leading many observers to believe that football was too dangerous to play. In response to public outcry, thirteen football representatives gathered at the White House, where President Theodore Roosevelt held two meetings, and attendees agreed on reforms. Shortly thereafter, the NCAA’s predecessor was born.

I. The NCAA and the Birth of the Term “Student-Athlete”

More than 50 years ago, the NCAA created the term “student-athlete” both to preserve the principle of amateurism and reinforce the notion that college athletes are “students first, athletes second.” More often than not, this ideal is unrealized. Athletics programs frequently require student-athletes to structure their class schedules around sports obligations and, in total, college football players spend more time on football than most Americans spend at their nine-to-five jobs. In truth, the NCAA coined the term “student-athlete” primarily to shield itself from workers’ compensation claims and other liabilities.

Despite the NCAA’s goal “to protect young people from the dangerous and exploitative athletic practices of the time,” in a recent court filing, the NCAA claimed no responsibility to protect student-athletes from physical harm. This assertion raises an important question—how did the NCAA transform from an

32. Id.
33. Id.
34. Id. Theodore Roosevelt, along with Harvard football coach William T. Reid, Jr., and U.S. Naval Academy coach Paul Dashiell, formed a committee after the 1905 season to change football’s rules. Id. The committee decided to allow forward passing, which spread players across the field and reduced dangerous scrums. Id.
36. See Christopher L. Gasper, Time for NCAA to Pay Up and Let Athletes Benefit, BOS. GLOBE (Apr. 02, 2014), http://www.bostonglobe.com/sports/2014/04/01/payment-due-for-collegiate-athletes/aFDXYwUUnwKGgDak1qyc8N/story.html (“[I]f you’re playing football or men’s or women’s college basketball at the highest level, you are an athlete-employee-entertainer-student, in that order.”).
37. Id.
39. See Nathan Fenno, In Court Filing, NCAA Denies Legal Duty to Protect Athletes, WASH. TIMES, Dec. 15, 2013, at C02 (“The NCAA denies that it has a legal duty to protect student-athletes.”) (quoting NCAA filing in Sheely v. NCAA, No. 380-569V (Md. Cir. Ct. 2013)).
Collegiate Collisions on the Field and in the Courtroom

organization that prioritized player safety into a multi-million dollar enterprise whose sole concern seemingly is to ensure that student-athletes do not receive compensation for their skills.\(^{40}\)

According to the NCAA, Division I and Division II schools "provide more than $2 billion in athletics scholarships annually to more than 126,000 student-athletes."\(^{41}\) Although the NCAA permits schools to provide multi-year athletic scholarships, most scholarships extend only one academic year.\(^{42}\) Moreover, although athletic scholarships can cover tuition and fees, room and board, and required course-books, many student-athletes’ scholarships compensate only a portion of these costs.\(^{43}\) Contrary to popular belief, most full-scholarship athletes do not receive a “free ride.”\(^{44}\) The average shortfall, or out-of-pocket cost, for each Football Bowl Series “full scholarship” athlete in the 2011–12 academic year was $3,285.\(^{45}\) A disproportionate number of student-athletes’ families are financially disadvantaged, so athletes often struggle to cover the cost.\(^{46}\)

The NCAA’s financial aid programs provide scholarships to thousands of student-athletes,\(^{47}\) but what about the thousands of others? What about athletes who lose their scholarships before they earn a college degree? The NCAA itself states that, in most cases, “coaches decide who receives a scholarship, what it will cover and whether it will be renewed.”\(^{48}\) Essentially, an athlete who fails to satisfy his coach can lose his scholarship, regardless of the NCAA’s stance.\(^{49}\)

Undoubtedly, athletes who attend larger, more successful universities receive benefits not afforded to athletes at smaller schools.\(^{50}\) In addition to tuition

\(^{40}\) See Treadway, supra note 35 (claiming that the NCAA operates under an outdated organizational model).


\(^{42}\) Id.

\(^{43}\) See id.


\(^{45}\) Id.

\(^{46}\) Id. (“Many African-American student-athletes come from very financially disadvantaged backgrounds and are often much poorer than the general African-American college population.”) (emphasis removed) (quoting Richard Salgado, Educating Someone Who Can’t or Doesn’t Want to Be Educated: The Shifting Fiduciary Duty Continuum of Big-Time College Sports, 3 WILLAMETTE SPORTS L.J. 27, 36 (2006)).

\(^{47}\) See NCAA, supra note 41.

\(^{48}\) Id.


\(^{50}\) See Jeffrey Dorfman, Pay College Athletes? They’re Already Paid up to $125,000 per Year, FORBES (Aug. 29, 2013, 8:00 AM), http://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000/year/.
scholarships, big-school athletes receive tutoring, academic counseling, life-skill training, and nutritional advice.\(^{51}\) They receive free coaching, strength and fitness training, and support from athletic trainers and physical therapists.\(^{52}\) These perks certainly constitute a form of “pay,” but what about student-athletes who do not attend major-conference schools? What about athletes who play non-revenue sports and do not receive tuition money or living expenses? Unfortunately, the NCAA has refused to provide benefits even to this group.\(^{53}\)

Recently, the NCAA approved unlimited meals and snacks for all Division I student-athletes, in “an effort to meet [their] nutritional needs . . . .”\(^{54}\) Previously, scholarship student-athletes had received only three meals a day, or a food stipend.\(^{55}\) Given the countless hours student-athletes devote to workouts alone, the NCAA’s policy change seems long overdue. Coaches rarely permit student-athletes to travel home for holidays,\(^{56}\) and often force athletes to spend their summers at school.\(^{57}\) Grueling summer two-a-day workouts often do not leave enough time for summer courses, rendering the athletes ineligible to collect scholarship money from during this period.\(^{58}\) Despite the steady increase in athletics program demands on athletes, benefits to these athletes have shockingly remained unchanged since the NCAA’s birth.\(^{59}\)

Perhaps most troublingly, despite the NCAA’s nearly $1 billion in annual revenue,\(^{60}\) players too often foot the bill for injury-related medical expenses.\(^{61}\) Under
the NCAA’s current rules, injured players can lose their scholarships, often must obtain their own insurance, and generally bear financial responsibility for on-field injury-related healthcare. The NCAA has demonstrated that, regardless of the billion-dollar revenues student-athletes generate, it will never voluntarily provide the basic protections athletes deserve. This attitude has motivated several former and current student-athletes to file suit against the NCAA.

II. Litigation

A. The Nemeth, State Fund, and Rensing Decisions

Student-athletes’ lawsuits against the NCAA usually stem from serious injuries. In April 1950, for example, University of Denver football player Ernest Nemeth injured his back during team practice. At the time, the University paid him $50 per month for “certain work in and about the tennis court on its campus.” In University of Denver v. Nemeth, the Colorado Supreme Court concluded that, when Nemeth sustained the injury, he was “in the employ of the University, [and] was upon his employer’s premises, occupying himself consistently with his contract of hire in a manner pertaining to or incidental to his employment.” The Court found a “sufficient relationship to the employment in the activity of Nemeth at the time of his injury to justify entitlement to compensation.” Because Nemeth’s injuries “arose out of and in the course of his employment,” he was an “employee” under the Colorado workers’ compensation statute, and the Court ordered the University to compensate Nemeth for his injuries.
Four years later, in *State Compensation Insurance Fund v. Industrial Commission*, the Colorado Supreme Court again considered whether scholarship football players have a right to workers’ compensation. Ray Herbert Dennison, a student-athlete at Fort Lewis A & M College, suffered a head injury during a game’s opening play and died two days later. Dennison was a scholarship athlete and, like Nemeth, worked at the College in a non-athletic role. Unlike Nemeth, however, the College did not condition Dennison’s job on his football-team participation. The Court distinguished Nemeth on this basis; it explained that Nemeth’s employment “depended wholly on his playing football, and it is clear that if he failed to perform as a football player he would lose the job provided for him by the University.”

The *State Fund* Court emphasized that, absent a contractual obligation to play football, no employer-employee relationship exists, and a player has no right to workers’ compensation. Although the Court did not overturn Nemeth, it denied Dennison’s claim, and carved a gaping hole in Nemeth’s holding.

In Nemeth and State Fund’s wake, courts have generally found that student-athletes do not qualify as “employees” under workers’ compensation statutes “unless they are also employed in a university job in addition to receiving scholarship benefits.” In *Rensing v. Indiana State University Board of Trustees*, the Supreme Court of Indiana held that no employer-employee relationship existed between the student and the University notwithstanding the student’s football scholarship.

In Nemeth and State Fund’s wake, courts have generally found that student-athletes do not qualify as “employees” under workers’ compensation statutes “unless they are also employed in a university job in addition to receiving scholarship benefits.” In *Rensing v. Indiana State University Board of Trustees*, the Supreme Court of Indiana held that no employer-employee relationship existed between the student and the University notwithstanding the student’s football scholarship.

---

72. 314 P.2d 289 (Colo. 1957).
73. Id. at 289–90.
74. Id. at 289.
75. Id.; Univ. of Denver v. Nemeth, 257 P.2d 423, 428 (Colo. 1953) (en banc) (“[Nemeth] was receiving $50 per month from the University for certain work in and about the tennis court on its campus.”).
76. Compare *State Comp. Ins. Fund*, 314 P.2d at 290, with *Nemeth*, 257 P.2d at 428 (“Nemeth, by not participating in football not only would endanger his position . . . he would lose his job.”).
78. See id. at 289 (“Since the evidence does not disclose any contractual obligation to play football, then the employer-employee relationship does not exist and there is no contract which would support a claim for compensation under the Act.”).
79. Id. at 290. *State Fund* limited Nemeth to cases where (1) a university employs a student-athlete in a non-athletic capacity, and (2) such employment depends on the student-athlete’s continued athletic participation. Id. at 289–90. The Court denied that receipt of an athletic scholarship can alone establish an employer-employee relationship. Id.
80. See, e.g., *Rensing v. Ind. State Univ. Bd. of Tr.*, 444 N.E.2d 1170, 1174 (Ind. 1983) (providing that student-athletes are “not considered professional athletes, musicians, or artists employed by the University for their skills”); Coleman v. W. Mich. Univ., 336 N.W.2d 224, 227 (Mich. Ct. App. 1983) (denying a student-athlete’s workers-compensation claim because he “did not have any part-time job with defendant’s athletic department and was given neither an hourly wage nor a monthly fixed fee but was instead provided with a scholarship for the school year”).
quadriplegic. Nevertheless, because Rensing’s scholarship did not qualify as “pay” under the Workmen’s Compensation Act, the Indiana Supreme Court ruled that an essential element of the employer-employee relationship did not exist. The Court cited evidence that Rensing had enrolled at the University because he sought advanced educational opportunities, not because he expected compensation for his athletic abilities. Rensing therefore was not entitled to workmen’s compensation benefits.

The aforementioned landmark decisions barely scratched the surface of issues that have arisen in recent cases in which college athletes have endeavored to establish their employee rights. In the 60 years since Nemeth, the NCAA’s record remains nearly undefeated in such lawsuits. The tide has begun to turn, however, in student-athletes’ favor. Today, any rule that favors the NCAA or its member institutions typically attracts public backlash, which has forced the NCAA to loosen its hold on more archaic rules that have stymied athletes in the past. If the Rensing and State Fund courts had ruled in favor of student-athletes and had set a precedent for player-friendly rulings, the NCAA might not be under siege today.

Instead, the fatalities continue. In 2011, Frostburg State University football player Derek Sheely died after he sustained a head injury during a summer practice. Sheely’s parents filed a wrongful death lawsuit against the NCAA, the head coach, assistant coach, assistant athletic trainer, and several companies that
Anthony R. Caruso

manufacture and distribute helmets. Although Sheely bled from his forehead during four consecutive practice sessions and had suffered a concussion the previous season, the team permitted him to return to the full-force collision drill where he sustained the initial injury. Notably, this event followed the NCAA’s 2010 rulebook changes, which required each member-school to create a concussion policy. Notwithstanding this policy change, the NCAA did little to enforce the rule; “no school has been investigated or punished for violating [it].”

In another recent case, a class of former college football players alleged that the NCAA negligently and recklessly endangered them when it “failed to establish known protocols to prevent, mitigate, monitor, diagnose and treat brain injuries.” A survey of athletic trainers bolstered the plaintiffs’ claim—53% reported “pressure from football coaches to return a student to play faster than they thought was in his best interest medically.” The suit sought various remedies, including court-supervised, NCAA-funded concussion monitoring programs. Are such drastic measures really necessary to resolve the NCAA’s concussion problem?

B. The Northwestern Decision

In January 2014, former college athletes established the College Athletes Players Association (“CAPA”) to advocate for players’ rights. CAPA represents more than 17,000 Division I athletes, aims to secure their health, safety, and welfare, and seeks sports-related medical-expense coverage for current and former players. Recently,

91. See id.

Vol. 10, No. 1 2015 25
in an effort to create college sports’ first athlete-specific union, CAPA petitioned the National Labor Relations Board (“NLRB”) and asserted Northwestern University football players’ labor rights.99

To succeed, CAPA first had to show that the National Labor Relations Act (“NLRA”),100 which covers private universities’ private employees and guarantees them the right to form unions, applied to the student-athletes.101 The NLRB’s determination depended on whether the players qualified as “employees” under the NLRA,102 which incorporates the term’s common law definition.103 Under the common law definition, an employee is “a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.”104

The players argued that they qualified as employees because they practiced up to 60 hours a week during a month-long training camp before the college semester began.105 During the season, players prepared for games up to 50 hours a week, which left minimal time for academics.106

III. Student-Athlete Unionization

On March 26, 2014, Peter Sung Ohr, Regional Director of the NLRB’s Chicago office, ruled in favor of the Northwestern University players, granted them the right to unionize, and set a precedent for student-athlete unionization and private college and universities across the nation.107 Ohr reasoned that “[1] the letter of intent and scholarship offer is the employment contract, [2] the hours of practice and play that generates millions of dollars of revenue for the school are the employer’s benefits, [3] the coach’s rules are the control, and [4] the scholarship itself is the pay.”108

101. See Travis Waldron, Making Sense of the Labor Ruling Allowing Northwestern Football Players to Unionize, THINKPROGRESS (Mar. 27, 2014), http://thinkprogress.org/sports/2014/03/27/3419553/making-sense-of-the-labor-ruling-allowing-northwestern-football-players-to-unionize/ ("The National Labor Relations Act just covers private employers and private employees of those employers. If athletes at, say, Michigan State or the University of Michigan wanted to do the same thing they would have to proceed under state law.").
103. Id. at 13 (citing Nat’l Labor Relations Bd. v. Town & Country Electric, 516 U.S. 85, 94 (1995)).
106. Id.
107. Id. at 2.
Following Ohr’s ruling, Northwestern players immediately instituted unionization procedures. The University had one week to submit to the NLRB a list of eligible scholarship-athletes’ full names and addresses. These athletes then held a unionization vote. The votes remain uncounted, however, as Northwestern appealed Ohr’s decision to the full NLRB and secured a stay pending review. If the NLRB upholds Ohr’s ruling, Northwestern football players will qualify as employees, regardless of the unionization vote.

What would unionization mean for college athletes? If student-athletes qualified as employees, they would become eligible for workers’ compensation for their injuries, unless a state enacts legislation that exempts them from coverage. Would student-athletes then seek vacation time, base salaries, or better accommodations? The possibilities proceed to the near-absurd.

A. Potential Issues Student-Athlete Unions Pose

While college-athlete unions may sound appealing, particularly as a mechanism to provide better health care for student-athletes, that prospect raises several issues, especially with respect to gender equality. Under Title IX, schools must provide men and women equal opportunities to participate in sports. Thus, if schools pay only male athletes, their female counterparts can surely claim Title IX violations. Benefits such as safer football helmets, however, would not fall under the Title IX requirement.
What about athletes who attend public universities? Because the NLRA governs only private employers and employees, public-university student-athletes cannot rely on Northwestern.119 Instead, their efforts to unionize must proceed under state laws.120 This may pose a challenge, as the vast majority of Division I universities are public,121 and almost half the states limit, or outright deny public university employees the right to unionize.122

Student-athlete unions also raise tax questions. Once student-athletes unionize, will they pay state and federal taxes? Many critics have contended that, if players qualify as employees, tax laws apply to their income.123 The IRS, not the NLRB, will resolve this issue.124

Although the college-athletics system certainly cries for change, student-athlete unions might not represent an ideal solution. Northwestern University Athletic Director Jim Phillips, for one, does not support his football players’ efforts to unionize, but concedes that “college athletics . . . need[s] to be fixed.”125 Following the NLRB’s ruling, Northwestern’s Vice President for University Relations, Alan Cubbage, asserted that unionization and collective bargaining did not constitute appropriate methods to address student-athletes’ concerns.126

---


121. Jacqueline Rabe Thomas, UConn’s Napier: ‘We Do Have Hungry Nights’, CT MIRROR (Apr. 7, 2014), http://ctmirror.org/uconns-napier-on-altheletes-unionizing/ (“The NLRB ruling does not empower athletes at public universities like UConn to unionize, as public schools rely on state labor laws for such issues.”).


123. Jeffrey Brown, Labor Board Rules Northwestern Football Players Are Entitled to Unionize as School Employees, PBS.ORG (Mar. 26, 2014, 6:41 PM), http://www.pbs.org/newshour/bb/labor-board-rules-northwestern-football-players-entitled-unionize-school-employees/; see, e.g., TEX. GOV. CODE ANN. § 617.002 (West 2014) (“An official of the state or of a political subdivision of the state may not enter into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees.”); VA. CODE ANN. § 40.1-57.2 (West 2014) (“No state, county, municipal, or like governmental officer, agent or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers . . . . ”).


125. See Trahan, supra note 118.


Anthony R. Caruso

statement, which argued that the “attempt to turn student-athletes into employees undermines the purpose of college: an education.”

B. Proposed Rules and Regulations

The NCAA’s Division I board met in August to review proposed changes to its governance model. The proposal aimed to “allow[] the division to be more nimble, streamlined and responsive to needs,” particularly student-athletes. The proposed changes would create a Student-Athlete Advisory Committee, and afford student-athletes a greater voice in the NCAA’s decision-making process. Additionally, the changes would grant larger conferences, such as the Atlantic Coast Conference, Big 12, and Southeastern Conference, greater autonomy to define their own rules. Another conference, the Big Ten, recently expressed its desire to implement “a 21st century governance structure that preserves the collegiate model, while allowing each school to focus on improved student-athlete welfare.”

Thus far, NCAA member-schools generally support autonomy for the five major conferences in several areas: (1) financial aid, including full cost of attendance and scholarship guarantees, (2) insurance, including policies that protect future earnings, and (3) academic support, particularly for at-risk student athletes.

131. Id. at 18.
133. Mike Carmin, Big Ten Aligns with Pac-12 on NCAA Reform, LAFAYETTE J. & COURIER (June 2, 2014, 10:36 AM), http://www.iconline.com/story/mike-carmin/2014/06/02/big-ten-aligns-pac-12-on-ncaa-reform/9864123/ (“The Big Ten continues to strongly support full cost of attendance scholarships, reasonably on-going medical or insurance assistance to student-athletes, continued efforts to reduce the incidence of disabling injury, guaranteed scholarships to complete a bachelor’s degree . . . and counsel of agents and a meaningful role in governance for student-athletes.”).
134. Hosick supra note 129 (delineating these three points of consensus, plus a fourth point: “other support, such as travel for families, free tickets to athletics events, and expenses associated with practice and competition (such as parking)”)}
IV. The Need to Minimize Sports-Related Injuries

A. Proposed Methods and Scientific Developments

In 1988, the NCAA and the National Athletic Trainers' Association developed a system to compile trainers' injury reports.\(^{135}\) Through 2004, trainers had filed 200,000 reports, which equates to roughly 12,500 athletic injuries per year.\(^{136}\) Although these figures reveal widespread injuries of all types, many athletes' foremost medical concern is to avoid traumatic brain injury.\(^{137}\) Thirty-four percent of football players have suffered at least one concussion, and thirty percent have suffered two or more.\(^{138}\) Moreover, the University of Pittsburgh's Department of Neurological Surgery reported that "suffering a second blow to the head while recovering from an initial concussion can have catastrophic consequences . . . [and] has led to approximately 30–40 deaths over the past decade."\(^{139}\) Other researchers have attributed 26 deaths to this "second impact syndrome."\(^{140}\)

In college athletes specifically, researchers have found that concussions cause learning disabilities and severe memory impairments.\(^{141}\) Though sports other than football, such as ice hockey and lacrosse, likewise involve body-to-body contact and collisions during play, football maintains the highest injury rate at 36 injuries per 1,000 male athletes.\(^{142}\)

---

137. See Paula Faris & Katie Hinman, Football's Risk Factor: Brain Injuries Raise New Concerns for Young Athletes, ABC NEWS (May 24, 2012), http://abcnews.go.com/Health/footballs-risk-factor-brain-injuries-raise-concerns-young/story?id=16416737 (quoting several football players and parents' strong reactions to the news that Junior Seau, an NFL legend, may have committed suicide because he suffered from chronic traumatic encephalopathy).
141. Roy Lubit, Postconcussive Syndrome, MEDSCAPE, http://emedicine.medscape.com/article/292326-overview (last updated June 3, 2013) ("Traumatic brain injury can lead to deficits in 5 general areas: (1) short-term memory impairment, (2) slowed processing speed, (3) impaired executive function, (4) disrupted abilities of attention and concentration (which likely contributes to the deficits noted in the first 3 categories), and (5) emotional dysregulation.").
Anthony R. Caruso

Many observers agree that concussion mismanagement poses a greater problem than concussions themselves.\(^\text{143}\) Physicians, athletic trainers, and coaches often misunderstand concussion symptoms, and fail to respond appropriately.\(^\text{144}\) This problem extends not only to these groups, but also to players themselves.\(^\text{145}\) Notwithstanding the athletic community’s shared responsibility, many believe meaningful change will not occur until the NCAA updates its safety regulations.\(^\text{146}\) Commentators have proposed several measures, including limits on physical contact in practices,\(^\text{147}\) independent concussion experts to evaluate athletes during games,\(^\text{148}\) and a uniform return-to-play protocol.\(^\text{149}\)

University of Arkansas researchers have developed a technology that could mitigate concussions’ long-term health effects.\(^\text{150}\) Their wireless health-monitoring system allows team physicians to monitor many players simultaneously.\(^\text{151}\) The system utilizes a network of sensors, woven or printed into a skullcap and worn under a helmet, to detect physiological signs of concussion.\(^\text{152}\) It transmits the data via a wireless network to a remote server or monitor, such as a computer or smartphone.\(^\text{153}\)

143. See, e.g., Robert C. Cantu, Consequence of Ignorance and Arrogance for Mismanagement of Sports-Related Concussions: Short- and Long-Term Complications, in CONCUSSIONS IN ATHLETICS: FROM BRAIN TO BEHAVIOR 23, 24 (Wayne J. Sebastianelli & Semyon M. Slobunov eds., 2014); Diagnosing and Treating Sports-Related Concussion, MAYO CLINIC, http://www.mayoclinic.org/medical-professionals/clinical-updates/general-medical/diagnosing-treating-sports-related-concussion (last visited Sept. 9, 2014) (“Concussions that are unrecognized or are mismanaged put athletes at considerable risk of potentially catastrophic sequelae from re-injury.”).


145. Id. (noting that college football players often disregard concussion symptoms and “try to persuade medical staff that they feel fine” because they fail to appreciate potentially severe consequences).

146. See Experts: NCAA Should Mull NFL Policy, ESPN (Dec. 5, 2009, 3:54 PM), http://sports.espn.go.com/nfc/news/story?id=4716262 (arguing that the NCAA should adopt the measures the NFL recently implemented, including stricter “return-to-play” policies when medical staff detect concussion symptoms).


151. Id.

152. Id.

153. Id.
In 2014, Kent State University football players began to use another promising technology, the “intelligent mouth guard.”\(^{154}\) The device measures head impacts as they occur, and transmits data about head orientation, position, velocity, and acceleration.\(^{155}\) Researchers hope the device will gather data that enables them to design a safer helmet.\(^{156}\)

B. The NFL’s Role

The NFL has acknowledged, albeit hesitantly, the need to address concussion risks.\(^{157}\) On the heels of President Barack Obama’s Healthy Kids and Safe Sports Concussion Summit, the NFL committed $25 million to promote youth sports safety.\(^{158}\) The grant funded new, long-overdue programs to place more athletic trainers in high schools nationwide.\(^{159}\)

Over the years, the NFL and its teams have paid millions of dollars in settlement money to players who have sustained concussions and other brain injuries.\(^{160}\) The NFL’s own study revealed that retired players suffer from dementia, Alzheimer’s, and other neurological diseases at a much higher rate than the general population.\(^{161}\) In August 2013, the NFL reached a $765 million settlement to resolve approximately 5,000 former players’ claims that the league “deliberately ignored and actively concealed” information about “the pathological and debilitating effects of mild traumatic brain injuries . . . that have afflicted former professional football players.”\(^{162}\) The agreement created a $675 million award fund to compensate players.
with brain impairments. Nevertheless, U.S. District Court Judge Anita B. Brody found that the sum did not suffice to compensate the plaintiffs’ injuries, and she rejected the deal. A revised agreement lifted the monetary cap. Per the settlement, players may receive compensation for a 65-year maximum, a crucial step in the right direction for the league and injured players. Despite this positive step, no legal settlement or monetary sum can eliminate football’s intrinsic violence.

Recently, medical researchers found a clear connection between football and Chronic Traumatic Encephalopathy (“CTE”), a progressive, degenerative brain disease that stems from multiple concussions or cumulative contact. Essentially, over time, tackling and blocking can cause long-term brain damage, even if a player never sustains a concussion. In response to these revelations, the NFL implemented rule changes. The new rules, which ban hits with the crown of the helmet and place independent neurological experts on sidelines during games, reduced NFL concussions by 13% from 2012 to 2013. The NFL did not stop there. To minimize the risk of long-term brain damage associated with cumulative hits,


166. Id. at 37.


169. See id.


the NFL prohibited live contact and forbid players to wear pads during offseason practices.\textsuperscript{173}

In response to an American Football Coaches Association recommendation, the NCAA also adjusted its rules.\textsuperscript{174} The new rules punish players who hit “above the shoulders” or target opponents.\textsuperscript{175} Although the NCAA’s rule changes combated concussion hits, they did not address cumulative offseason contact.\textsuperscript{176} Compared to the NFL’s regular-season practice rules, the NCAA’s rules set an unjustifiably deferential standard; individual coaches, not the NCAA, prescribe permissible contact.\textsuperscript{177}

College players’ brains are less developed, and more injury prone, than their NFL counterparts’.\textsuperscript{178} Because 35-times more athletes play NCAA football than NFL football,\textsuperscript{179} the NCAA’s prospective head-injury liability forebodes bankruptcy. At the high school level, where players’ brains remain in formative stages through their teenage years, injury risks are greater still.\textsuperscript{180} A recipe for disaster materializes when one factors in high-school athletes’ often less-than-stellar protective equipment.\textsuperscript{181}

Given recent revelations as to the dangers of cumulative contact,\textsuperscript{182} the NCAA’s failure to implement stricter rules makes little sense. Although college athletes


\textsuperscript{176} See Gilmore, supra note 174; NCAA Football Rules, supra note 175, at 87, 121–22.

\textsuperscript{177} Compare NFL COLLECTIVE BARGAINING AGREEMENT, supra note 173, at 143, art. 24, sec. 1(a) ("During the regular season, padded practices for all players shall be limited to a total of fourteen, eleven of which must be held during the first eleven weeks of the regular season, and three of which must be held during the remaining six weeks of the regular season."), with Football Practice Guidelines, NCAA, http://www.ncaa.org/health-and-safety/football-practice-guidelines (last visited Oct. 1, 2014) ("In-season practice: No current NCAA legislation addresses contact during inseason practices.").


\textsuperscript{179} Id.


\textsuperscript{181} Id.; see, e.g., Lauren Leamanczyk, I-Team: Local Schools Using Subpar Football Helmets, CBS BOS. (Sept. 23, 2014, 11:24 PM), http://boston.cbslocal.com/2014/09/23/i-team-local-schools-using-subpar-football-helmets/ ("According to data provided by BFS, at least one quarter of Boston’s helmets rank as 2 stars or lower. That includes 29 of the worst zero star helmets."); Mark Stevens, TV-6 Investigates: Football Helmet Ratings, KWQC IOWA (Sept. 30, 2014, 6:10 PM), http://www.kwqc.com/story/26669858/tv-6-investigates-football-helmet-ratings ("Danville Athletic Director Kirk Soukup says replacing all 38 of his two star helmets costs too much.").

\textsuperscript{182} See Stern, supra note 168, at 1122.
arguably need more blocking and tackling practice than NFL players, the NCAA should adopt the NFL model and eliminate preseason contact.183 Alternatively, the NCAA could limit preseason and regular-season practice contact.184 Several high school and middle school teams have already done so.185 While NFL, high school, and middle school officials have taken action, the NCAA has seemingly ignored concussions’ serious risks.186

C. Political Involvement

President Obama has urged the NCAA to implement safety reforms.187 In an interview with the New Republic, the President stated:

I tend to be more worried about college players than NFL players in the sense that the NFL players have a union, they’re grown men, they can make some of these decisions on their own, and most of them are well-compensated for the violence they do to their bodies. You read some of these stories about college players who undergo some of these same problems with concussions and so forth and then have nothing to fall back on. That’s something that I’d like to see the NCAA think about.188

The President recently hosted a summit to raise awareness and money for concussion diagnosis, treatment, prevention, and research.189 Attendees included young athletes, parents, coaches, professional players, military service members, and medical experts.190 At the summit, the President advocated a shift in American sports culture away from a “suck it up” mentality.191

United States Senators have also entered the concussion debate. For example, the Senate Committee on Commerce, Science and Transportation sent a letter to NCAA President Mark Emmert, urging him to “protect student-athletes from...
exploitation” on college campuses.\textsuperscript{192} The Committee expressed concern that the NCAA “defers to member institutions on most matters potentially leaving student-athletes vulnerable to the very abuses the NCAA was created to protect against.”\textsuperscript{193}

On the state level, 49 states have passed laws to raise concussion awareness and ensure that young athletes receive proper treatment.\textsuperscript{194} For example, many states have enacted “return-to-play” restrictions, which provide that an athlete who manifests concussion symptoms may not participate in games or practices until a medical professional clears him or her.\textsuperscript{195} In addition, the NCAA and Department of Defense recently launched a $30 million concussion database, which “will attempt to comprehensively track the natural histories of concussions.”\textsuperscript{196} The database will compile concussion treatment data, facilitate research, and hopefully lead to medical advances.\textsuperscript{197} Unfortunately, in the database’s initial phase, athletes at only ten universities will participate;\textsuperscript{198} ultimately, the database will collect data from just 37,000 of 450,000 collegiate athletes.\textsuperscript{199} That said, is the database too little, too late?

V. METHOD TO THE MADNESS?

Recently, the NCAA and videogame producer Electronic Arts settled a former student-athletes’ class action claim that the defendants unlawfully used the athletes’ likenesses in videogames.\textsuperscript{200} The settlement’s effect on student-athlete compensation

\begin{thebibliography}{9}


\bibitem{193} Id.


\bibitem{195} See, e.g., MICH. COMP. LAWS § 333.9156(3) (2014) (“A youth athlete who has been removed from physical participation in an athletic activity under this subsection shall not return to physical activity until he or she has been evaluated by an appropriate health professional and receives written clearance from that health professional authorizing the youth athlete’s return to physical participation in the athletic activity.”); VT. STAT. ANN. tit. 16, § 1431(d)(2) (2014) (“Neither a coach nor a health care provider shall permit a youth athlete who has been prohibited from training or competing pursuant to subdivision (1) of this subsection to train or compete with a school athletic team until the athlete has been examined by and received written permission to participate in athletic activities from a health care provider.”).


\bibitem{197} Id.

\bibitem{198} Id.

\bibitem{199} Associated Press, IU Medical School Helping to Lead Concussion Study, WASH. TIMES (May 30, 2014), http://www.washingtontimes.com/news/2014/may/30/iu-medical-school-helping-to-lead-concussion-study/ (estimating 37,000 eventual participants); Solomon, supra note 16 (quantifying the total number of collegiate athletes).

Anthony R. Caruso

is not yet clear, but a line has been drawn. The NCAA has effectively admitted that college athletes no longer merely dabble in sports.

While this admission is meaningful in itself, it potentially lays the groundwork for even greater change. The student-athletes that Americans so proudly honor deserve full, complete, and lasting protection of their health, safety, and welfare. Without further hesitation, regulators and lawmakers should provide such assurances to student-athletes from the day they step on the field.

First and foremost, student-athletes merit full protection against all forms of sports-related disability and death. Legislators or the NCAA should create a massive, far-reaching insurance fund for all student-athletes, without regard to sport or division. This package would provide a safety net to collegiate competitors, and ensure their dedication no longer returns only partial reward.

Second, critics should bury at sea the argument that student-athletes warrant monetary compensation. Instead, advocates should focus on student-athletes’ need to prioritize their studies above athletics. The NCAA must limit the countless hours college athletes devote to team activities. Also, it should close the “voluntary” practice loophole, to maintain a level playing field among college teams, and enable student-athletes to engage more fully in their educations.

In lieu of compensation, the NCAA should fulfill its “obligation to protect both the health and well-being of its student-athletes in return for the physical demands constantly placed upon them.” Student-athletes desperately need greater financial support from the NCAA. Such support should include irrevocable four-year...

keller-s-video-games-suit-061014 (discussing the NCAA’s agreement to pay $20 million to former athletes featured in videogames).


203. See generally id. (“In California, a 2012 law established a ‘student-athlete bill of rights,’ including a requirement that the state’s four Pac-12 universities — Cal-Berkeley, Stanford, UCLA and USC — pay for sports-related medical expenses.”) (quoting CAL. EDUC. CODE § 67453(a)(2) (2014)).

204. See Jeff Morganteen, Why College Athletes Don’t Need Paychecks, CNBC (Mar. 26, 2014, 8:58 AM), http://www.cnbc.com/id/101526106 (quoting NCAA president Mark Emmert) (“We want to make sure they get degrees, and that they really have the education that sets them up for life. . . . That’s the game-changer here.”).


208. See Strauss, supra note 61 (lamenting the hardships injured players face).
Collegiate Collisions on the Field and in the Courtroom

 scholarships, scholarships that cover the full cost of attendance, and improved medical coverage, including those athletes who sustain career-ending injuries.

VI. The Future of College Athletics

Looking to the future, college athletics’ fate is uncertain. What is apparent, however, is that colleges and universities will not expose themselves to liability without a fight. 209 Pacific-12 Conference (“Pac-12”) university presidents, 210 unhappy with the current state of affairs and desperate to express their voices, proposed sweeping NCAA reforms in a letter to the presidents of other Football Bowl Subdivision schools. 211 The letter, spurred in part by Northwestern University’s football players’ effort to unionize, 212 proposed ten changes to the NCAA model, and urged other presidents to support their reform agenda. 213

The letter asked the NCAA to: “[p]ermit institutions to make scholarship awards up to the full cost of attendance;” “[p]rovide reasonable on-going medical or insurance assistance for student-athletes who suffer an incapacitating injury in competition or practice;” “[c]ontinue efforts to reduce the incidence of disabling injury;” and “[g]uarantee scholarships for enough time to complete a bachelor’s degree, provided that the student remains in good academic standing.” 214 Also, the letter sought to “[d]ecrease the time demands placed on the student-athlete in-season, and correspondingly enlarge the time available for studies and full engagement in campus life.” 215 Essentially, the presidents prompted the NCAA to realize its “student-athlete” ideal. 216 The letter also noted that while many of its “core objectives could prove to be expensive and controversial, . . . the risks of inaction or moving too slowly are far greater.” 217 Importantly, the presidents contended that “[t]he time for tinkering with the rules and making small adjustments is over.” 218

209. See infra text accompanying notes 210–16.


212. See supra text accompanying notes 105–14.

213. Letter from Ann Weaver Hart et al. to Colleagues, supra note 211.

214. Id.

215. Id.

216. Id. (“[T]he time has come for a meaningful response both to the student-athletes’ grievances and the need to reassert the academic primacy of our mission.”).

217. Id.

218. Id; see also Brian Leigh, Pac-12 Presidents Reportedly Propose Sweeping Changes to NCAA, BLEACHER REP. (May 21, 2014), http://bleacherreport.com/articles/2070951-pac-12-presidents-reportedly-propose-sweep
Anthony R. Caruso

Regardless of the Northwestern case’s outcome,219 the letter will likely spur positive change. Although NCAA reforms are unquestionably necessary, student-athlete unions go too far.220 Instead, the NCAA should adopt the Pac-12 presidents’ suggestions, provide funds for injured players’ long-term medical treatment, and ensure that injured athletes can afford to complete their degrees even when schools terminate their athletic eligibility and scholarships.221 Unpaid college athletes generate hundreds-of-millions of dollars for NCAA universities, yet too often, athletes foot the bill for their sports-related injuries.222

Since 2005, the NCAA has required universities to certify that athletes have obtained insurance for on-field injuries.223 When parents’ policies do not cover an athlete, colleges offer the athlete the same policy they offer to other students.224 These standard policies, however, are not tailored to sport-related injuries or the specialized surgeries, rehabilitative procedures, and expensive tests that often follow.225 Secondary insurance coverage could cover these costs, but many schools decline to offer it.226 Meanwhile, the NCAA operates a catastrophic insurance program, yet few injuries surpass its $90,000 deductible.227 No government entity or organization has forced institutions to close the coverage gap.228 The time for change has come.

Generally, once a student-athlete leaves college, NCAA and school medical insurance no longer cover injuries the athlete sustained as a player, even injuries that develop into chronic conditions.229 Some universities extend athletes’ medical...
coverage one year past graduation, but when athletes do not receive coverage, the financial burden can devastate them and their families.

A former athlete’s inability to afford adequate care poses a significant enough problem when injuries limit the athlete’s mobility, quality of life, and job prospects. An even greater danger, however, stems from the fact that concussions often manifest their debilitating effects on brains years after athletes’ careers end. Despite the NCAA’s claims that it “has specifically addressed the issue of head injuries through a combination of playing rules, equipment requirements and medical best practices,” it needs to accomplish much more.

College athletes have undertaken a strong effort to compel the NCAA to provide concussion-management training and evaluation for current players, and follow-up care for former players. While many critics concede that NCAA medical coverage has improved in recent years, athletic departments continue to assume far too little responsibility for athletes. Their failures often generate confusion and frustration, as most players never imagined they would pay exorbitant medical bills from their own pockets.

A. Recent Advances

On July 29, 2014, the NCAA agreed to pay $75 million to settle former college athletes’ concussion-related class action claims. The proposed settlement requires the NCAA to monitor an estimated 4.2 million players who suffered serious head

---

236. Solomon, supra note 16.
237. Id.
injuries.\textsuperscript{239} It also compels the NCAA to implement standard concussion-management procedures for athletes who sustain concussions during games or practices.\textsuperscript{240} The agreement mandates concussion education initiatives,\textsuperscript{241} as well as a $5 million NCAA contribution to a concussion research fund.\textsuperscript{242} In exchange, the class plaintiffs agreed not to pursue further claims against the NCAA.\textsuperscript{243}

Per the proposed settlement, “all current and former NCAA student-athletes in all sports and divisions who competed at an NCAA member school within the past fifty years may qualify for physical examination, neurological measurements and neurocognitive assessment.”\textsuperscript{244} Further, specially trained medical personnel must attend all “contact” sports games and practices, defined to include football, ice hockey, wrestling, lacrosse, field hockey, soccer, and basketball.\textsuperscript{245}

The settlement also requires the NCAA to set strict return-to-play guidelines and provide academic accommodations to student-athletes who sustain concussions.\textsuperscript{246} Team physicians must run preseason baseline tests on student-athletes, and clear athletes who suffer concussions before they participate in games or practices.\textsuperscript{247} NCAA member schools also must report concussion diagnoses and their resolution.\textsuperscript{248} The settlement’s terms represent a major shift from the NCAA’s prior concussion guidelines, adopted in 2010.\textsuperscript{249} These guidelines allowed schools to set...
Collegiate Collisions on the Field and in the Courtroom

their own concussion management plans, and permitted non-doctors to clear athletes to return to play.250

The NCAA settlement comes on the heels of the NFL’s recent agreement to compensate former players for their concussion-related injuries.251 The settlements differ in several respects, including price tag.252 Unlike the NFL’s uncapped pact, which may require payments upwards of $900 million, the NCAA dollar figure seems miniscule.253 Also, while the NFL settlement sets damage awards for a list of concussion-related ailments,254 the NCAA merely agreed to provide medical testing to evaluate future claims, as opposed to actual treatment.255

In contrast to the NFL settlement, the NCAA agreement does not foreclose individual lawsuits.256 However, class actions typically carry much greater weight than single-plaintiff claims.257 If U.S. District Court Judge John Lee accepts the proposed settlement, it will shield the NCAA from costly class actions.258

The settlement is not yet final.259 Before Judge Lee can approve it, he must hold a “fairness hearing,” where players may voice “questions, criticisms or objections.”260 However, because players may file individual claims notwithstanding the settlement,261 few will likely object.262

Though the proposed settlement reflects the NCAA’s growing will to consider reforms and acknowledge student-athletes’ rights, many critics question whether it will produce meaningful change.263 After all, several collegiate athletics programs,

250. NAT’L COLLEGIATE ATHLETIC ASS’N, supra note 249, at 56.
253. Id.
255. Class Action Settlement Agreement and Release, supra note 238, at 9, 16 (requiring the NCAA to establish a Medical Monitoring Fund and providing that “medical monitoring does not mean rendering medical care”).
256. See Barrett, supra note 252.
258. Id.
260. Id.
261. See Barrett, supra note 252.
262. Munson, supra note 259.

42 JOURNAL OF BUSINESS & TECHNOLOGY LAW
and high school programs too, have already implemented concussion-management programs like the program the settlement proposes. For example, in 2010, the Big Ten Conference instituted a nearly identical concussion-management plan. As the largest collegiate sports organization in the country, the NCAA should lead the concussion-safety movement, not play catch-up.

Per the proposed settlement, the NCAA need not provide a medical examination to evaluate a former athlete’s injuries until the athlete completes a questionnaire. This provision effectively limits athletes’ eligibility to receive exams, as athletes “may complete the Screening Questionnaire not more than once every five (5) years until the age of fifty (50), and then not more than once every two (2) years after the age of fifty (50) until the end of the fifty (50) year Medical Monitoring Period.” Further, athletes may complete no more than five questionnaires during this period. If the NCAA truly valued student-athletes’ health and well-being, would it have imposed such restrictions?

Because the plaintiffs’ filings allege that more than ten thousand athletes may qualify for damages under the settlement, a crucial question is whether $75 million will suffice. Importantly, attorneys’ fees and litigation expenses could extract up to $15.75 million, twenty-three percent of the settlement fund. Moreover, $5 million will pay for concussion-related research. If the fund fails to compensate the plaintiffs’ injuries, they may request additional payments; however, the settlement does not require the NCAA or its insurers to satisfy such pleas.

The settlement demonstrates that the NCAA, which admits no wrongdoing and denies that it understated concussions’ dangers, will go only so far. The settlement

---

266. See id.
269. Id. at 23.
270. Id.
271. Associated Press, supra note 239.
273. Solomon, supra note 16.
274. Id.
275. Id.

Vol. 10, No. 1 2015
COLLEGIATE COLLISIONS ON THE FIELD AND IN THE COURTROOM

does not even require the NCAA to immediately adopt protective measures. Instead, it merely provides that the NCAA’s Executive Committee “will recommend that the governing bodies of Divisions I, II, and III pass legislation requiring member schools to certify that they have a concussion management plan in place . . . .” Though the NCAA has agreed to fund claimants’ diagnostic tests, it will neither pay damages nor provide medical treatment until players sue and win judgments, assuming they can afford to do so. Furthermore, the NCAA has not wavered in its refusal to compensate athletes for its use of their names, images, and likenesses.

While the NCAA settlement will by no means make college football safe, it will, at the very least, make it marginally less dangerous. Notwithstanding these slight improvements, the NCAA must do more to honor student-athletes’ sacrifices, and to protect them to the best of its ability. The NCAA’s obligations should endure beyond athletes’ college careers, for as long as they continue to suffer the consequences of their injuries.

CONCLUSION

As discussed above, Northwestern University is one of several ongoing cases involving challenges to the traditional model of intercollegiate athletics as historically advanced by the NCAA. A victory for Northwestern University will diffuse this recent salvo against the longstanding definition of student athlete. Defeat would allow the players to vote in favor of a union, and the NLRB would invariably order Northwestern to take a seat at the bargaining table across from this newly formed student athlete union. Failure to comply may open the door to an unfair labor practice charge alleging an unlawful refusal to bargain. It is most probable that a defeat for the University would allow the trend of student athlete unionization to flourish, albeit perhaps with the limitation of applying only to those private universities from the big five conferences. Are we still talking about college sports?

Big-time college sports epitomize pure competition, without the excessive salaries, pampered athletes, and inflated egos that characterize professional leagues. Loyal alumni and feverish fans value student-athletes’ commitment to

277. See Class Action Settlement Agreement and Release, supra note 238, at 33.
278. Id.
280. See Munson, supra note 259.
281. Barrett, supra note 252.
282. See supra Part II.
284. See Gasper, supra note 36 (describing public perception of college athletes); Ivan Maisel, Passion, Tradition Elevate College Football over NFL, ESPN, http://sports.espn.go.com/ncf/preview06/columns/story?id=2549750 (commending college football players’ humility in comparison to NFL professionals).
excellence on the field and in the classroom. Yet, college athletes risk injury every
time they compete. 285 Concussions pose a special threat, particularly in the absence
of proper diagnosis and treatment protocol. 286 Surely, young athletes deserve greater
protections and benefits than professionals for physical and mental injuries.
However, the reality does not match this ideal. 287 As college sports revenues
continue to rise, why has the NCAA not developed a cohesive plan to address the
concussion issue?

The NCAA desperately needs to rethink its outdated model. Though its
amateurism principle retains value, the principle should not foreclose reforms that
advance student-athletes’ health, safety, and welfare. Undoubtedly, the NCAA
should have taken action long before it confronted a bevy of lawsuits.

Until recently, no one would have imagined that college athletes would unionize
and share in revenues from the use of their names and likenesses. Who would have
thought that the NCAA, under threat of defection, would free the major
conferences to set their own rules? Has the NCAA acted proactively, reactively, or
has it simply tossed a “Hail Mary” pass? 288

Student-athlete unions will not resolve college sports’ problems. 289 Likewise,
monetary compensation for college athletes is not the answer. 290 On the other hand,
no one who understands the stakes would dispute the need to provide first-rate
health benefits, life and long-term disability insurance, and a myriad of counseling,
training, career-placement, and other services to student-athletes. 291 Nothing less
befits youths who entertain millions while they pursue their educations. 292

Regulators and lawmakers need to get a grip on a system they have let slip for too
many years. Is the amateurism model’s tradition paramount to student-athletes’
well-being? I think not.

The pending NCAA settlement with college athletes regarding the concussion
class action lawsuit should be carefully monitored. The medical affirmation that
concussions can potentially have long term effects, and the mandate that the NCAA
should focus on concussion management policies for the student athlete, are
promising trends. 293

285. See Smith, supra note 178 (“[T]he brains of college players are less developed [than NFL players’] and
more susceptible to serious head injury.”).
286. See supra notes 9, 143–44 and accompanying text.
287. See discussion supra notes 251–55 (discussing the NFL and NCAA concussion settlements).
288. A “Hail Mary” is “a long forward pass in football, especially as a last-ditch attempt at the end of a game,
where completion is considered unlikely.” DICTIONARY.COM, http://dictionary.reference.com/browse/hail-mary
(last visited Sept. 30, 2014).
289. See Femia, supra note 220 (relaying NCAA President Mark Emmert’s opinion that unions would
detract from collegiate athletics).
290. Buchanan, supra note 233.
291. See supra Part IV.
292. See Gasper, supra note 36 and accompanying text.
293. See supra Parts IV.A, VI.A.
Regardless, if the NCAA and its member-institutions fail to be more proactive before litigation advances, college sports face grave danger.\footnote{294} Players will sustain further injuries, and lawsuits will continue to fester. Then again, if the NCAA acts quickly to tackle pressing issues, collegiate athletics may survive.\footnote{295} Plaintiffs should agree to cease litigation, so the NCAA can revamp its governing body and committees. The NCAA should not do so reactively, but rather in a thoughtful, visionary manner that advances both athletes’ and universities’ interests. Notwithstanding its arguments to the contrary,\footnote{296} the NCAA holds a duty to safeguard student-athletes’ health.\footnote{297} Technological advancements, medical research, and even common sense dictate that the NCAA must do more to protect athletes from injury. If the NCAA values its survival, it will heed the medical community’s warnings, support injured athletes, and devise innovative safety solutions, before judges and juries wrest control.

\footnote{294}{Trahan, supra note 25.}
\footnote{295}{See Smith, supra note 178.}
\footnote{296}{See Fenno, supra note 39 and accompanying text.}
\footnote{297}{NCAA, supra note 27 (“The [NCAA] is . . . dedicated to safeguarding the well-being of student athletes.”).}