

NCAA Institutions and a Duty to Warn Football Student-Athletes: A Look into the Arrington v. NCAA case

By Spencer Anderson

Table of Contents

I. Introduction.....	3
II. Background.....	4
A. Adrian Arrington v. NCAA.....	4
1. Facts	5
i. Adrian Arrington.....	5
ii. Derek Owens.....	6
iii. Mark Turner.....	7
iv. Angela Palacios.....	8
iv. National Collegiate Athletic Association.....	10
2. Allegations.....	10
3. Requests for Relief.....	11
B. Concussion Research.....	12
C. Establishing a Duty of Care in Football.....	17
i. Contact Sports Exception to the Duty of Care.....	18
ii. Trainers and Coaches.....	19
iii. High School Athletic Associations Owe No Duty to Student-Athletes	19
iv. NCAA Institutions Do Not Have a Special Custodial Relationship with Student-Athletes.....	20
D. NFL Response to the Long-Term Health Risks of Concussions.....	21
1. NFL Rule Changes and Monitoring Policies.....	22
2. CBA Provisions.....	25
E. NCAA and NCAA Institution Response to the Long-Term Health Risks of Concussions.....	30
III. Analysis.....	33

A. Adrian Arrington v. NCAA.....	33
1. Has the NCAA Been Negligent in Failing to Warn of Concussion Risks?.....	33
i. Duty of Care.....	34
ii. Breach of Duty.....	37
iii. Cause in Fact.....	38
iv. Proximate Cause.....	39
2. Has the NCAA Concealed Information that is Material to Concussion Health Risks?.....	40
3. Has the NCAA Been Unjustly Enriched By Retaining the Services of Football Student-athletes and Refusing to Pay Medical Expenses for Sports-Related Injuries Occurring After the Athlete’s College Career?.....	43
4. Has the NCAA Failed to Medically Monitor Student-Athletes Who Have Suffered From a Concussion or Other Head Trauma?.....	46
B. Possible Defenses for the NCAA and NCAA Institutions.....	46
1. Assumption of Risk.....	47
2. Contact Sports Exception to Negligence.....	49
3. Remoteness of the Injury.....	50
4. Statute of Limitations Bars Claim.....	52
IV. Recommendation.....	54
A. Probable Outcome of Arrington v. NCAA & NCAA Football.....	54
B. How Can the NCAA Decrease the Risks of Long-term Mental Health Complications?.....	55
1. Partner with the NFL to Increase Concussion Awareness and Research.....	55
2. Promote Rule Changes to Increase Safety.....	56
3. Promote State Legislation Efforts.....	58
3. Increase Monitoring and Reporting Standards.....	59
4. Provide a Pool of Resources for Affected Players.....	60
V. Conclusion.....	61

I. Introduction

The game of football has recently come under fire as a result of studies indicating long-term health complications of concussions, trainers allowing players to continue to play football while still under the effects of concussion-like symptoms, and coaches specifically endangering players' health by paying bounties to players who injure or sideline opponents. Both current and former football players have responded through multiple class action lawsuits including 59 concussion lawsuits against the NFL (1231 players involved)¹ and a class action lawsuit against the NCAA (*Adrian Arrington v. National Collegiate Athletic Association*).² This paper will outline the complaint made against the NCAA, provide an overview of recent medical research on the effects of football on future mental health, evaluate how the NFL has responded through rule changes and the newly signed collective bargaining agreement (hereafter "CBA") between NFL owners and the National Football League Players Association (hereafter "NFLPA") to protect its current players and former players by providing benefits for players who suffer from mental health complications, and finally evaluate the response from the NCAA and its member institutions to the aforementioned research.

¹ NFL Concussion Litigation: Plaintiffs/Former Players. April 20th, 2012.

http://nflconcussionlitigation.com/?page_id=274

² Adrian Arrington, Derek Owens, Mark Turner, and Angela Palacios, et al. v. NCAA. No. 1:2011cv06356, Northern Illinois District (Chicago).

<http://www.scribd.com/doc/78428992/NCAA-Complaint>

The later sections of the paper will analyze the issues involved in the Arrington v. NCAA complaint including each of the four claims and possible defenses the NCAA will raise. Finally, the paper will predict the probable outcome of the case and how the NCAA can decrease the incidence of long-term mental health complications for student-athletes.

II. Background

This section of the paper will give an overview of the Adrian Arrington v. National Collegiate Athletic Association complaint by discussing the facts and the four claims against the NCAA. Following an overview of the case, the paper will then discuss the growing amount of concussion research addressing the long-term effects of head trauma for football players. Then the paper will discuss the current law of negligence in a sport setting and the elements to establish a duty to warn in the context of football participation. Finally, the paper will discuss how the NFL and NCAA have responded to concussion-like symptoms and the long-term care for football players to address whether the NCAA has fulfilled its potential duty.

A. Adrian Arrington v. NCAA

Adrian Arrington, Derek Owens, Mark Turner, and Angela Palacios are the named plaintiffs in the class action suit against the National Collegiate Athletic Association (NCAA). The complaint was filed in the United States District Court in the Northern District of Illinois,

Eastern Division, on November 21st, 2011.³ The complaint alleges negligence on the part of the NCAA, stating the NCAA failed in its duty to ensure a safe environment for student-athletes. The NCAA's Constitution recognizes that: "It is the responsibility of each member institution to protect the health and provide a safe environment for each of its participating student-athletes."⁴

1. Facts

The four plaintiffs represent the class of all similarly situated individuals who have been injured allegedly due to the NCAA's negligence.⁵

i. Adrian Arrington

Adrian Arrington, a former Eastern Illinois (EIU) football player from 2006-2009, is a 25-year-old suffering from post-concussion syndrome. As a player at EIU he sustained numerous and repeated concussions. In each instance after he sustained his first three concussions, the EIU doctor told Arrington he could return to play the very next day.⁶ After his third concussion, Arrington started experiencing memory loss and seizures. Arrington suffered two more concussions while participating on the EIU football team before he

³ *Id.* at 1

⁴ NCAA Constitution, Article 2, at 2.2.3. Adopted 1/10/95.

⁵ Arrington, et. al. at 1

⁶ *Id.* at 4

decided to focus on his school work which was suffering due to his memory loss. Arrington claims that the NCAA failed to: 1) require its member institutions to implement a "return-to-play" guideline for student-athletes who have sustained concussions; 2) adopt rules requiring the education of coaches, staff, and athletes regarding the symptoms and dangers of concussions; 3) implement rules addressing the treatment and eligibility of student-athletes who have sustained multiple concussions; and 4) implement system-wide guidelines for the screening and detection of head injuries. These guidelines would have detected the numerous concussions Arrington received and thus prevented him from playing until he had fully recovered.⁷

ii. Derek Owens

Derek Owens is a 22-year-old former football player at the University of Central Arkansas (UCA). Entering college, Owens was the true definition of a student-athlete. He was very well rounded and participated in band, lettered in three different sports for three consecutive years, and scored a 32 on his ACTs.⁸ Owens received offers to play football at a variety of schools, but decided to take the academic scholarship offered by UCA (Division II). In the summer of 2008, Owens attended a voluntary practice. Prior to the practice, Owens did not receive any information on how to recognize or report head injuries or the proper tackling and blocking techniques to avoid them. During the practice, Owens suffered a hit to the head which

⁷ *Id.* at 5.

⁸ *Id.* at 5.

resulted in concussion-like symptoms causing him to miss the rest of summer practices. During the fall season he received two more severe concussions causing him to sit out for the 2007-08 season.⁹ Owens received another concussion during the 2009 season and by the fall of 2010 Owens was starting to experience post-concussion syndrome. Symptoms included memory loss, trouble sleeping, headaches, an inability to concentrate, and depression.¹⁰ This affected his academic record and caused him to lose his academic scholarship. Owens continued to struggle academically and ultimately dropped out of school and football as a result of his symptoms. Owens has seen both a neurologist as well as a specialist in football-related concussions and has been diagnosed with post-concussion syndrome.¹¹

iii. Mark Turner

The third named plaintiff is Mark Turner, a former student at Fordham University in New York who was on an academic scholarship and a member of the football team for the 1988-1989 seasons.¹² During a game in his second season, Turner went to make a tackle resulting in the other player's knee hitting him in the helmet rendering him unconscious. Turner suffered from concussion symptoms, but was never

⁹ *Id.* at 7.

¹⁰ *Id.* at 8.

¹¹ *Id.* at 9.

¹² *Id.* at 10.

checked on by the team staff. As a result of his head injuries he quit the team.¹³

Shortly after leaving the team, Turner developed Bell's Palsy - a form of partial facial paralysis. Turner was examined by a neurologist who found that Turner had a dark area in the frontal lobe of his brain precisely where he was hit when he lost consciousness. Turner continues to live with symptoms of Bell's Palsy.¹⁴

iv. Angela Palacios

The final named plaintiff is Angela Palacios, a 19-year-old currently attending Ouachita Baptist University (OBU) and a former member of the OBU women's soccer team.¹⁵ Prior to attending OBU, Palacios sustained two concussions while playing soccer in high school. Her parents alerted OBU about the prior concussions and provided protective head gear for her to wear while playing on the soccer team. Palacios was a very successful player as a freshman and was listed among the 2010 team leaders in points, assists, shots on goal, and game winning goals.¹⁶

At a team practice on September 13, 2011 Palacios suffered a head injury. The trainer asked Palacios if she was dizzy, nauseous, or had a headache. Palacios answered "yes" to all three questions. No further

¹³ *Id.* at 11.

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 12.

concussion-related tests were administered on the day of her injuries and she was instead sent to her dorm room to rest. The following day, Palacios was given an online test to determine whether she had any lingering neurological deficiencies. Based on that test, Palacios was held out of practice and competition until September 17th. She continued to suffer from concussion related symptoms.¹⁷ She returned to practice and informed the coach that she was not feeling well. The coach made her participate in running drills and did not consult the trainer. When Palacios asked the trainer for help, the trainer responded: "You don't want to make the coach mad." Palacios was excused from practice after the coach was contacted by her mother.

Palacios sought medical attention at a hospital emergency room where a doctor found that Palacios had diminished sensation on her left side, her memory was sluggish, and that she had sustained a serious concussion.¹⁸

All these plaintiffs make similar claims against the NCAA: 1) that the NCAA failed to educate student-athletes, trainers, and coaches about concussion and head trauma symptoms; 2) that the NCAA failed to properly monitor or check on the student-athlete following a head injury; 3) that proper treatment was not immediately prescribed leading to possible further injuries; 4) that return to play guidelines were not in place leading to a danger of further head injuries (and in some cases actual injuries); 5) that reporting head

¹⁷ *Id.* at 13.

¹⁸ *Id.* at 14.

injuries or lingering symptoms was not encouraged or a part of the culture for NCAA student-athletes; 6) that student-athletes missed time from school as a result of the injuries; and 7) that student-athletes incurred out-of-pocket expenses for medical treatment.¹⁹

iv. National Collegiate Athletic Association

The defendant, NCAA, is an unincorporated association that acts as the governing body of college sports. The NCAA represents more than 400,000 student-athletes competing in three divisions at over 1,000 colleges and University member institutions. The NCAA oversees 88 championships in 23 different sports. Through various licensing programs, the NCAA takes in over \$750 million in revenues each year. The lawsuit names the NCAA as the representative of all NCAA member institutions with NCAA accredited athletic programs.²⁰

2. Allegations

The plaintiffs' claims are four-fold and include allegations of:

1. Negligence
2. Fraudulent Concealment of Material Information
3. Unjust Enrichment
4. Inadequate Medical Monitoring

¹⁹ *Id.* at 14.

²⁰ *Id.* at 15

The thrust of the plaintiffs' argument lies in the fact that the NCAA and its member institutions: 1) did not encourage these injured athletes to report or complain about their physical well-being; 2) did not thoroughly educate or warn student-athletes of the long-term effects of concussions; 3) did not educate student-athletes on head injury prevention; 4) did not identify and manage a concussion once it occurred; and 5) did not follow-up with players forced to stop playing as a result of concussions.²¹ As a result, the members of the class-action suit have suffered physical injuries and have also incurred out-of-pocket related medical expenses related to their injuries.²²

3. Requests for Relief

The plaintiffs request 1) compensatory damages including prejudgment interest, costs, and attorneys' fees; 2) injunctive relief requiring the NCAA adopt corrective measures regarding: i) the adoption of coaching methodologies so players avoid tackles which cause head injuries; ii) the implementation of system-wide "return-to-play" guidelines for student-athletes who have sustained concussions; iii) the implementation of system-wide guidelines for the screening and detection of head injuries; and iv) the implementation of regulations addressing the treatment and eligibility of student-athletes who have sustained multiple concussions in the course of play; 3) the establishment of medical monitoring programs; and 4) the

²¹ *Id.* at 33

²² *Id.* at 33

establishment of a trust fund, in an amount to be determined, to pay for the medical monitoring of all past, current and future NCAA student-athletes.²³

B. Concussion Research

Research involving the effects of concussions has proliferated in the past decade. There have been hundreds of studies with many focused on the effects of concussions from playing football. The increasing research and data have resulted in doctors being able to better identify concussion-like symptoms, treat concussions, and inform the public of the dangers of concussions. For example, in 2003, it was believed that there were approximately 300,000 sports-related concussions that occurred annually in the U.S.²⁴ while a recent 2012 study showed this number at an estimated 1.6 to 3.8 million²⁵ sports-related concussions. Studies have shown that players with a history of previous concussions are more likely to have future concussive injuries than players with no history of head trauma.²⁶ The majority of patients with a sports-related concussion recover within a 7-10 day

²³ *Id.* at 39

²⁴ Guskiewicz, et al., Cumulative Effects Associated With Recurrent Concussion in Collegiate Football Players, *The NCAA Concussion Study*, *THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION*, Vol. 290, No. 19, November 19, 2003, at 2549.

²⁵ Leddy, et al., Rehabilitation of Concussion and Post-concussion Syndrome. *Sports Health: A Multidisciplinary Approach*. January 10, 2012.

²⁶ *Id.*

period. However, some athletes develop post-concussion syndrome (PCS). PCS is defined by the fourth edition of the *Diagnostic and Statistics Manual* as 1) cognitive deficits in attention or memory and (2) at least 3 or more of the following symptoms: fatigue, sleep disturbance, headache, dizziness, irritability, affective disturbance, apathy, or personality change.²⁷ The problem with diagnosing PCS is that many of these symptoms are nonspecific and cognitive deficits symptoms usually resolve within 1-3 months in the majority of patients.²⁸

The short-term effects of concussions on football student-athletes were measured in a 2003 study which showed that collegiate football players may require several days to recover from concussion symptoms, cognitive dysfunction, and postural instability following a diagnosed concussion.²⁹

Long-term effects are still being explored, but Malcolm Gladwell called the public's attention to some of the long-term mental health risks for NFL players through an article in *The New Yorker* published

²⁷ Boake C, et al. Diagnostic Criteria for Postconcussional Syndrom after Mild to Moderate Traumatic Brain Injury. *Journal of Neurophysiatry*. 2005; 17(3):350-356.

²⁸ Al Sayegh A, Sandford D, Carson AJ. Psychological approaches to treatment of postconcussion syndrome: a systematic review. *J Neurol Neurosurg Psychiatry*. 2010;81(10):1128-1134.

²⁹ McCrea, et al., Acute Effects and Recovery Time Following Concussions in Collegiate Football Players, The NCAA Concussion Study, *JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION*, Vol. 290, No. 19, November 19, 2003, at 2561.

on October 19, 2009. In the article, entitled *Offensive Play*, Gladwell tells the stories of multiple former NFL players who are suffering from PCS. One such player, Kyle Turley, a 34-year-old six feet five inch former offensive lineman, played in the NFL for 9 years, he talks in the article about his experiences:

"You are just out there, trying to hit the guy in the middle, because there are three of them. You don't remember much. There are cases where you hit a guy and you'd get into a collision where everything goes *off*...Every play: collision, collision, collision."³⁰

The article discusses how many players are taught and encouraged to play through concussion-like symptoms and that getting hit and going back into the huddle is a part of "the game."³¹ Players are taught by their high school and college coaches to continue to play through pain. The long-term effects of playing through concussion-like symptoms are evident in Turley. Turley now experiences frequent headaches, nausea, and about once a month experiences vertigo and/or passes out. As a former NFL player, he is not the only one with physical ailments which have implications also for mental and emotional health. For example, there have been multiple NFL players who have committed suicide due to physical ailments that have led to poor mental health.

Many casual observers believe that the problem lies in how fast, strong, and violent football has become over the years. Professional

³⁰ Gladwell, Malcolm. *Offensive Play*. The New Yorker. October 19, 2009.

http://www.newyorker.com/reporting/2009/10/19/091019fa_fact_gladwell

³¹ *Id.*

and collegiate football players are bigger and stronger than ever before. Common sense postures that the human skull is not designed to take some of the big hits that coaches and fans alike encourage and applaud. This is part of the problem, but research has found that the bigger problem related to long-term mental health stems from the brain being repeatedly injured by all of the small collisions in football.³²

Studies done by Ann McKee with the help of Chris Nowinski, a former college football player and professional wrestler, along with his group, called the "Sports Legacy Institute" have connected traces of "tau," an abnormal protein indicator found in many patients with dementia, with patients affected by a brain trauma or chronic traumatic encephalopathy (C.T.E.). With Nowinski's help of tracking down former-athletes' brains for research, the team has found C.T.E. and traces of the abnormal "tau" in all cases involving athletes who have participated in contact sports. Most of these athletes have died relatively young (24-40) and show this abnormal protein which under normal circumstances develops late in life (65+).³³

The most recent example is Dave Duerson, a 50-year old and 11-year NFL veteran. Duerson suffered from chronic traumatic encephalopathy (C.T.E.), a progressive degenerative disease found in individuals who have suffered from multiple concussions and other

³² *Id.*

³³ *Id.*

forms of head injury.³⁴ Duerson had at least ten concussions in his NFL career. CTE affects judgment, inhibition, impulse, control, mood, and memory. Duerson committed suicide in February 2011 by shooting himself in the chest to preserve his brain for research at the Sports Legacy Institute.³⁵

However, NFL players are not only players who have been found to have mental health issues due to head injuries caused by playing football.

The NCAA has known about the high incidence of concussions in football since the 1970's and have funded multiple studies to learn more about the effects of concussions on student-athletes. These studies have uncovered that a history of multiple concussions is associated with a greater risk of future brain defects, including post-traumatic brain injury symptoms of headaches, dizziness, loss of memory, and impulse control problems.³⁶ A 2003 NCAA funded study concluded that NCAA players require an average of five to seven days after a concussion for their cognitive function to return to normal.³⁷

³⁴ Zeigler, Terry. Chronic Traumatic Encephalopathy (CTE). February 1, 2012. <http://www.sportsmd.com/Articles/id/44.aspx>

³⁵ ESPN News Services. Dave Duerson had Brain Damage. May 3, 2011. ESPN Chicago. <http://sports.espn.go.com/chicago/nfl/news/story?id=6465271>

³⁶ Guskiewicz, et al. Cumulative Effects Associated With Recurrent Concussion in Collegiate Football Players at 2550

³⁷ McCrea, et al., Acute Effects and Recovery Time Following Concussions in Collegiate Football Players at 2561.

Another 2003 NCAA funded study concluded that NCAA players with a history of concussions are at an increased risk of sustaining future concussions and recommended that student-athletes with a high cumulative history of concussions should receive more information about the increased risk of repeat concussions before deciding whether to continue to play football.³⁸

In late 2009, the University of Michigan conducted a survey of over a thousand randomly selected retired NFL players - all who had played in the NFL for at least three seasons. Just over six percent of players over 50 reported that they had received a diagnosis of "dementia, Alzheimer's disease, or other memory-related disease," which is five times higher than the national average for that age group. For players between the ages of thirty and forty-nine, the reported rate was nineteen times the national average.³⁹ There has not been a similar survey conducted for former NCAA football players, but there appears to be a strong association between documented head trauma from participation in sports and longer-term mental health issues like those experienced by the plaintiffs.

C. Establishing a Duty of Care in Football

In general, every person owes a duty of ordinary care to guard against injuries to others, and a person who breaches this duty

³⁸ Guskiewicz, et al.

³⁹ Weir, David. Jackson, James. Sonnega, Amanda. National Football League Player Care Foundation. Study of Retired Players. The University of Michigan Institute for Social Research. September 10, 2009.

is deemed negligent and may be held financially liable if his conduct proximately causes the injury of another.⁴⁰

i. Contact Sports Exception to the Duty of Care

The Supreme Court of Illinois has adopted an exception to the standard of ordinary care for participants engaged in contact sports. "Voluntary participants in contact sports are not liable for injuries caused by simple negligent conduct."⁴¹ "When the court concludes that 'physical contact among participants is inherent' in the game, a player owes no duty to a co participant to avoid ordinary negligence."⁴² The Supreme Court of Illinois adopted an exception to the exception by finding liability in full contact sports like hockey and football where "a participant breaches a duty of care to a coparticipant only if the participant intentionally injures the coparticipant or engages in conduct totally outside the range of the ordinary activity involved in the sport."⁴³ The players filing suit against the NCAA and NFL with mental health complications due to participating in football most likely do not have a cause of action against coparticipants and have instead argued that the governing

⁴⁰ Karas v. Strevell 227 Ill.2d 440, 445. Supreme Court of Illinois. February 22, 2008.

⁴¹ Pfister v. Shusta 167 Ill.2d 417, 422. Supreme Court of Illinois. October 26, 1995.

⁴² Karas v. Strevell at 454.

⁴³ *Id.* at 459.

bodies themselves are to blame for not warning them about known risks involved with head injuries.

ii. Trainers and Coaches

In 2002, a similar previous case was decided by the Supreme Court of Illinois involving an Eastern Illinois football player who suffered from severe neurological injuries while playing in a football game on September 2, 2006.⁴⁴ Prior to the injury the plaintiff experienced trauma that produced neurological symptoms (stingers). The player named the trainers and coaches in the suit for alleged negligence for failing to monitor such injuries during practices, for failing to keep records of neurological injuries, and for failing to evaluate and assess the plaintiff's capacity to safely engage in the physical activities required by playing football. The Appellate Court of Illinois, Fourth District, found that the trainers had a professional duty of care through the Section 3(4) of the Athletic Trainers Act, but that coaches did NOT owe a professional duty of care to student-athletes.⁴⁵

iii. High School Athletic Associations Owe No Duty to Student-Athletes

The Arrington case is one of first impression for deciding whether NCAA institutions have a duty of care to student-athletes. The District Court of Illinois will look to other jurisdictions, secondary sources, and public policy to determine whether the NCAA has a duty to

⁴⁴ Sellers v. Rudert. 395 Ill. App.3d 1041, 1044. Appellate Court of Illinois, Fourth District. November 20, 2009.

⁴⁵ *Id.* at 1053.

warn its student-athletes who voluntarily participate in inherently dangerous sports about the risks of concussions and head injuries. In general, the governing bodies of sports' competitions involving football have not been found to have a duty to protect participants from injuries arising from competition. In a case in Louisiana where a high school football player was paralyzed due to participation, the Court of Appeals for the 4th Circuit found that

"the High School athletic association had **no duty to warn** high school football player that he could be injured playing football, even if association had knowledge of allegedly high number of paralyzing injuries among Louisiana's high school football players. The association existed to provide framework for interscholastic competitions, not to insure safety of those individuals who participated in various sports, and even if association required physical examination for all sports players, assumption of that limited duty did not encompass further requirement of specific warnings to football participants."⁴⁶

iv. NCAA Institutions Do Not Have a Special Custodial Relationship with Student-Athletes

In a case involving an injury to a BYU football player, the US District Court for Utah found that no special duties were owed by a University to college athletes based on a special custodial relationship by virtue of a student's status as a football player.⁴⁷ Although neither of these cases control for the Arrington lawsuit,

⁴⁶ 669 So.2d 541. Edwards v. Doug Ruedlinger, Inc. Court of Appeal of Louisiana, Fourth Circuit. January 31, 1996.

⁴⁷ 960 F.Supp. 1522. Orr v. Brigham Young University. United States District Court, D. Utah, Central Division. August 5, 1994.

they suggest that a finding that the NCAA had a duty to warn football players about the risks of participation most likely will be difficult.

Assuming that the plaintiffs can establish a duty to warn, the paper will now look to the responses by the NFL and the NCAA, given the medical research and the law as to whether each organization has fulfilled their duty.

D. NFL Response to the Long-Term Health Risks of Concussions

This paper will next look how the NFL has responded to the long-term mental health risks associated with playing football. This connection will be valuable comparison to the NCAA in order to establish whether the NCAA's conduct has fulfilled its duty to warn student-athletes. The relationship is not perfectly analogous since the NFL has an established employment relationship controlled by a collective bargaining agreement with its players. Employers typically have a duty of care for their employees under the Federal Employers' Liability Act.⁴⁸ If it can be established that the NFL has failed its duty to properly warn players against future mental health risks, the argument for establishing that the NCAA has fulfilled its duty to warn is much weaker.

⁴⁸ Ackley v. Chicago and North Western Transp. Co. 820 F.2d 263, 266. United States Court of Appeals, Eighth Circuit. June 2, 1987.

The startling medical research relating football and mental health complications has not been brushed aside by the NFL. The NFL has responded with rule changes, monitoring systems, and increased benefits for former players with mental health complications.

1. NFL Rule Changes and Monitoring Policies

The NFL has had a history of rule changes to increase the safety of its players (i.e. making grabbing the facemask illegal in 1956, making crackback blocks and blocking below the waist on certain plays illegal in 1979, making it a personal foul to directly strike, swing at, or clubbing the head, neck, or face in 1980, making hits with the helmet or to the head by a defender a personal foul subject to fines, etc.)^{49,50} As an employer, the NFL has a duty to ensure the safety of its players. Since this research and literature have uncovered the health risks of concussions, the NFL has responded both through rule changes and monitoring policies and changes in the collective bargain agreement (CBA).

In 2007, the NFL created its first set of guidelines on return-to-play rules. The policy stated that, "a player could not return to a game or practice in which he lost consciousness and a player must be completely asymptomatic and pass his neurological tests normally

⁴⁹ History of NFL Rules. <http://www.sportsattic.com/araig/NflRulesHistory.htm>.

⁵⁰ Evolution of Rules. <http://nflhealthandsafety.com/commitment/evolution/>.

before returning to play.”⁵¹ The NFL also expanded its neurological testing for all players while requiring those players who have had a previous concussion during the season to undergo extra neurophysiological tests later in the year.⁵²

In August 2009, NFL executives and lawmakers joined in the House Judiciary Committee on Capitol Hill to discuss the effects of head injuries in football leading to a new, stricter set of guidelines. This included a policy which stated, “a player cannot return to a practice or game if he shows any of the symptoms of a concussion, not just a loss of consciousness.” Players were also required to be analyzed by an independent neurologist as well as a team physician after a concussion.⁵³ The NFL also made it illegal for an opponent to make a hit to the head or neck area with a helmet, forearm, or shoulder on a defenseless receiver.⁵⁴

In 2010, the NFL made it illegal to lead with the helmet when tackling and issued large fines and suspensions for players (mainly repeat offenders) for helmet to helmet hits. The NFL expanded the definition of an illegal hit to include hits to the head or neck for all defenseless players. The NFL also required all teams to employ an

⁵¹ Policies on Concussions in the NFL. Concussions in Sports. ESPN Topics.

http://espn.go.com/nfl/topics/_page/concussions.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ History of NFL Rules. <http://www.sportsattic.com/araig/NflRulesHistory.htm>.

independent trainer on the sideline to observe the games and alert team training staffs to possible head injuries.⁵⁵

In 2011, the NFL moved the independent trainers from on the field to in the press box to make it easier for them to identify potential injuries.⁵⁶ The NFL also moved the kick-off from the 30-yard line to the 35-yard line to increase the number of touchbacks. The NFL also prohibited any "running starts" by requiring that no player on the kicking team could line up more than 5 yards behind the kick-off. These rules were directly aimed at reducing the number of concussions. The kick-off is usually a very dangerous play with both teams sprinting full-speed before high impact collisions which many times result in concussions. The NFL has concluded that this rule change has been a success with a 40% reduction in concussions during kick-offs in 2011. Total concussions were reduced by 12.5%, from 218 in 321 games in 2010 to 190 in 320 games in 2011.⁵⁷

The NFL and its owners have implemented many rule changes throughout the years that have had a positive impact on the safety of its players without jeopardizing the integrity of the game of

⁵⁵ *Id.*

⁵⁶ NFL Rule Change Reduced Concussions 40 Percent. SportsConcussions.org. March 26, 2012. <http://www.sportsconcussions.org/ibaseline/nfl-rule-change-reduces-concussions-40-percent.html>.

⁵⁷ NFL: Concussions Down on Kickoffs. Associated Press. ESPN.com. March 26, 2012. http://espn.go.com/nfl/story/_/id/7740025/rich-mckay-says-nfl-kickoff-tweak-reduced-concussions.

football. As mentioned before, although playing football is an inherently dangerous activity, the NFL recognizes its duty as an employer to provide a safe environment for its employees. Its employees also recognize the importance of future benefits and healthcare and have bargained for provisions to ensure they are protected against future unforeseen mental health problems.

2. CBA Provisions

The NFL and NFLPA recently signed a CBA in July 2011 effective through the 2020 season.⁵⁸ One of the main sticking points in the negotiations was the future benefits for current players and the creation of a fund to take care of current retirees. The players realized the long-term health risks involved with playing football and wanted a safety net for future health problems resulting from playing the violent sport. This section will describe the applicable mental health provisions that were adopted in the NFL's CBA.

- **Article 57 - Legacy Benefit:** The legacy fund of \$620 million is to be paid by the NFL and its clubs to qualified

⁵⁸ Summary of the New NFL Collective Bargaining Agreement. Sports Illustrated. July 25, 2011. <http://sportsillustrated.cnn.com/2011/football/nfl/07/25/cba-settlement-summary/index.html>.

players who retired prior to the 1993 season during the term of the agreement.⁵⁹

- **Article 58 - 88 Benefit:** Provides medical benefits to former players who are (1) vested due to their Credited Seasons or their total and permanent disability under the Bert Bell/Pete Rozelle NFL Retirement Plan and (2) determined to have "dementia," ALS, or Parkinson's disease. Mental health costs will reimburse qualified players up to \$100,000 per year. NFL clubs will make advance contributions to the plan and the plan will continue to provide benefits to qualified players after the final year of the agreement. The plan also establishes a committee to develop guidelines for reimbursement of covered expenses.⁶⁰
- **Article 61 - NFL Player Disability Plan:** Creates a new Taft-Hartley welfare benefit plan for the payment of disability benefits to former players who are eligible and qualify. The plan does not require that the disability to have arisen out of football activities. The plan separates benefits into Inactive A (claims within 15 years of the last Credited Season) and Inactive B (claims after 15 years of the last Credited Season).⁶¹ The plan defines "permanent"

⁵⁹ NFL and NFLPA Collective Bargaining Agreement. August 4, 2011. Page 229.

http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA_Searchable.pdf

⁶⁰ *Id* at 230.

⁶¹ *Id* at 237.

as "a disability that has persisted or is expected to persist for at least twelve months from the date of its occurrence, excluding any reasonably possible recovery period."⁶² Those Total and Permanent Disabilities that are caused by the use of, addiction to, or dependence upon any controlled substance as defined in 21 USC Sec. 802(b), alcohol, or illegal drugs, shall only be eligible for Inactive B Disability Benefits.⁶³ Minimum benefit amounts are as follows:

- Active Football \$250,000 (increased to \$265,000 effective January 1, 2016)
 - Active Nonfootball \$150,000 (increased to \$165,000 effective January 1, 2016)
 - Inactive A \$120,000 (increased to \$135,000 effective January 1, 2016)
 - Inactive B \$50,000 (increased to \$60,000 effective January 1, 2016)⁶⁴
- **Article 64 - Former Player Life Improvement Plan:** Provides that eligible former players may receive benefits consisting of life insurance and assistance with obtaining joint replacements, prescription drugs, assisted living, Medicare supplemental insurance, spinal treatment, and

⁶² *Id* at 237.

⁶³ *Id* at 238.

⁶⁴ *Id* at 239.

neurological treatment.⁶⁵ The Neurological Benefit clause provides that eligible players will receive facilitated access and comprehensive, coordinated evaluation at participating medical centers. Each facility will designate one of its neurologists or neurosurgeons as a point of contact to coordinate and oversee all aspects of an eligible former player's evaluation.⁶⁶

- **Article 65 - Neuro-Cognitive Disability Benefits:** Amends the Disability Plan to provide a benefit for those eligible players (defined as i) under the age of 55; ii) vested under the Retirement Plan due to their Credited Seasons; iv) have at least one Credited Season after 1994; and v) have executed a release of claims and covenants not to sue in a form agreed upon by the parties in the CBA) who have a permanent, neuro-cognitive impairment but are not receiving Line of Duty or Total & Permanent Benefits under the Disability Plan or Pension Benefits under the Retirement Plan.⁶⁷ A Special Committee of three healthcare professionals will define the two categories (Moderately Impaired and Mildly Impaired). Qualified players are paid benefits (minimum of \$3,000 and \$1,500 for Moderately Impaired Benefits and Mildly Impaired Benefits respectively) and reimbursed for medical expenses related

⁶⁵ *Id.* at 245.

⁶⁶ *Id.* at 246.

⁶⁷ *Id.* at 247.

to the treatment of the player's neuro-cognitive disorder (not to exceed \$10,000 per year).⁶⁸ Those players qualifying for the Moderately Impaired Benefits within 15 years of the player's last Credited Season becomes eligible for Inactive B level Total and Permanent Disability Benefits and will cease to be eligible under Article 65.⁶⁹

The NFL has tried to shield itself from liability through a clause in Article 65 - Neuro-Cognitive Disability Benefits stating:

"The parties acknowledge and agree that the provision of the benefit under this Article shall not be construed as an admission or concession by the NFL Releasees or any of them that NFL football caused or causes, in whole or in part, the medical conditions covered by the benefit, or as an admission of liability or wrongdoing by the NFL Releasees or any of them, and the NFL Releasees expressly deny any such admission, concession, liability or wrong doing."⁷⁰

The effect of this clause is that those players falling under the requirements of Article 65 have the choice to pursue a negligence claim against the NFL or accept the benefits in Article 65. It is obvious that the NFL and the NFLPA realize the future mental health problems occurring in former football players. The steps that the NFL has taken through rule changes and CBA provisions provides the NFL with some strong arguments for establishing that if it has a duty to warn its players, it has fulfilled this duty.

However, the question this paper addresses is whether the NCAA and NCAA Institutions have a duty to warn student-athletes who

⁶⁸ *Id.* at 248.

⁶⁹ *Id.* at 248.

⁷⁰ *Id.* at 247.

participate in football and the next section in the paper will discuss whether the NCAA has fulfilled its duty regardless of whether the courts decide the duty exists.

E. NCAA and NCAA Institution Response to the Long-Term Health Risks of Concussions

The NCAA has also taken steps to decrease the risks of concussions. The NCAA Rules Committee oversees the playing rules of each sport and works with the NCAA Committee on Competitive Safeguards and other medical experts to make competitions safer. The NCAA Rules Committee meets once a year and rules must be voted on by the membership before being implemented the following year. Football rule changes have occurred, but generally follow the NFL's lead. In 2005, the NCAA Football Rules Committee removed the "intent" requirement from spearing or leading with the helmet.⁷¹ The NCAA also focused on educating student-athletes, coaches, officials, and administrators about preventing head and neck injuries by producing educational materials to teach the proper tackling technique.⁷² In 2008 the NCAA implemented rule 9-1-2-1 stating: "a) No player shall initiate contact with an opponent with the crown of his helmet; b) No player shall initiate contact and target a defenseless opponent ABOVE THE SHOULDERS

⁷¹ A Primer On NCAA Rules for Safety. October 20, 2010.

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/October/A+primer+on+NCAA+rules+for+football+safety>.

⁷² *Id.*

(i.e., whether or not with the helmet)."⁷³ This rule specifically targeted hitting defenseless players, helmet-to-helmet hits, and "launching" oneself against an opponent. In 2010, the Committee clarified that any contact above the shoulders with a body part is a violation of rule 9-1-2-1.⁷⁴ In early 2012, the NCAA followed the lead of the NFL and moved kickoffs forward five yards with the intention of increasing the number of touchbacks and therefore decreasing the number of risky, high impact plays. To further induce the receiving team to take a touchback, the NCAA moved the touchback starting yard line from the 20 to the 25.⁷⁵

In 2010, specific concussion and injury management rules were implemented requiring injured student-athletes to be cleared by appropriate medical personnel before returning to competition. Each NCAA member institution is required to have a concussion management plan.⁷⁶ This plan requires:

⁷³ NCAA. Football Rules and Hitting Defenseless Players. 2008.

http://fs.ncaa.org/Docs/health_safety/2008_football_poster.pdf.

⁷⁴ A Primer On NCAA Rules for Safety.

⁷⁵ Fitzgerald, David. 2012 College Football Rule Changes: How Do These Affect the Big 10? February 25, 2012. <http://bleacherreport.com/articles/1080633-2012-college-football-rule-changes-how-do-these-affect-the-big-ten>.

⁷⁶ NCAA Approach to Concussions: It's Better to Miss One Game than a Whole Season. 2011. <http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/bluedisks/behind+the+blue+disk+concussions>.

- a) an annual process that ensures student-athletes are educated about the signs and symptoms of concussions by requiring student-athletes to acknowledge they have received the information and that they have a responsibility to report concussion related injuries and illnesses to a medical staff member;
- b) a process that ensures students with signs, symptoms, or behaviors consistent with a concussion to be removed from athletic activities and evaluated by a medical staff member experienced in the evaluation and management of concussions;
- c) a policy precluding the student-athlete exhibiting concussion symptoms from returning to the athletic activity for at least the remainder of the calendar day;
- d) a policy requiring medical clearance for a student-athlete diagnosed with a concussion to return to athletics activity as determined by a physician⁷⁷

The plan includes a protocol under the direction of a physician for responding to possible concussions with the intent to ensure the best interest of the student-athlete's well-being and lessen the chances of further harm to a student-athlete's health.⁷⁸ The requirements of the Concussion Management Plan are minimums and the bylaw is supposed to

⁷⁷ NCAA Bylaw 3.2.4.17. 2011-2012 NCAA Division I Manual. August 1, 2011.

⁷⁸ NCAA Memorandum. Legislative Requirement - Concussion Management Plan - Effective August 16, 2010. August 13, 2010.

http://fs.ncaa.org/Docs/DII_MC_PC/Miscellaneous/Concussion%20Management%20Memorandum.pdf.

allow institutions the flexibility to implement a plan that best protects each institution's student-athletes.

In the past few years the NCAA has made strides through rule changes, monitoring, and disseminating educational materials to inform student-athletes about the risks of head injuries. However, the plaintiffs in the Adrian Arrington case argue that the NCAA was too slow with implementing changes and informing them regarding the potential risks.

III. Analysis

This section of the paper will analyze the legal issues involved in Arrington v. NCAA. Emphasis will be put on applying the law to the facts and circumstances of the complaint.

A. Adrian Arrington v. NCAA

The plaintiffs in the class action have filed four claims in their complaint and each will be analyzed separately.⁷⁹

1. Has the NCAA Been Negligent in Failing to Warn of Concussion Risks?

In order for the plaintiffs (Arrington) to prove that the NCAA has been negligent in warning of concussion risks involved in participating in contact sports, they must prove four different

⁷⁹Arrington, et. al. at 37.

elements. First, Arrington must establish the existence of a duty owed by the NCAA to the plaintiffs.⁸⁰ Second, Arrington must prove the NCAA breached this duty. Third, Arrington must establish that the NCAA's conduct was a cause in fact of his injury. In other words, Arrington must establish "a reasonable certainty that a defendant's acts or omissions caused the injury or damage."⁸¹ Finally, Arrington must establish a legal cause or establish that "the defendant's conduct is so closely tied to the plaintiffs' injury that he should be held responsible for it."⁸²

i. Duty of Care

The first element of establishing a duty owed by the NCAA will be a difficult element for Arrington to establish. The complaint alleges that the NCAA had a duty, at all relevant times, to supervise, regulate, monitor, and provide reasonable and appropriate rules to minimize the risk of injury to the players.⁸³ The only case that would control holds that coaches at Universities do NOT have a professional duty of care owed to student-athletes.⁸⁴ The case is analogous to this one in that head trauma was not identified or treated properly which

⁸⁰ Coole v. Central Area Recycling. 384 Ill.App.3d 390, 390. Appellate Court of Illinois, Fourth District (2008).

⁸¹ Lee v. Chicago Transit Authority, 152 Ill.2d 432, 455. Supreme Court of Illinois (1992).

⁸² Simmons v. Garces, 198 Ill.2d 541, 558. Supreme Court of Illinois (2007).

⁸³ Arrington, et. al. at 33.

⁸⁴ Sellers v. Rudert. 395 Ill. App.3d 1041, 1053. Appellate Court of Illinois, Fourth District (2009).

led the student-athlete plaintiff to suffer further complications.⁸⁵ Since the coach has significant control over student-athletes, but does not have a professional duty of care to them, the Court will probably not extend a duty to the NCAA or NCAA Institution which has less control over the safety of student-athletes than a coach.

Furthermore, prior non-controlling case law has found that NCAA institutions and high school regulatory bodies of sports do NOT owe a duty to student-athletes when they are injured while participating.^{86,87} For example, in Edwards v. Doug Ruedlinger, Inc, the court found that the High School Athletics regulatory body established that it was not involved in the selection, training, supervision, or payment of teachers, coaches, referees, or other officials and existed as a body to provide a framework for interscholastic competition and not to ensure the safety of participants. Plaintiffs will likely argue that the NCAA exerts more control than just providing a framework for interscholastic competition. However, the NCAA constitution transfers the responsibility of many principles to the each member institution, including Health and Safety.⁸⁸ This transfer does not admonish a duty to the student-athlete as the NCAA is named as a defendant as a representative of all of its member institutions. However, in Orr v. Brigham Young University, Orr suffers from a back injury during his

⁸⁵ *Id.* at 1044.

⁸⁶ *Edwards v. Doug Ruedlinger, Inc.* at 541.

⁸⁷ *Orr v. Brigham Young University* at 1522.

⁸⁸ NCAA Constitution, Article 2, at 2.2.3. Adopted 1/10/95.

participation as a member of the football team and later suffers from complications from the injury. The United States District Court for the Central Division of Utah held that Universities do NOT have special "custodial" relationships with student-athletes and therefore could not be held negligent for Orr's injuries.⁸⁹ A special relationship arises when one assumes responsibility for another's safety.⁹⁰ Since ordinarily, a party does not have an affirmative duty to care for another, absent a special relationship, the NCAA and its member institutions most likely do not have a broad duty to their student-athletes. However, this does not mean that NCAA member institutions do not have a duty to student-athletes altogether.

The court in Orr recognized a duty where training and medical services were provided and negligently performed.⁹¹ The Arrington complaint alleges that the NCAA was negligent in teaching and training proper tackling techniques to prevent head injuries as well as failing to educate players concerning symptoms that may indicate a concussion occurred.⁹² These facts and allegations make it a closer call to establish a duty, but it is still not likely that the court will find that Arrington has established that the NCAA owes a duty to student-athletes if the court looks to other jurisdictions for guidance.

⁸⁹ Orr v. Brigham Young University at 1522.

⁹⁰ Restatement (Second) of Torts § 314A (1964).

⁹¹ Orr v. Brigham Young University at 1523.

⁹² Arrington, et. al. at 34.

If the court is to find that the NCAA owes a duty to student-athletes it will most likely be found on public policy grounds. The existence of a duty turns in large part on public policy grounds.⁹³ Since the NCAA makes well over \$750 million in revenues each year with most of those revenues coming as a result of participation by football student-athletes, the Court may make a point that the NCAA and its member institutions need to start taking care of the revenue drivers (in this case student-athletes) in the system. Currently, football student-athletes receive grant-in-aid scholarships which cover the cost of tuition and cost of living which is a fraction of what the NCAA institutions make as a result of their efforts.⁹⁴ As a result of this inequity, the court may find that the NCAA owes a duty of care to the athletes it derives a substantial benefit from.

ii. Breach of Duty

The second element that Arrington must prove to establish negligence is that the NCAA breached its duty to student-athletes. If the plaintiffs prove that the NCAA does indeed have a duty to warn student-athletes about the risks of concussions and head injuries, it is very likely that the Court will find that the NCAA has breached this duty. The complaint alleges that the NCAA breached its duty of care by:

⁹³ Ward v. K Mart Corp. 136 Ill.2d 132, 134. Supreme Court of Illinois. April 18, 1990.

⁹⁴ NCAA Bylaw 15.1 Maximum Limit on Financial Aid. 2011-2012 NCAA Division I Manual. August 1, 2011.

- a. Failing to educate players concerning symptoms that may indicate a concussion has occurred;
- b. Failing to warn of the risk of unreasonable harm resulting from repeated concussions;
- c. Failing to disclose the special risks of long-term complications from repeated concussions and return to play;
- d. Failing to disclose the role of repeated concussions in causing chronic life-long cognitive decline;
- e. Failing to promulgate rules and regulations to adequately address the dangers of repeated concussions and a return-to-play policy to minimize long-term chronic cognitive problems;
- f. Misrepresenting pertinent facts that players needed to be aware of to make determinations of the safety of return to play;
- g. Concealing pertinent facts;
- h. Failing to adopt rules and reasonably enforce those rules to minimize the risk of players suffering debilitating concussions⁹⁵

The facts show that the NCAA has moved very slowly to address potential risks to student-athletes by waiting years and in some cases decades to adjust rules, monitoring systems, and treatment plans for student-athletes at its member institutions. The Court is likely to find that the NCAA breached its duty leading to a question whether the NCAA's conduct was a cause in fact of the injuries complained of.

iii. Cause in Fact

The Court is likely to find that the NCAA's conduct was a cause in fact for the plaintiffs' injuries. The determination of whether an action is the cause in fact of the injury is a question of fact for the jury.⁹⁶ In order to prove cause in fact there must be reasonable

⁹⁵ Arrington, et. al. at 34.

⁹⁶ Wacker v. Home Depot U.S.A., Inc. 543 F.Supp.2d. 976, 980. United States District Court, W.D. Wisconsin. April 11, 2008.

certainty that the defendant's actions caused the injury or damage.⁹⁷ The court's use a "but for" test to determine actual causation.⁹⁸ The failure of the NCAA to provide safeguard are a cause of the plaintiffs' injuries. In this case, the jury is likely to find that wrongful conduct of the NCAA and its member institutions was a cause in fact of the plaintiffs' injury.

iv. Proximate Cause

The final inquiry for the negligence claim is whether the NCAA's conduct is a proximate cause of the plaintiffs' injury. Proximate cause is a question of fact for the jury.⁹⁹ This requires a jury to determine whether a defendant will be held legally responsible for the actual consequences of his/her conduct.¹⁰⁰ The key inquiry here is whether the injury is foreseeable given the NCAA's conduct.¹⁰¹ In this case the jury is unlikely to find that the wrongful conduct of the NCAA is a proximate cause of the plaintiffs' injuries. Injuries happen in sports all of the time with differing effects caused by physiological differences between athletes. It seems like a stretch

⁹⁷ Mann v. Producer's Chemical Co. 356 Ill.App.3d 967, 967. Appellate Court of Illinois, First District, Second Division. February 15, 2005.

⁹⁸ Turner v. Roesner. 193 Ill.App.3d 482, 490. Appellate Court of Illinois, Second District. January 16, 1990.

⁹⁹ Robinson v. Boffa. 402 Ill.App.3d 401, 403. Appellate Court of Illinois, First District, First Division. June 14, 2010.

¹⁰⁰ *Id.* at 490.

¹⁰¹ Ortiz v. City of Chicago. 79 Ill.App.3d 902 at 907. Appellate Court of Illinois, First District, Fifth Division. December 21, 1979.

for a jury to determine that the injuries would not have occurred if the NCAA had informed student-athletes about the possible risks of head injuries. The injuries are too remote to link directly to the NCAA to establish that the NCAA's negligence was a proximate cause of injury.

In sum, it is unlikely that the plaintiffs will succeed on the negligence claim because the Court is unlikely to find that the NCAA owes a duty to student-athletes and that the actions/omissions by the NCAA are not a proximate cause of the injuries incurred by the plaintiffs. Even if the Court finds that Arrington has established the four elements necessary to find the NCAA negligent, the NCAA can argue defenses which will be discussed in Section II(B) of this paper.

2. Has the NCAA Concealed Information that is Material to Concussion Health Risks?

The second claim made by Arrington is that the NCAA has concealed facts and information which were material to its student-athletes. Plaintiffs claim that the NCAA has known about the high incidence of concussions among student-athletes, was aware that a history of concussions is associated with a greater risk of future brain defects in student-athletes, and was also aware of the correlation between concussions and depression, dementia, and early on-set Alzheimer's disease.¹⁰²

¹⁰² Arrington, et. al. at 34

The fraudulent concealment claim is two-fold. First and foremost, this argument is to create a duty to speak which is an additional argument to fulfill the difficult first element of establishing a negligence claim. In order to establish a duty to speak there must be a fiduciary or special relationship between the parties.¹⁰³ The burden to prove the relationship lies with the party seeking relief.¹⁰⁴ The Court in Orr has determined that NCAA institutions do not have a special relationship with student-athletes.¹⁰⁵ It is unlikely that the Court will find that NCAA institutions have a special relationship with student-athletes and therefore do not owe them a duty to speak.

Even if the Court finds a special relationship exists between the NCAA and its student-athletes, the plaintiffs must show that they relied on the NCAA's fraudulent concealment to their detriment.¹⁰⁶ Further, the court must determine what was reasonable to discover by the exercise of ordinary prudence.¹⁰⁷ Both of these are questions of fact for the jury. The plaintiffs most likely could bear the burden to prove that their injuries were caused (or at the very least worsened) because the NCAA failed to communicate or act on its knowledge about the risks of concussions. However, it is less clear that the

¹⁰³ Neptuno Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor. 295 Ill.App.3d 567, 573. Appellate Court of Illinois, First District, Sixth Division. March 13, 1998.

¹⁰⁴ *Id.* at 573.

¹⁰⁵ *Orr v. Brigham Young University* at 1522.

¹⁰⁶ *Neptuno Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor* at 573.

¹⁰⁷ *Id.* at 573.

plaintiffs could not have discovered these risks themselves by exercising ordinary prudence.

In the complaint, Arrington argues that the truth could not be discovered through reasonable inspection or inquiry, or that they were prevented from discovering the truth. They argue that student-athletes are under the care and treatment of the NCAA and school trainers, and doctors, and relied on their silence misled them with respect to the risks of head trauma.¹⁰⁸ However, even if a trainer or coach told them they could participate after first receiving a concussion, it seems prudent for an ordinary person to look up symptoms and risks after the first diagnosis. With all of the plaintiffs being student-athletes they all had access to pertinent information through thousands of journals, databases, and theses from their respective schools along with access to information through the internet which could have led them to discover the risks involved in continuing to participate after receiving head trauma. Furthermore, many times after an injury (especially an injury to the head which is known to most as being less of an exact science), it is recommended and prudent to get a second opinion. It is likely that the Court will find that the student-athletes could have discovered the truth about risks involved in participation through a reasonable inspection or inquiry.

The second thrust of this fraudulent concealment argument is to allow all members of the class to participate by tolling the statute

¹⁰⁸ Arrington, et. al. at 34.

of frauds in Illinois. According to § 13-215: Fraudulent Concealment of the Illinois code:

"If a person is liable to an action fraudulent conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards."¹⁰⁹

Since it is unlikely that the Court will find the requisite special legal relationship, the tolling of the statute of frauds is unlikely. The Court is unlikely to find that the NCAA fraudulently concealed facts and information from student-athletes that are material to the health risks of concussions and head trauma.

3. Has the NCAA Been Unjustly Enriched By Retaining the Services of Football Student-athletes and Refusing to Pay Medical Expenses for Sports-Related Injuries Occurring After the Athlete's College Career?

The third claim made by the plaintiffs is one of unjust enrichment. The complaint states that the NCAA is unjustly enriched by retaining the services of student-athletes and refusing to pay medical expenses for sports-related injuries occurring after the athlete's college career. The complaint outlines some of the recent multi-billion dollar television contracts that the NCAA and its members have signed (i.e. \$2.25B 15-year deal between the SEC and ESPN, \$2.8B that is expected to be generated by the Big 10 Network over the next 25

¹⁰⁹ 5/13-215. Fraudulent concealment. West's Smith-Hurd Illinois Compiled Statutes Annotated, Chapter 735. Civil Procedure.

years, \$3B 12 year Pac 12 TV contract, and the \$300M 20 year deal between the Texas University Longhorn Network and ESPN).¹¹⁰

Unjust enrichment is an equitable remedy based upon a contract implied in law.¹¹¹ The basis for the unjust-enrichment doctrine is that no one ought to enrich himself unjustly at the expense of another.¹¹² Equitable remedies like unjust enrichment are only available when there is no adequate remedy at law.¹¹³ Unjust enrichment requires a factual examination of the circumstances and of the conduct of the parties and is a question of fact.¹¹⁴

If the plaintiffs are unsuccessful in their negligence and fraudulent concealment claims, the court may step in and determine that the NCAA has been unjustly enriched compelling the NCAA to pay the medical expenses of former student-athletes that were caused by participation in collegiate athletics.¹¹⁵ Public opinion has recently

¹¹⁰ Arrington, et. al. at 37.

¹¹¹ People ex rel. Hartigan v. E & E Hauling, Inc. 153 Ill.2d 473, 498. Supreme Court of Illinois. December 4, 1992.

¹¹² Village of Bloomingdale v. CDG Enterprises, Inc. 196 Ill.2d 484, 500. Supreme Court of Illinois. June 21, 2001.

¹¹³ Season Comfort Corp. v. Ben A. Borenstein Co. 281 Ill.App.3d 648, 652. Appellate Court of Illinois, First District, Third Division. September 6, 1995.

¹¹⁴ Bourdeau, John. § 3. Unjust enrichment; relation to doctrines of restitution, quasi contract, and other equitable remedies—Unjust enrichment defined. 66 Am. Jur. 2d Restitution and Implied Contracts § 3.

¹¹⁵ Bourdeau, John. § 3. Unjust enrichment.

garnered that football and men's basketball players should reap in the revenues that they are generating for the NCAA and its member institutions. An NCAA regulation has been proposed requiring institutions to give student-athletes an additional \$2,000 per year with the intention to meet "everyday living expenses" like food and clothing.¹¹⁶ Many people think it is unfair for the NCAA and its member institutions to cash in on billions of revenues while exploiting student-athletes who are not paid the true value of their services.

While the inequity is apparent, it does not seem to be an inequity worthy of the court adopting a remedy of unjust enrichment. Student-athletes receive full room and board scholarships along with a number of other benefits that normal students do not receive including: access to tutors and special help, travel opportunities for competition, health insurance, and access to coaches that serve as mentors for student-athletes.¹¹⁷ Being a question of fact, it will be a close call with the jury most likely not finding that the NCAA has been unjustly enriched through the services of student-athletes and should not be obligated to pay for medical expenses of former student-athletes that have mental health injuries linked to collegiate athletics participation.

¹¹⁶ Wharton, David. Los Angeles Times. NCAA's pay-for-play proposal has its supporters and detractors. November 16, 2011.

<http://articles.latimes.com/2011/nov/16/sports/la-sp-1117-ncaa-pay-for-play-20111117>.

¹¹⁷ UMass Academic Services. Student Support Services.

<http://www.umass.edu/sas/current-students/health>.

4. Has the NCAA Failed to Medically Monitor Student-Athletes Who Have Suffered From a Concussion or Other Head Trauma?

The final claim is for a failure to medically monitor athletes under the state of Indiana's laws (where the NCAA resides).¹¹⁸ This class is alleged to have not fully manifested the long-term physical and mental effects of the alleged misconduct by the NCAA and requires specialized testing for the early detection of the long-term effects of concussions. The claim further states that monitoring this class of former and current student-athletes will reduce the risk of long-term injuries, memory loss, early onset dementia, and Alzheimer's disease. This issue requires extensive fact finding and has been alleged to require the NCAA to monitor student-athletes who suffer from a concussion or head trauma.

B. Possible Defenses for the NCAA and NCAA Institutions

The NCAA filed an answer to the Arrington complaint on December 21, 2011.¹¹⁹ The answer could not form a sufficient belief about many of the facts stated by the plaintiffs, but denied all of the claims

¹¹⁸ Arrington, et. al. at 38.

¹¹⁹ Anderson, Paul. Concussion Litigation May Be a Constant Headache for NCAA.

January 16, 2012. NFLconcussionlitigation.com.

<http://nflconcussionlitigation.com/?p=111>.

alleged.¹²⁰ The NCAA has a number of strong arguments against the claims made by the plaintiffs in the complaint. The next section will analyze the NCAA's potential defenses and arguments of assumption of risk, contact sport exception to negligence, remoteness of the injuries alleged, and finally that the statute of limitations that bar recovery for the plaintiffs.

1. Assumption of Risk

The first and strongest defense for the NCAA is the plaintiffs' assumption of risk. Assumption of risk operates as a complete bar to plaintiffs' recoveries.¹²¹ There are two forms of assumption of risk: express and implied. Assumption of risk is a question of law.¹²² Under express assumption of risk, the parties agree that the defendant owes no legal duty to plaintiff. In this case, defendants can only sustain liability if their actions are construed as wanton, willful, or reckless (not alleged in this case).¹²³ Under implied assumption of risk, the plaintiff's willingness to assume a risk is determined from

¹²⁰ Arrington v. NCAA. Answer and Affirmative Defenses of Defendant NCAA to Consolidated Class Action Complaint. December 21, 2011.

<http://www.scribd.com/doc/78430406/NCAA-Answer>.

¹²¹ Duffy v. Midlothian Country Club. 135 Ill.App.3d 429, 433 Appellate Court of Illinois, First District, Fifth Division. July 26, 1985.

¹²² Pickel v. Springfield Stallions, Inc. 398 Ill.App.3d 1063, 1073. Appellate Court of Illinois, Fourth District. March 23, 2010.

¹²³ *Id.* at 433.

the conduct of the parties rather than from an explicit agreement.¹²⁴ This implied assumption of risk has been replaced by the rule of comparative negligence in Illinois and is therefore no longer a complete bar in negligence actions.¹²⁵

Assumption of risk in this case means that the student-athlete participants knew about the potential risks of injury by signing a waiver (express assumption of risk) or participating (implying an assumption of risk/comparative negligence) and therefore assumed the risk of any liability incurred during participation. While each NCAA institution is different, the NCAA Guideline for Sports Medicine Administration (published annually) provides for steps to administer a safe athletics program injury prevention. Included in this checklist is a provision entitled Acceptance of Risk: Any informed consent or waiver by student-athletes should be based on awareness of participating in intercollegiate sports.¹²⁶ The NCAA advises all institutions to provide informed consent before obtaining a waiver of liability from student-athletes. Informing about the risks involved in participation and requiring student-athletes to expressly assume the risk of participation bars the plaintiffs' negligence claim against the NCAA.

¹²⁴ *Id.* at 433.

¹²⁵ *Id.* at 433.

¹²⁶ 2011-12 NCAA Sports Medicine Handbook. Sports Medicine Administration. Page 6.

If the institution does not receive express assumption of risk the student-athlete's implied assumption of risk would be covered through the rule of comparative negligence. Comparative negligence reduces the amount of liability for the defendant by the amount that the plaintiff is responsible for.¹²⁷ However, in this case, the state of Illinois has carved out a contact sport exception that further protects schools and administrators.

2. Contact Sports Exception to Negligence

The state of Illinois has carved out a contact sports exception to negligence claims as stated in section II(C) of this paper. The contact sports exception is not an affirmative defense, but an objective doctrine that defines the scope of the defendant's duty.¹²⁸ Assumption of risk concepts are duplicative of other doctrines including the scope of duty owed to a plaintiff.¹²⁹ As previously mentioned, in order to decide whether the contact sports exception applies, a court must consider the nature of the sport at issue and determine, based on inherent risks, whether it is a contact sport. In this case, a court will find, as the Karas v. Srevell court did, and determine that football is a contact sport. Since it is established that injuries occurring while playing football within the rules and

¹²⁷ Pickel v. Springfield Stallions, Inc.. 398 Ill.App.3d 1063, 1077. Appellate Court of Illinois, Fourth District. March 23, 2010.

¹²⁸ Karas v. Srevell at 453.

¹²⁹ *Id.* at 454.

regulations set forth by the NCAA shield coparticipants and organizers from liability, the court is likely to find that the contact sport exception limits the NCAA's duty to the student-athlete.

Even where the court finds that student-athletes' injuries should be measured under a comparative negligence rule, the NCAA can argue that it is exempt from liability because it does not owe an affirmative duty of care to its players. In order to establish a negligence claim there must be a duty owed to the plaintiff.¹³⁰ The courts in various jurisdictions have held that NCAA institutions do not have a "special relationship" with student-athletes resulting in an affirmative duty to them.¹³¹ Furthermore, high schools and high school league associations have been found to NOT owe a duty to warn high school football participants about the risks involved in playing football.¹³² Therefore, the court will likely find that the NCAA did not have a duty to warn student-athletes of potential risks of participating in football.

3. Remoteness of the Injury

The NCAA could also argue against a finding of the causation element of negligence. The causation element includes two prongs: 1) cause in fact and 2) proximate cause. In order to prove cause in fact

¹³⁰ *Id.* at 454.

¹³¹ *Orr v. Brigham Young University* at 1528.

¹³² *Edwards v. Doug Ruedlinger* at 545.

there must be reasonable certainty that the defendant's actions caused the injury or damage.¹³³ This is a question of fact for the jury.¹³⁴ In Arrington, the plaintiffs argue that the NCAA's failure to properly educate student-athletes about the risks of head injuries, monitor injuries, and practice proper "return to play" procedures caused the injuries to the plaintiffs which would not otherwise have occurred. The court's use a "but for" test to determine actual causation.¹³⁵ In this case the jury would have to determine that "but for" the NCAA's failure to inform about the risks of head trauma, monitor injuries, and have a required "return to play" procedure the plaintiff's would not have suffered an injury. This is a close question. It can be argued that these procedures should be in place to protect football players from themselves because in most cases football players will play through pain and are not concerned about long-term risks. All that matters to most football student-athletes is playing in the next game regardless of the risk. This is typical for 18-22 year-old men because their youth and health makes them feel invincible leading to decisions that fail to weigh consequences. However, in analyzing whether there was a reasonable certainty that the defendant's actions caused the injury, the jury might have a tough time finding that the

¹³³ Mann v. Producer's Chemical Co. 356 Ill.App.3d 967, 967. Appellate Court of Illinois, First District, Second Division. February 15, 2005.

¹³⁴ *Id.* at 972.

¹³⁵ Turner v. Roesner. 193 Ill.App.3d 482, 490. Appellate Court of Illinois, Second District. January 16, 1990.

NCAA's actions were a cause in fact to the head injuries suffered by the plaintiffs.

The second prong of causation is proximate or legal cause. This requires a jury to determine whether a defendant will be held legally responsible for the actual consequences of his/her conduct.¹³⁶ The key inquiry here is whether the injury is foreseeable given the NCAA's conduct.¹³⁷ Here, the immediate injuries (concussions/head trauma) of the plaintiffs are foreseeable as a result of the NCAA's inaction in implementing the safety procedures previously mentioned. However, the NCAA can argue that it could not foresee that head injuries could develop into life-long complications. These injuries in some cases take years to arise and could (or could not) be linked to participation in college football. The cause of early onset dementia and other mental diseases is still a valid question among researchers. While it is true that participation in football and damage to the front lobe of the brain has resulted in a higher incidence in these diseases, it still is a close question for the jury whether these injuries are foreseeable because of the NCAA's conduct.

4. Statute of Limitations Bars Claim

The last probable defense the NCAA can raise is that the statute of limitations bars the claims of those individuals who did not submit

¹³⁶ *Id.* at 490.

¹³⁷ *Ortiz v. City of Chicago*. 79 Ill.App.3d 902 at 907. Appellate Court of Illinois, First District, Fifth Division. December 21, 1979.

their claim within two years of their injuries. This is the weakest defense and is aimed at class action participants. The statute of limitations for a negligence claim in Illinois is two years, and the discovery rule determines when the limitations period begins to run.¹³⁸ "Under the discovery rule, a cause of action accrues, and the limitations period begins to run, when the party seeking relief knows or reasonably should know of an injury and that it was wrongfully caused."¹³⁹ The Supreme Court of Illinois has held that the Illinois statute of limitations is NOT tolled during the pendency of a class action in federal court.¹⁴⁰ This means that the statute of limitations clock does not stop in class action cases like Arrington which are filed in federal court. In Arrington, the clock for the statute of limitations should start when the plaintiffs were injured. If not during the injury it should begin when the injured party is diagnosed with neuro-cognitive complications (2010 for Arrington, May 2011 for Owens, 1989 for Turner, and October 2011 for Palacios).¹⁴¹ The statute of limitations would only apply for Turner and other class-action individuals who discovered their neuro-cognitive injury complications more than two years ago. Plaintiffs can argue they did not know that the injury was "wrongfully caused" until after they realized the

¹³⁸ 5/13-202. Personal injury--Penalty. West's Smith-Hurd Illinois Compiled Statutes Annotated. Chapter 735. Civil Procedure.

¹³⁹ Clark v. Children's Memorial Hosp. 2011 IL 108656. Supreme Court of Illinois. May 6, 2011.

¹⁴⁰ Portwood v. Ford Motor Co. 183 Ill.2d 459, 462. Supreme Court of Illinois. October 1, 1998.

¹⁴¹ Arrington, et. al. at 3.

research and data showed the dangers of concussions, the plaintiffs had access to all possible data and research and subjected themselves to the possibility of injury. The statute of limitations argument only bars those claimants who were injured and diagnosed more than two years ago.

IV. Recommendation

This section will discuss the probable outcome of the Arrington v. NCAA litigation (assuming it proceeds) and discusses recommendations for the NCAA to reduce the incidence of head trauma to student-athletes in the future.

A. Probable Outcome of Arrington v. NCAA & NCAA Football

The most probable outcome from the Arrington v. NCAA case is that the case is dismissed for failure to establish the element of duty on the NCAA. Past precedent along with assumption of risk and the contact sport exception in Illinois make the plaintiffs' claims an uphill battle. However, even if the NCAA "wins" the case if it is dismissed, the case will bring to light a lot of important subjects and force the NCAA to continue to research the potential risks to its student-athletes, to increase monitoring standards, to improve equipment quality, and to refine the rules to eliminate the type of contact that leads to head trauma. Many states have started to enact regulations to address some of these issues and the NCAA should be one of the organizations to spearhead the effort to make the game of football

safer. Some ideas for the NCAA to decrease the risks of long-term mental health complications are discussed in more detail in the upcoming section.

B. How Can the NCAA Decrease the Risks of Long-term Mental Health Complications?

Throughout the years, the game of football has evolved through rule changes and the implementation of penalties for dangerous hits to make it safer. There are plenty of actions the NCAA can take to decrease the risks of football to student-athletes while still maintaining the integrity of the game. This section will discuss a few ideas on how to decrease the risks of long-term mental health complications for student-athletes.

1. Partner with the NFL to Increase Concussion Awareness and Research

The current football culture of playing through the pain, not reporting injuries, hitting players by leading with the helmet/neck, providing incentives for hits that result in the opponent being sidelined, and disregarding symptoms or warning signs is unsustainable for the sport of football to continue to thrive. While players, coaches, and fans enjoy big hits and excessive contact, the long-term mental effects cannot be ignored. The NFL is undergoing the same litigation assault (but to a much larger degree) with regard to the

long-term effects of concussions and head trauma.¹⁴² The NCAA should partner with the NFL to increase the awareness of the dangers of playing with head trauma symptoms. This educational effort should take place at all levels of football (from young kids participating in Pop Warner to the NFL) to instill a culture that promotes safety, self-reporting, monitoring protocols, and rest/recovery until concussion symptoms have subsided.

Furthermore, the NCAA and the NFL should partner to research the effects of concussions starting when children begin to play in Pop Warner or in middle school. This research will provide baseline information and help in monitoring athletes throughout their football careers. This research will help in determining the optimal amount of playing time and whether hits from an early age affect the development of the brain.

2. Promote Rule Changes to Increase Safety

The NFL has been the first mover when it comes to making changes to increase safety (mainly thanks to a CBA that allows players a voice and a seat at the bargaining table). These changes have resulted in a higher level of safety for NFL players while maintaining the game of football that the public loves. The NCAA needs to adopt some of the rules and penalties that the NFL has implemented to make the game safer for student-athletes. The NCAA should follow the NFL's strict

¹⁴²NFL Concussion Litigation: Plaintiffs/Former Players. April 20th, 2012.

http://nflconcussionlitigation.com/?page_id=274.

guidelines for illegal hits and suspend players who make illegal or dangerous hits. The NCAA claims to have outlawed these hits, but under the current system the penalty for an illegal hit is a 15-yard penalty and rarely results in a suspension for the perpetrator. Intentional hits using the helmet as a weapon, spearing, and hitting defenseless players should result in a 1-game suspension for the first offense with subsequent offenses leading to 4-6 game suspensions depending on the egregiousness of the hit.

The research shows that much of the long-term neuro-cognitive complications have resulted from the head being injured repeatedly from small hits or not giving the brain enough time to heal before returning to the field.¹⁴³ The NCAA should limit the number of two-a-days (or eliminate them altogether) and limit the number of full contact practices/plays a player can partake in per week.

The NCAA should recommend state high school football associations that they adopt rule changes that promote safety and reporting of concussion-like symptoms. High school football associations need to make changes to reduce the number of high risk plays (see kickoffs). High school kickers usually do not have a leg powerful enough to cause any touchbacks which leads to every kickoff being returned with the potential for high impact hits. These plays need to either be eliminated or the kickoff needs to be moved up to increase the number of touchbacks that occur. By continuing to be a partner to make a

¹⁴³ Gladwell, Malcolm. Offensive Play. The New Yorker. October 19, 2009.

safer and more responsible football culture the NCAA will reduce the incidence of long-term head injuries to its student-athletes.

3. Promote State Legislation Efforts

Both the US Congress and State Legislatures have taken notice of the recent research and claims against the NFL and NCAA and have started to propose and enact legislation to attack this problem. Currently 40 of the 51 states (including D.C.) have concussion laws in various forms. The NCAA should continue to support these laws that require monitoring, reporting, return-to-play procedures, and the dissemination of information about the long-term risks of head injuries to both student-athletes and their parents. One such law was enacted in Washington in July of 2009 for high school student-athletes who utilize school district property. The law established monitoring and reporting procedures, the requirement that any student-athlete suspected of having a concussion in a game/practice be immediately removed from participation, return to play guidelines, and a requirement that students and parents must sign a concussion information sheet prior to the student-athlete's participation.¹⁴⁴ It is expected that state laws will continue to become more stringent with added requirements for school districts, leagues, coaches, and trainers to educate participants, require base-line testing, recognize

¹⁴⁴ Chapter 475. Bill 1824: Youth Sports - Head Injury Policies.

Sportsconcussions.org. <http://www.sportsconcussions.org/ibase/line/state-laws/statelaws.html?id=185>.

symptoms, remove players from participating when symptoms are recognized, require reporting of symptoms, teaching the safe/correct ways to tackle, formulate a return-to-play protocol, and cap on the number of concussions before the student-athlete can no longer participate.

3. Increase Monitoring and Reporting Standards

Beginning in the Fall of 2010, the NCAA requires each member institution to have a concussion management plan (discussed in section II(D)).¹⁴⁵ While this provides a lot of flexibility for member institutions, the NCAA should develop a "best practices" for monitoring and reporting. This does not have to be required for all institutions because the implementation for some of the smaller schools would be too costly or not necessary. A "best practices" will ensure consistency and give the institutions better guidance on what is required.

The NCAA should adopt some of the monitoring standards requested in the claim brought by Arrington. Each player should have to take neuro-cognitive tests as he/she enters the institution to be used as a base-line. The institution should then be required to keep records of any head trauma that occurs during student-athlete participation in intercollegiate athletics and require a re-testing after each incidence of possible head trauma. If the student-athlete does not meet a threshold (determined by medical professionals) compared to the

¹⁴⁵ NCAA Bylaw 3.2.4.17. 2011-2012 NCAA Division I Manual. August 1, 2011.

base-line he/she should be required to sit out until meeting the threshold. All football players should be subject to neuro-cognitive testing before and after the season regardless of whether they suffered head trauma symptoms. The NCAA team should then set up a research team to analyze this data to find trends and try to continually refine and improve the process.

The NCAA should also require each institution to review its concussion protocol with its student-athletes and require them to sign an acknowledgement form stating that they have received the information on potential long-term risks of concussions. The protocol should require athletes to report to a coach or trainer if they experience concussion-like symptoms.

After experiencing concussion-like symptoms or head trauma, student-athletes should then have a required 5-7 days of non-participation (consistent with research concluding the term necessary to recover) while they undergo neuro-cognitive tests against their base-line.¹⁴⁶

While the previous remedies will help to keep future student-athletes safe, it is important that the NCAA and its member institutions take care of those student-athletes who have been injured due and are affected by long-term mental health injuries.

4. Provide a Pool of Resources for Affected Players

The NCAA should follow the NFL's lead and provide medical

¹⁴⁶ McCrea, et al., at 2561.

benefits for players who suffer from a neuro-cognitive disability. The NCAA should provide a pool of resources for players affected by these mental injuries which are related to participating in collegiate sports. With the amount of money generated by the NCAA and its member institutions from athletics each year, it seems fair to take care of the student-athletes who are severely injured due to their participation in collegiate athletics.

Since the majority of revenues and head injuries are generated through collegiate football, it makes sense for those schools with football teams to bear the majority of the costs involved with funding this pool of resources. Since the Bowl Championship Subdivision (BCS) conferences generate the most in revenues, they should bear the majority of the cost. The funding should come from a percentage of both the TV contracts and ticket receipts.

The pool of resources from which student-athletes can draw should be limited to a capped benefit per year and should only pay for medical expenses related to the neuro-cognitive disability. This would be consistent with the NFL's plan in that participants would be required to waive their litigation rights.

V. Conclusion

The popular game of football is facing a crossroads in the next five years. With litigation mounting against the NFL and NCAA due to medical research about the dangers of the game, the decision-makers at the top of these organizations will be forced to make tough decisions.

While it is likely that the NCAA will not be judged responsible for the claims alleged in the Arrington v. NCAA complaint, it is less likely that the NFL will remain unscathed in all of the jurisdictions where the 59 (and counting) lawsuits have been filed. Regardless of whether these cases find the NCAA and NFL liable for injuries suffered during participation, the NCAA and NFL need to be leaders in implementing safety precautions. As medical research continues to accumulate about the risks of participating in football, the NCAA and NFL have to take a more pro-active role in promoting a safe football culture because football players in the current culture are unable to protect themselves.