Concussion Litigation Against the NCAA is Gathering Momentum

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The NFL wasn't the only organization blindsided by a flurry of concussion-related lawsuits. On September 12, 2011, a class action was filed against the National Collegiate Athletic Association (NCAA), *Adrian Arrington v. NCAA*.[1] Shortly thereafter, another lawsuit was filed, *Derek Owens et al v. NCAA*. The cases were subsequently consolidated, and a "Corrected Consolidated Complaint" was filed naming Adrian Arrington, Derek Owens, Mark Turner[2] and Angela Palacios as plaintiffs for the putative class.

The crux of the complaint alleges that the NCAA was negligent in safeguarding student-athletes from the risks of concussions. The complaint asserts four counts: negligence, fraudulent concealment, unjust enrichment and medical monitoring.

The plaintiffs specifically allege that the NCAA failed to (1) educate coaches about proper tackling techniques; (2) educate coaches, trainers and student athletes as to concussion-like symptoms; (3) implement system-wide return to play guidelines; (4) implement guidelines for screening and detecting head injuries; (5) implement legislation addressing the treatment and eligibility for athletes that have sustained multiple concussions; and (6) implement a support system for athletes who are "unable to either play or even lead a normal life," according to the complaint.

According to the NCAA's website, it has consistently implemented rules and guidelines to protect and educate student-athletes about concussions. In 2010, the NCAA passed legislation that required all member schools to adopt a Concussion Management Plan. Nevertheless, the plaintiffs argue that these guidelines ring hollow because the responsibility for reporting concussions falls on the athletes, as evidenced by NCAA Rule 3.2.4.17.

The plaintiffs seek to represent two nationwide classes.

First, "*All former NCAA student-athletes who sustained a concussion(s) or suffered concussion-like symptoms while playing sports at an NCAA school, and who have, since ending their NCAA careers, developed chronic headaches, chronic dizziness or dementia or Alzheimer's disease and/or other physical and mental problems as a result of the concussion(s) suffered while a player and who post-college have incurred medical expenses from such injuries.*"

Second, a nationwide medical monitoring class that consists of *"All former and current NCAA student-athletes who have suffered a concussion or concussion-like symptoms while playing sports at an NCAA school."*

And, in order to address the NCAA's unique governing structure, the complaint designates the NCAA as the class representative of its members, which is defined as, *"The NCAA and all members of the NCAA that have sports teams in which student-athletes participate"*[3]

It is important to note, that the putative class is **NOT** limited to football players; it includes **ALL** student-athletes. In fact, one of the class representatives, Angela Palacios, is a former women's soccer player, who played at Ouachita Baptist University.

The NCAA responded to the complaint on December 21, 2011, basically denying the majority of the allegations. The NCAA argues that the plaintiffs will be unable to certify either class because it will require a fact-intensive analysis of each plaintiff's alleged injury, his/her knowledge regarding concussion risks and each plaintiff's reliance on the alleged fraudulent concealment — all valid arguments.

Generally, class actions seeking personal injuries are almost impossible to certify due to the lack of commonality. The plaintiffs seek to get beyond this hurdle by attempting to certify a medical monitoring class. The NFL concussion litigation plaintiffs are trying a similar tactic. The NCAA litigation may provide a strategic glimpse at how the class certification process will shape out in the NFL concussion lawsuits.

The parties started discovery but have spent a substantial amount of time arguing over the proper protocol for electronically stored information. Even after two months of motion practice and Magistrate Judge Brown's ruling regarding the protocol, the plaintiffs continue to dispute the method of production.

The NCAA asserts that it has approximately 150 gigabytes of data — approximately 19 million documents — ready to be produced once the court rules on the plaintiffs' objections. Based upon this relatively minor dispute, it is equally clear that the parties will be fighting tooth-and-nail throughout the litigation.

On September 13th, federal Judge John Lee ruled in favor of the NCAA, and essentially blasted the plaintiffs for litigating such a minor issue. Thus, the NCAA will soon be delivering millions of documents worth of data to the plaintiffs. The plaintiffs are hoping to find several smoking-gun memos, just like the lawyers recently did in the names and likeness NCAA litigation.

The NCAA designees were scheduled to be deposed in July and August 2012, and the NCAA also plans to depose the class representatives at or around this time. It is unclear whether these deposition have been taken place.

The parties have proposed to extend fact discovery 6 months, with an estimated completion date of January 2013. Once fact discovery is complete, the class certification process will begin. Based upon the parties' proposed schedule, briefing for class certification will likely span all of

2013. Following the court's ruling, and if the court certifies the proposed class, the NCAA plans to file a motion for summary judgment.

Finally, the parties estimate a jury trial will take two to four weeks, and the NCAA also notes that trials for individual class members would take "several years."

There is undoubtedly a long litigation battle ahead, and just like the plaintiffs in the NFL concussion lawsuits, the plaintiffs, here, face an uphill battle if they hope to score big.

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[1] Case No. 11-cv-06356 U.S. Dist. Ct. N.D. Ill

[2] Turner and another plaintiff, Alexander Rucks, were voluntarily dismissed.

[3] The NCAA believes that this putative class "raises significant due process concerns" because Rule 23(b) "does not permit opt outs." For an excellent analysis on the due process concerns raised in a defendant class action, *See* Elizabeth Brandt, *Fairness to the Absent Members of a Defendant Class: A Proposed Revision of Rule 23,* 910 BYU Law Review 1990

[4] To read a scholarly article on the NCAA litigation, check out Spencer Anderson's article in the NFL Concussion Litigation Library – http://nflconcussionlitigation.com/wp-content/uploads/2012/08/NCAA-Institutions-and-a-Duty-to-Warn-copy1.pdf