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# **Are College Football Players Being Promised Big NFL Bucks and Being Shortchanged in the Classroom and on the Field?**

*by* Melanie Navarro

## **Abstract**

Football is America's pastime. Over one hundred million people tuned in to watch this year's Super Bowl. Sundays during football season are spent in front of a television rooting for our favorite teams. Football has been an integral part of American culture for over 120 years. But in recent years, football has lost yardage. Information regarding the causal link between head injuries on the football field and degenerative brain diseases has come to light. Thousands of former National Football League ("NFL") players took part in a highly publicized class-action lawsuit against the league. Players alleged that the NFL knew of the link and suppressed the information in an effort to avoid bad publicity and damages.

The trauma and devastation are not limited to the NFL. Former college football players have filed lawsuits against the National Collegiate Athletic Association ("NCAA"), claiming the association knew of the long-term effects of concussions and withheld the information from athletes.

The NCAA argues that it has no duty to these athletes. However, many of these young adults are made promises upon recruitment to a college program while still in high school. They are promised an education and unrivaled exposure to NFL scouts and teams. The NCAA fails to ensure these athletes are getting a quality education and further denies any liability stemming from the head injuries they sustained during their college careers.

Many of the lawsuits filed by these former NCAA athletes are still in the early stages of litigation. Inspired by the success of the NFL concussion litigation, these athletes have taken on an association that makes over a billion dollars a year and governs every aspect of college athletics. It will be for the courts to decide if the NCAA has breached its duty to these athletes on the field and in the classroom.

## Introduction

In its statement of core values, the National Collegiate Athletic Association commits itself to integrity, sportsmanship, and the pursuit of excellence in academics and athletics.<sup>1</sup> Someone looking to find information of the NCAA's commitment to college athletes' health needs only look at the NCAA's website under the tab titled "Well-Being."<sup>2</sup> However, instead of finding an expansive and detailed memorandum on its commitment to the health of college athletes, the website only makes vague references towards the NCAA "working hard to protect them [athletes] physically and mentally, on the field and off."<sup>3</sup> In the same passage the NCAA also claims to have been founded to keep college athletes safe.<sup>4</sup> It seems contradictory that an organization that claims to have been founded on the tenant of safety does not have a clear action plan to ensure the safety and health of its athletes.

These athletes, football players in particular, represent a huge portion of campus life and activity.<sup>5</sup> All while providing large sums of revenue for the athletic departments of their universities that often bolster other sports that would not be financially sustainable if not for the capital produced by a few very lucrative sports, like football.<sup>6</sup> College football players are subject to grueling workouts and severe scrutiny by their coaches and members of the training staff.<sup>7</sup> Even their diets are heavily regulated.<sup>8</sup> Many top performing college football programs run themselves much like NFL franchises, focused on performance and wins.<sup>9</sup> College football players are controlled and regulated with such intensity and rigor that they could quite

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1. *NCAA Core Values*, NCAA, <http://www.ncaa.org/about/ncaa-core-value> (last visited Mar. 3, 2018).

2. *NCAA Well-Being*, NCAA, <http://www.ncaa.org/health-and-safety> (last visited Mar. 3, 2018).

3. *Id.*

4. *Id.*

5. Jason Barlow, *College Football and Your School's Spirit*, USA TODAY COLLEGE (Oct. 30, 2012, 11:16 AM), <http://college.usatoday.com/2012/10/30/college-football-and-your-schools-spirit/>.

6. *Where Does the Money Go?*, NCAA, <http://www.ncaa.org/about/where-does-mon-ey-go> (last visited Mar. 10, 2018).

7. Kelly Mantick, *A Day in the Life of A Division I Football Player*, NEXT COLLEGE STUDENT ATHLETE, <https://www.ncsasports.org/blog/2017/10/03/day-life-division-football-player/>.

8. Michael Felder, *What Are College Football Players Eating at BCS Training Tables?*, BLEACHER REPORT (Mar. 19, 2013), <http://bleacherreport.com/articles/1571830-what-are-college-football-players-eating-at-bcs-training-tables>.

9. *Economist: College Football like NFL—But for No Pay*, USA TODAY (Feb. 29, 2014, 8:51 PM), <https://www.usatoday.com/story/sports/ncaaf/2014/02/19/college-football-nfl-player-pay-student-athletes-northwestern/5624651/>.

possibly be considered employees of their respective universities.<sup>10</sup> As employees, college football players should be entitled to some kind of post-career benefits from the universities they trained so diligently and worked so tirelessly to represent on the college football field.

The recent litigation between the NFL and former NFL players has been splashed across a multitude of various headlines and was even the subject of a 2015 film.<sup>11</sup> College football players enjoy a similar relationship with the NCAA as NFL players have with the NFL. Both college players and professional players are bound by the rules and regulations of either the NCAA or the NFL and cannot play in either league unless they are in compliance with the strict restrictions set forth.<sup>12</sup> If the NFL has a duty to retired players, the NCAA should have a duty to its former college football players as well. NCAA football players, who are suffering the same crippling concussion side effects as NFL players after concluding their college careers, should be entitled to care from the NCAA just like their NFL counterparts received compensation from the NFL.

This note will explore the scope of the NCAA's relationship with college football players and how the NCAA has breached its duty to students both in the classroom and on the football field. The NCAA has breached its duty to student-athletes by withholding information relating to head injuries and their long-term effects.<sup>13</sup> The NCAA has breached its duty again by allowing universities to game the system and allow athletes to graduate with worthless degrees without receiving any meaningful instruction in the classroom.

### Background

There have been several cases filed recently by former NCAA football players and athletes from other sports, claiming that the NCAA had knowledge of the link between head injuries and brain diseases, like CTE and Parkinson's.<sup>14</sup> Former athletes are alleging that the NCAA withheld this

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10. Nathan Fenno, *U.S. Labor Board Calls Northwestern Athletes 'Employees' in Memo on 'Unlawful' Social Media Restrictions*, L.A. TIMES (Oct. 11, 2016, 2:50 PM), <http://www.latimes.com/sports/sportsnow/la-sp-sn-northwestern-nlrb-memo-20161011-snap-story.html>.

11. *Concussion*, IMDB, <http://www.imdb.com/title/tt3322364/> (last visited Mar. 1, 2018).

12. Adam Stites, *NFL Restricted Free Agency: Rules, Tender Amounts, and More*, SB NATION (Mar. 12, 2018, 5:41 PM), <https://www.sbnation.com/nfl/2017/3/8/14834554/nfl-restricted-free-agents-rules-tender-amounts>.

13. Justin Worland, *Many Colleges Fail to Address Concussions, Study Shows*, TIME (Oct. 22, 2014), <http://time.com/3531566/concussions-athletes-ncaa/>.

14. Steve Berkowitz, *Florida, Purdue Face Legal Scrutiny in College Football Head Injuries Lawsuit*, USA TODAY (Sept. 30, 2017, 10:35 AM), <https://www.usatoday.com>

vital information from them and failed to provide updated developments in healthcare related to brain injuries and available treatments.<sup>15</sup> The NCAA refutes these claims, stating they that did not assume any responsibility on the part of college athletes and do not have a duty to ensure their health.<sup>16</sup> Former athletes were inspired by the NFL brain injury litigation that began in 2012 and its subsequent settlement. Former college football players feel they are entitled to compensation for the concussions and brain injuries they received playing football for their universities.<sup>17</sup>

### *NFL Litigation Filed in 2012 Finally Settles*

The recent litigation between the National Football League and former NFL players has been the subject of heavy media coverage, shedding new light on the connection between head injuries and degenerative brain conditions.<sup>18</sup> Football head injuries have been the subject of several flashy investigative journalism ventures, even being highlighted on HBO's *Real Sports with Bryant Gumball*.<sup>19</sup> Football head injuries have further permeated the mainstream and were even the subject of a major Hollywood production in Will Smith's *Concussion*.<sup>20</sup> However, the discussion has centered almost exclusively on the NFL and retired NFL players. But what about the players that do not quite make it that far?

The National Collegiate Athletic Association estimates that 1.6% of college football players will go onto play in the NFL.<sup>21</sup> Leaving a whopping 98.4% of college football players to find homes off the NFL's mainstage without the medical coverage the NFL Players' Association would afford them.<sup>22</sup> To understand the predicament many of these athletes find themselves in, it is important to understand the connection between continuous head injury and degenerative brain conditions. This is perhaps

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/story/sports/college/2017/09/30/florida-purdue-face-legal-scrutiny-college-football-head-injuries-lawsuit/719480001/.

15. *Id.*

16. Chris Fuhrmeister, *The NCAA Denies that It Has a Legal Duty to Protect Student-Athletes*, SB NATION (Dec. 29, 2013, 11:09 AM), <https://www.sbnation.com/college-football/2013/12/19/5227480/ncaa-concussion-lawsuits-derek-sheely>.

17. Berkowitz, *supra* note 14.

18. *NFL Concussion Fast Facts*, CNN (Nov. 28, 2017, 10:46 AM), <https://www.cnn.com/2013/08/30/us/nfl-concussions-fast-facts/index.html>.

19. *Real Sports with Bryant Gumball: Concussions*, HBO, <https://www.youtube.com/watch?v=VfO6Yyr4dmw> (last visited Mar. 11, 2018).

20. *Concussion*, *supra* note 11.

21. *Estimated Probability of Competing in Professional Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (last visited Mar. 10, 2018).

22. *Id.*

most succinctly laid out in a detailing of the NFL's litigation with former players.

After an alarming rash of suicides from former NFL players, including Mike Webster, Dave Duerson, and Ray Easterling, a collective concussion lawsuit consisting of more than eighty concussion related claims was filed against the NFL in 2012.<sup>23</sup> The lawsuit alleged that the NFL failed to notify players of the causal link between concussions and brain injuries.<sup>24</sup> The NFL and its commissioner, Rodger Goodell, denied any relation between head injuries and various degenerative brain diseases, specifically chronic traumatic encephalopathy ("CTE").<sup>25</sup> CTE is a neurodegenerative disease who's symptoms include depression, aggression, and disorientation.<sup>26</sup> A number of former NFL athletes suffering from CTE have acted out in aggressive ways, some even going as far to kill themselves and loved ones.<sup>27</sup> CTE can only be officially diagnosed posthumously.<sup>28</sup>

Despite its steadfast denial of any link between concussions and CTE, the NFL donated \$30 million to the Foundation for the National Institutes of Health to back research on the most common injuries plaguing athletes.<sup>29</sup>

In late 2013, the NFL and the ex-players reached an agreement; the NFL would pay \$765 million to pay for medical exams, concussion related compensation and medical research.<sup>30</sup> The settlement needed to be approved by the judge assigned to the case before it was finalized.<sup>31</sup> In early 2014, a federal judge declined to approve the settlement deal, claiming the \$765 million amount was insufficient.<sup>32</sup> Since the initiation of the lawsuit, the class size had swelled to over 5,000 claimants.<sup>33</sup>

In April of 2015, a federal judge approved a settlement deal that provided every retired NFL player with five million dollars for "serious medical conditions associated with repeated head trauma."<sup>34</sup> Though the suit was brought by over 5,000 retired NFL athletes, the settlement will apply to any retired NFL player who retired on or before July 7, 2014.<sup>35</sup>

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23. *NFL Concussion Fast Facts*, *supra* note 18.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *NFL Concussion Fast Facts*, *supra* note 18.

29. *Id.*

30. Steve Almasy and Jill Martin, *Judge Approves NFL Concussion Lawsuit Settlement*, CNN (Apr. 22, 2015 8:36 PM), <https://www.cnn.com/2015/04/22/us/nfl-concussion-lawsuit-settlement/>.

31. *NFL Concussion Fast Facts*, *supra* note 18.

32. *Id.*

33. *Id.*

34. *Judge Approves NFL Concussion Lawsuit Settlement*, *supra* note 30.

35. *Id.*

It was not until 2016 that a senior NFL official actually admitted that there is most certainly a link between repeated head injuries and CTE.<sup>36</sup> In the middle of that year the NFL announced its intention to enforce a new set of concussion safety guidelines in an effort to increase the safety of the game.<sup>37</sup>

The tale of this litigation still extends to the present. In 2017, an independent medical journal identified CTE in 99%, 110 out of 111, of deceased NFL players whose brains were donated to science.<sup>38</sup> Famed and notorious athletes, most recently Aaron Hernandez, continue to be diagnosed with CTE postmortem.<sup>39</sup>

The NFL has reported a decline in the number of concussions logged throughout the 2016 NFL season.<sup>40</sup> The decline of 11.3% appeared to reflect the NFL's increase in head trauma protocol and the vigilance of independent team doctors.<sup>41</sup> However, the most recent numbers reported for the 2017 season have shown a 13.5% increase in concussions.<sup>42</sup> The NFL attributes this increase in part to the self-reporting of injuries and a marked increase in the number of concussion sustained during preseason practices.<sup>43</sup>

As evidenced above, concussions will continue to be at the head of the NFL's agenda as it struggles to garner back the favor of its audience.

## Analysis

### *Employee or Athlete?*

In order to analogize college athletes to NFL players, it is necessary to evaluate whether college football players are employees, rather like their NFL equivalents. College football players live regimented lives and are often scheduled every minute of their days to maximize the efficacy of their football training regimen.<sup>44</sup> A graphic tweeted by a Florida University football coach, shows the grueling schedule Division 1 football players are

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36. *NFL Concussion Fast Facts*, *supra* note 18.

37. *NFL, NFLPA Announce Policy to Enforce Concussion Protocol*, NFL (July 25, 2016, 5:18 PM), <http://www.nfl.com/news/story/0ap3000000676669/article/nfl-nflpa-announce-policy-to-enforce-concussion-protocol>.

38. *NFL Concussion Fast Facts*, *supra* note 18.

39. *Id.*

40. Ken Belson, *N.F.L. Reports a Decline in Concussions this Season*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/sports/football/nfl-concussions-decline.html>.

41. *Id.*

42. *NFL Releases Injury Data for 2017 Season*, NFL (Jan. 26, 2018, 5:48 PM), <http://www.nfl.com/news/story/0ap3000000911123/article/nfl-releases-injury-data-for-2017-season>.

43. *Id.*

44. Andy Hutchins, *Florida details football players' 15-hour days with daily schedule graphic*, SB NATION: ALLIGATOR ARMY (June 9, 2015, 1:00 PM), <https://www.alligatorarmy.com/2015/6/9/8752711/florida-gators-football-players-daily-schedule-graphic>.

expected to keep.<sup>45</sup> Their days are jam packed with lifting, dieting, practices, recovery and what appears to be a mere three hours in class a day.<sup>46</sup> All of this totals to a fifteen hour day.<sup>47</sup> With a strict schedule like that, it seems obvious that football players are essentially employees of their colleges. After all, the Internal Revenue Service defines an employee as, “anyone who performs a service for you is your employee if you can control what will be done and how it will be done.”<sup>48</sup>

This rudimentary test is further examined in famed employment cases like *Alexander v. FedEx* and *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*.<sup>49</sup> There is a six factor test that has been used to evaluate whether a worker is an employee or an independent contractor of a company.<sup>50</sup> These factors include 1) the employee’s opportunity for profit or loss based on managerial skill, 2) the employee’s investment in equipment or materials required for his task, 3) whether the service rendered requires special skill, 4) the degree of permanence of the working relationship, 5) whether the service rendered is an integral part of the alleged employer’s business, and 6) the employer’s right to control the work.<sup>51</sup> Regarding these factors, the courts have said that no one factor is determinative and that the factors need to be evaluated as a whole.<sup>52</sup>

Pertaining to college football players, some of these factors cut against and some favor their being employees of the universities they represent on the field. First, the athlete has no potential for profit or loss based on his performance on the football field.<sup>53</sup> College athletes cannot receive compensation for their services to their universities.<sup>54</sup> The NCAA is incredibly strict about college athletes maintaining their amateur status.<sup>55</sup> Once a college athlete hires an agent, effectively becoming a professional athlete, they are no longer welcome to compete in the college arena.<sup>56</sup>

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Employee (Common Law Employee)*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee> (last visited Mar. 6, 2018).

49. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341, 354 (1989).

50. *Id.*

51. *Id.*

52. *Id.*

53. Stewart Mandel, *Why the NCAA won't be paying college athletes anytime soon*, FOX SPORTS (Nov. 15, 2016, 3:26 PM), <https://www.foxsports.com/college-football/story/ncaa-o-bannon-supreme-court-pay-for-play-mandel-101316>.

54. *Id.*

55. *Amateurism*, NCAA, <http://www.ncaa.org/student-athletes/future/amateurism> (last visited Mar. 9, 2018).

56. *Id.*

However, many college athletes enjoy partial and even full scholarships in return for their athletic prowess and efforts on the football field.<sup>57</sup> Second, the athletes have made no monetary contributions to their equipment or any other materials they might need to compete.<sup>58</sup> Helmets, pads, and uniforms are all provided by a university's athletic department which does not ask for compensation from the athletes.<sup>59</sup> Third, playing football at the college level requires an immense amount of skill and athleticism. These young athletes are often highly and competitively recruited for their skills while they are still juniors or seniors in high school.<sup>60</sup> Fourth, college football players typically remain with a university for the duration of their college careers.<sup>61</sup> At a minimum a college football player must play three seasons of college football before they are allowed to declare for the NFL draft.<sup>62</sup> Both athletes and universities anticipate an athlete staying with the university's athletic department for the entirety of their time in college and as a result college football players enjoy multi-year relationships with their universities. Fifth, while a college athlete does not serve the primary purpose of a university, they are an integral part of any athletic department. Presumably athletic departments cannot function without athletes. Furthermore, the NCAA would not exist without college athletes.<sup>63</sup> Sixth, the universities and the NCAA control every manner in which these athletes are allowed to compete.<sup>64</sup> As the courts have explained, no one factor of this test is determinative of a worker's status.

However, recent cases involving students and athletes at Northwestern University suggest that student athletes and graduate students may be considered employees of their universities.<sup>65</sup>

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57. *Scholarships*, NCAA, <http://www.ncaa.org/student-athletes/future/scholarships> (last visited Mar. 9, 2018).

58. Cork Gaines, *It Costs Six Figures To Dress A College Football Team*, BUSINESS INSIDER (July 2, 2012, 3:19 PM), <http://www.businessinsider.com/how-much-does-it-cost-to-equip-a-college-football-team-2012-7>.

59. *Id.*

60. Jason Smith, *NCAA Recruiting Rules Regard High School Juniors*, USA TODAY (Sept. 27, 2017), <http://usatodayhss.com/2017/ncaa-recruiting-rules-regarding-high-school-juniors>.

61. Jon Solomon, *Schools can give out 4 year athletic scholarships, but many don't*, CBS SPORTS (Sept. 16, 2014), <https://www.cbssports.com/college-football/news/schools-can-give-out-4-year-athletic-scholarships-but-many-dont/>.

62. *The Rules of the Draft*, NFL, <https://operations.nfl.com/the-players/the-nfl-draft/the-rules-of-the-draft/> (last visited Mar. 6, 2018).

63. *NCAA Core Values*, *supra* note 1.

64. *Amateurism*, *supra* note 55.

65. Lester Munson, *Free to tweet: Northwestern's restrictions on football players ruled unlawful*, ESPN (Oct. 10, 2016), [http://www.espn.com/espn/otl/story/\\_/id/17765516/nrb-rules-northwestern-restrictions-unlawful](http://www.espn.com/espn/otl/story/_/id/17765516/nrb-rules-northwestern-restrictions-unlawful).

The National Labor Relations Board (“NLRB”) brought action against Northwestern University due to a Northwestern policy that placed restrictions on the amount and type of information Northwestern football players were allowed to share on social media.<sup>66</sup> Northwestern aimed to limit the information athletes were permitted to share concerning their health or any information relating to the team or the athletic department.<sup>67</sup> The athletes’ handbook specified that they were prohibited from discussing “any aspects of the team with anyone.”<sup>68</sup> The NLRB did not make a decision on compensation for college athletes, but it did however refer to these athletes as employees of Northwestern in its opinion.<sup>69</sup> The NLRB was hesitant to enter into the field of college athletics, however their ruling was a watershed moment for college athletes and their rights concerning their relationships with their universities and colleges.<sup>70</sup>

Another case involving Northwestern, centered around graduate students, further lends itself to the notion that students can simultaneously also be employees of their schools.<sup>71</sup> Graduate students at Northwestern made up approximately 19% of the instructional faculty.<sup>72</sup> Grad students were referred to as the “glue” that holds together institutions of higher education that rely on graduate students to aid professors in the classroom.<sup>73</sup> They were deemed such an integral part of universities that the NLRB saw fit to award them employee status and allowed them to unionize.<sup>74</sup>

These rulings serve as evidence that students can be employees of their universities. College athletes have a similar relationship to the NCAA which dictates all of rules that govern college athletics. Certainly, if Northwestern graduate students are entitled to employee benefits, college athletes should be afforded the same.

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *NLRB gives Northwestern football players the right to tweet*, CHICAGO BUSINESS (Oct. 11, 2016), <http://www.chicagobusiness.com/article/20161011/NEWS13/161019951/nlrb-gives-northwestern-football-players-right-to-tweet>.

71. Alexia Elejalde-Ruiz, *NLRB rules that grad students are employees, opens door for unionization*, CHICAGO TRIBUNE (Aug. 23, 2016, 4:57 PM), <http://www.Chicagotribune.com/business/ct-nlrb-grad-students-unionize-0824-biz-20160823-story.html>.

72. *Id.*

73. *Id.*

74. *Id.*

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*Athletes are Thrown a Passing Grade in the Classroom*

Athletics take center stage for most student-athletes.<sup>75</sup> Schools expect their athletes to dedicate countless hours to perfecting their athletics—hours spent away from the classroom and academia.<sup>76</sup> The NCAA touts its dedication to athletics all across its website, but it fails to express any sort of meaningful promise to also foster academic success in its athletes.<sup>77</sup> Over twenty NCAA schools have been subject to investigations and probes centering around the lack of academic rigor for student-athletes and academic fraud.<sup>78</sup>

The general consensus appears to be that student-athletes are given passing grades merely to keep them eligible to play in the NCAA.<sup>79</sup> The University of North Carolina (“UNC”) was under investigation after it was discovered that the university was offering a “phantom class,” where athletes were given credit for class they never attended.<sup>80</sup> Likewise, Syracuse University was accused of allowing academically ineligible students to compete in sporting events and competitions.<sup>81</sup> These two examples are not unique as numerous other schools have been accused of similar practices.<sup>82</sup>

A group of former UNC student-athletes filed suit against the NCAA claiming that they did not receive an education at UNC because they were caught up in a huge academic fraud scandal.<sup>83</sup> The NCAA responded with a statement explaining that the NCAA does not have a duty to ensure that student athletes are taking advantage of the academic resources on campus or receiving an education while enrolled in college.<sup>84</sup> It seems strange that an association whose mission it is to aid college athletes does not assume any responsibility in ensuring they receive an education. The NCAA went further and stated that it had no legal duty to aid these student-athletes in their pursuits for higher education.<sup>85</sup>

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75. *Florida details football players' 15-hour days with daily schedule graphic*, *supra* note 44.

76. *Id.*

77. Zocalo Public Square, *Why Student Athletes Continue To Fail*, TIME (Apr. 20, 2015), <http://time.com/3827196/why-student-athletes-fail/>.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Why Student Athletes Continue to Fail*, *supra* note 77.

83. Sara Ganim, *NCAA: It's not our job to ensure educational quality*, CNN (Apr. 2, 2015, 12:54 PM), <https://www.cnn.com/2015/04/01/sport/ncaa-response-to-lawsuit/index.html>.

84. *Id.*

85. *Id.*

As one educator put it, “It’s impossible for [college athletes] to get a real education.”<sup>86</sup> These academic shortcomings have long reaching effects. Student-athletes are often directed towards academic programs that are not difficult, requiring minimal effort and time away from training.<sup>87</sup> These easy programs lead to relatively useless degrees.<sup>88</sup> College athletes who have been given a free pass in the classroom find themselves in a precarious situation post-graduation.<sup>89</sup> They are at a severe disadvantage compared to their peers who spent more time in the classroom and athletes often struggle to find long-term employment.<sup>90</sup> The NCAA pats itself on the back for ensuring that athletes get degrees, but falls short on ensuring they receive an education in turn.<sup>91</sup>

There are of course, exceptions to this rule. Stories of prominent college athletes deferring their eligibility for the NFL draft an extra year in order to finish their senior year of college and get their degrees.<sup>92</sup> Marcus Mariota opted to play another year at the University of Oregon in order to finish his degree and graduate.<sup>93</sup> However, these inspiring stories are rare. For most promising college football players the ultimate goal is declare for the NFL draft and get drafted in an early round.<sup>94</sup> It can be a tough decision for a young college player to pass up millions of dollars in potential earnings to pursue a degree that he is unlikely to use in his anticipated line of work, the NFL.<sup>95</sup> The option to defer is also only truly available to extremely prominent and highly recruited college football players, whom scouts and NFL franchises would be willing to wait another year to draft. The average no-name college football player would not have the luxury of waiting another year to finish his degree. He must strike while the iron is hot and declare for the draft as soon as possible to avoid the risk of a potentially career ending injury.

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86. Kevin Trahan, *How Much Is a Degree Worth to a College Athlete? Not Much.*, VICE SPORTS (Dec. 5, 2014, 5:48 AM), [https://sports.vice.com/en\\_us/article/vvan54/how-much-is-a-degree-worth-to-college-athletes-not-much](https://sports.vice.com/en_us/article/vvan54/how-much-is-a-degree-worth-to-college-athletes-not-much).

87. Kevin Trahan, *Athletes are getting degrees, but does that actually mean anything?*, SB NATION (July 9, 2014, 7:03 PM), <https://www.sbnation.com/college-football/2014/7/9/5885433/ncaa-trial-student-athletes-education>.

88. *Id.*

89. *Athletes are getting degrees, but does that actually mean anything?*, *supra* note 87.

90. *Id.*

91. *Id.*

92. Bryan Fischer, *Degree was a big factor in Marcus Mariota passing up NFL Draft*, NFL (July 23, 2014, 3:47 PM), <http://www.nfl.com/news/story/0ap2000000367696/article/degree-was-big-factor-in-marcus-mariota-passing-up-nfl-draft>.

93. *Id.*

94. *Id.*

95. *Id.*

Former athletes who fail to find stable long-term employment may also struggle to afford health insurance or may not have access to healthcare at all. This could be for several reasons. The first reason could be that by not being able to find full-time employment with benefits and the second could be an inability to afford health insurance. Without health insurance, it is highly unlikely that these former college football players will be able to find means to gain access to quality care and treatment for any head injuries they sustained while playing college football.

#### *Recent Filings Against NCAA Schools*

In light of the NFL's settlement with former players, there have been several suits filed against the NCAA relating to the NCAA's alleged duty to former college athletes. One such case was filed by a former college football player's widow.<sup>96</sup> Debra Ploetz's husband, Greg, played football for the University of Texas from 1968-1972.<sup>97</sup> Greg passed away due to complications of CTE in 2015.<sup>98</sup> Debra alleges that the NCAA breached its duty to Greg and players like him when it failed to warn them of the potential for brain disease and dementia as a result of continued head injury.<sup>99</sup> The complaint also alleges that the NCAA failed to keep former players up to date on available treatments for brain diseases.<sup>100</sup>

Another case claiming negligence on the part of the NCAA is *Bradley v. NCAA*.<sup>101</sup> Bradley is a former field hockey athlete who played for American University.<sup>102</sup> Bradley suffered a concussion during a field hockey game in 2011.<sup>103</sup> Bradley asserts that the NCAA was negligent in its duty to care for her as an NCAA athlete.<sup>104</sup> The NCAA, again, argued that it did not have a duty to Bradley or athletes like her.<sup>105</sup> Under Washington D.C. law, when alleging negligence, a plaintiff must first prove sufficient evidence to prove that they were owed a duty of care in the first place.<sup>106</sup> Then, the plaintiff must prove that the defendant breached that duty and that the breach

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96. Dennis Dodd, *Wife of Texas football legend Greg Ploetz sues NCAA over CTE*, CBS SPORTS (Jan. 19, 2017), <https://www.cbssports.com/college-football/news/wife-of-texas-football-legend-greg-ploetz-sues-ncaa-over-cte/>.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Bradley v. NCAA*, 249 F. Supp. 3d 149, 168 (D.D.C. 2017).

102. *Id.* at 156.

103. *Id.* at 167.

104. *Id.*

105. *Id.*

106. *Bradley*, 249 F. Supp. at 167.

was the proximate cause of their injury.<sup>107</sup> Though portions of Bradley's suit were dismissed by the court for lack of evidence, Bradley's claim of negligence against the NCAA was sustained.<sup>108</sup> The D.C. court held that Bradley had proven that the NCAA had a duty to student athletes regarding their health on and off the field.<sup>109</sup>

Unfortunately, Greg Ploetz and Bradley are not the only former college players to struggle with the long-term effects of repeated brain injury.<sup>110</sup> There have been several filings and even a new class action suit filed against the NCAA.<sup>111</sup> As of September 2017, ninety-six lawsuits have been filed against the NCAA alleging a breach of its duty to athletes or fraud.<sup>112</sup> The NCAA maintains that it does not have a legal duty to former athletes.<sup>113</sup>

This negligence will continue to plague the NCAA as more and more additional lawsuits are filed against the NCAA. It will be for the courts to decide if the NCAA has breached its duty to student athletes with regards to their continued health after the conclusion of their college playing careers. If the courts decide that the NCAA has breached its duty to student-athletes, it could be millions of dollars in losses for the NCAA as it scrambles to compensate ex-athletes. This litigation could have implications far beyond just football players. It could be applied to any athlete who has suffered a head injury while participating in college athletics. The NCAA should be prepared for an onslaught of claims arising from decades of negligence due to its lack of care shown for the health and well-being of student-athletes nationwide.

### Proposal

To say that college athletics are flawed is a drastic over-simplification. Student-athletes struggle to get a real education while in school and then some young men suffer debilitating after-effects of their head injuries sustained while playing college football. It seems unfair that a multi-billion dollar a year business like the NCAA has no duty to its athletes once they have graduated.<sup>114</sup> The model the NFL used in its settlement with players would appear to be a natural fit for former college players as well. Former

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107. *Id.*

108. *Id.* at 186.

109. *Id.*

110. *Student-Athlete Concussion Injury Litigation*, NCAA, <http://www.ncaa.org/sport-science-institute/topics/student-athlete-concussion-injury-litigation> (last visited Mar. 11, 2018).

111. *Id.*

112. *Florida, Purdue face legal scrutiny in college football head injuries lawsuit*, *supra* note 14.

113. *Id.*

114. *Where Does the Money Go?*, *supra* note 6.

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college football players would be eligible to receive compensation for medical care rendered in an effort to care for a brain injury sustained as the result of head trauma.

A large criticism of this approach is where to draw the line on the NCAA and a university's liability. Rule 9(b) of the Federal Rules of Civil Procedure state that a claimant must allege their claim of fraud or mistake with a certain level particularity and specificity.<sup>115</sup> Though this could prove to be a challenge for former college football players who are filing lawsuits decades after the conclusion of the college careers, CTE and brain diseases like it are not common amongst the general public and are seen at much higher rates in individuals who played competitive football at some point in their lives.<sup>116</sup>

The NCAA also claims that these athletes assume much of the risk of injury themselves when they sign up to be college athletes.<sup>117</sup>

This is not an all-encompassing health safety net for former college football players. The NCAA's liability would only extend to medical care being prescribed in order to treat brain disease that is the result of repeated head injuries that would have occurred during the player's college career. This liability would not extend to players who would go on to play in the NFL because there would be no way of knowing if their brain disease was the result of head injuries that took place while in college or while they were playing professionally. Though this would not be a huge concern for an NFL player who would have other protections, like the players' union.

### Conclusion

Former college football players are getting a bad deal. With a whopping 98.5% of college football players not reaching the NFL, there is a huge number of young men who may experience concussion related symptoms for decades to come, without the protection of a players' union to help bolster the medical costs associated with treatment.<sup>118</sup> These athletes give their all to their universities which inhibits their ability to get a meaningful education. The type of control exercised over these athletes is akin to that exerted over an employee. As such, athletes should be afforded the same benefits and protections as professional athletes, namely NFL players. Retired college football players should receive compensation for medical care relating to injuries sustained as a result of head trauma that occurred during their time

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115. Fed. R. Civ. P. 9(b).

116. *CTE Study Finds Evidence of Brian Disease in 100 out of 111 Former NFL Players*, NBC NEWS (July 25, 2017, 10:39 AM), <https://www.nbcnews.com/news/sports/large-report-finds-evidence-brain-disease-most-former-football-players-n786386>.

117. *Id.*

118. *Estimated Probability of Competing in Professional Athletics*, *supra* note 21.

as college athletes. These dedicated athletes give up their time, education, and physical well-being to perform at the highest level of amateur athletics. In return, they are rewarded with a meaningless degree and debilitating health issues for which they may be unable to afford adequate care. The NCAA has the financial means to provide for these athletes and it seems criminal that the NCAA should not be allowed to profit off the deteriorating health of these young athletes who are left to sort out medical care on their own.

The future of football is uncertain.<sup>119</sup> Parents are hesitant to allow their children to play football even at the middle school level.<sup>120</sup> This is evidenced by dwindling enrollment numbers in high school football programs.<sup>121</sup> Even NFL players are saying that they would not want their sons to pursue careers playing in the NFL.<sup>122</sup> Big names like Adrian Peterson and Drew Brees have voiced their opinions on not allowing their children to play football, “Peterson has several kids and has said he won’t let any of them play football.”<sup>123</sup> NFL viewership is down in recent years.<sup>124</sup> Viewers are citing violent hits and gruesome injuries as reasons why they are choosing to watch other sports over football.<sup>125</sup> Many critics of the NFL are saying that the league is soon to be obsolete.<sup>126</sup> That viewers will no longer support such violence and opt to watch other forms of entertainment instead.<sup>127</sup> Without the heavy revenue produced by television viewership, the NFL is likely to be unable to sustain itself.<sup>128</sup>

This will continue to be an issue going forward for both the NFL and the NCAA. The NFL’s settlement with its former players only applies to

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119. *Saturday Sports: The Future of the NFL*, NPR, <https://www.npr.org/2017/11/25/566438874/saturday-sports-the-future-of-the-nfl> (last visited Mar. 6, 2018).

120. John Keilman, *Youth football participation declines as worries mount about concussions*, CHICAGO TRIBUNE (Sept. 5, 2017, 7:20 AM), <http://www.chicagotribune.com/news/local/breaking/ct-football-youth-decline-met-20170904-story.html>.

121. Timothy Rapp, *Report Shows Continuing Drop in High School Football Players*, BLEACHER REPORT (Aug. 7, 2017), <http://bleacherreport.com/articles/2726124-report-shows-continuing-drop-in-high-school-football-players>.

122. Stefano Mocella, *Top 12 NFL Players Who Wouldn’t Let Their Kids Play Football*, THE SPORTSTER (Jan. 3, 2018), <https://www.thesportster.com/football/top-12-nfl-players-who-wouldnt-let-their-kids-play-football/>.

123. *Id.*

124. Daniel Rapaport, *NFL TV Ratings Down Roughly 10% From Last Season*, SPORTS ILLUSTRATED (Jan. 4, 2018), <https://www.si.com/tech-media/2018/01/04/nfl-tv-ratings-decline-ten-percent-colin-kaepernick-thursday-night-football>.

125. *Id.*

126. *Id.*

127. Adam Hartung, *The NFL has a Bigger Problem Than Kneeling Employees – Demographics and Trends*, FORBES (Sept. 29, 2017, 3:21 PM), <https://www.forbes.com/sites/adamhartung/2017/09/29/the-nfl-has-a-bigger-problem-than-kneeling-employees-demographics-and-trends/#2472e92b4efc>.

128. *Id.*

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players who retired prior to the settlement.<sup>129</sup> It did not make allowances for athletes who either retired after that date or are continuing to play. Football continues to be a huge money-maker and staple for the NCAA.<sup>130</sup> It does not appear that the NCAA is nervous about forthcoming litigation as they continue to deny any obligation to student-athletes.<sup>131</sup> The NCAA continues to advertise itself as an association dedicated to the pursuit of college athletics and academic excellence even in light of recent lawsuits and criticism.<sup>132</sup> Only time will tell if football remains on America's watch list or if audiences will favor less violent sports and entertainment instead.

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129. *Id.*

130. *NFL Concussion Fast Facts*, *supra* note 18.

131. *Bradley*, 249 F. Supp. at 168.

132. *NCAA Core Values*, *supra* note 1.