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ULTIMATE GAME-CHANGER? CONCUSSION-RELATED INJURIES AND LITIGATION

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I. Introduction

Hits to the head have always been part of athletics in America, be it in professional or collegiate sports, and specifically, in football and hockey. Over the past few years, however, these types of impacts – and the related concussive and sub-concussive injuries they cause – have become the source of significant litigation.

This article first discusses the status and key legal issues of the concussion-related injury litigation by current and former professional, collegiate, and even high school athletes. Then, in Section III, this article addresses the status and key legal issues of the related insurance coverage litigation. Section IV of this article explains the medical science which is at the heart of the concussion-related injury litigation, and Section V addresses the plaintiffs' claims for medical monitoring as well as the obstacles to class certification of the plaintiffs' claims. Finally, Section VI discusses various trial considerations based on lessons learned from past head injury litigation and provides a glimpse into the future of concussion-related injury helmet litigation.

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II. Concussion-Related Injury Litigation By Current And Former Players

A. Concussion-Related Injury Litigation Against The NCAA

1. Status of Litigation - Class Actions

On September 12, 2011, *Arrington, et al. v. NCAA*, Case No. 1:11-cv-06356 (N.D. Ill. 2011), was filed by four former NCAA athletes regarding concussion-related injuries (the "*Arrington* action"). The *Arrington* action is the first of sixteen proposed class action, concussion-related injury cases filed against the NCAA to date: (1) *Arrington, et al. v. NCAA,* No. 1:11-cv-06356 (N.D. Ill.), filed 11/21/11; (2) *Walker, et al. v. NCAA,* No. 1:13-cv-00293 (E.D. Tenn.), filed 9/3/13; (3) *DuRocher, et al. v. NCAA*, No. 1:13-cv-01570 (S.D. Ind.), filed 10/1/13; (4) *Caldwell, et al. v. NCAA*, No. 1:13-cv-03820 (N.D. Ga.), filed 10/18/13; (5) *Doughty, et al. v. NCAA*, No. 3:13-cv-02894 (D.S.C.), filed 10/22/13; (6) *Moore, et al. v. NCAA,* No. 1:11-cv-06356 (N.D. Ill.); filed 10/29/13; (7) *Powell, et al. v. NCAA*, No. 4:13-cv-01106-JTM (W.D. Mo.), filed 11/11/13; (8) *Morgan, et al. v. NCAA*, No. 0:13-cv-03174 (D. Minn.), filed 11/19/13; (9) *Walton, et al. v. NCAA*, No. 2:13-cv-02904 (W.D. Tenn.), filed 11/20/13; (10) *Washington, et al. v. NCAA*, No. 4:13-cv-02434 (E.D. Mo.), filed 12/3/13; (11) *Hudson, et al. v. NCAA*, No. 5:13-cv-00398 (N.D. Fla.), filed 12/3/13; (12) *Jobe, et al. v. NCAA, et al.*, No. 3:13-cv-00799 (S.D. Miss.), filed 12/23/13; (13) *Wolf v. NCAA*, No. 1:13-cv-09116 (N.D. Ill.), filed 2/20/14; (14) *Nichols, et al. v. NCAA*, No. 1:14-cv-00962 (N.D. Ill.), filed 2/11/14; (15) *Jackson v. NCAA*, No. 1:14-cv-02103 (E.D.N.Y.), filed 4/2/14; and (16) *Whittier v. NCAA*, No. 1:14-cv-0978 (W.D. Tex.), filed 10/27/14. As discussed in greater detail below, all plaintiffs seek injunctive relief in the form of medical monitoring, although some plaintiffs also seek monetary relief.

On December 18, 2013, the Judicial Panel for Multidistrict Litigation ("JPML") centralized the *Arrington* action and other NCAA concussion injury cases in a Multi-District Litigation ("MDL") styled as *In re: National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, MDL No. 2492, Case No. 1:13-cv-09116 (N.D. Ill.)(the "NCAA MDL"). The NCAA MDL was assigned to the Honorable John Z. Lee for coordinated pretrial proceedings. *See NCAA MDL,* Dkt. No. 53. Because the *Arrington* action was so advanced at the time the NCAA MDL was created, the pleadings filed in the *Arrington* action became the operative documents in the NCAA MDL, the discovery exchanged to date in the *Arrington* action was used in the NCAA MDL for negotiation purposes, and, eventually, the *Arrington* plaintiffs' counsel was appointed (along with certain other plaintiffs' counsel) as Lead Counsel for the plaintiffs in the NCAA MDL. *See NCAA MDL*, Dkt. No. 75. After significant negotiations among the various plaintiffs' attorneys, as well as with the NCAA, Lead Counsel for the plaintiffs and Lead Counsel for the NCAA reached an agreement to resolve the plaintiffs' medical monitoring claims (the "medical monitoring settlement" or "settlement"), and on July 29, 2014, filed a Motion for Preliminary Approval of Class Settlement and Certification of Settlement Class. *See NCAA MDL*, Dkt. Nos. 64 and 65 (initial settlement documents) and 91 (amended settlement documents, filed 10/20/14).

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By stipulation of the parties, the settlement class was defined as follows:

> All persons who played an NCAA-sanctioned sport at an NCAA member institution at any time through the date of Preliminary Approval.

See NCAA MDL, Dkt. No. 91. The settlement class was, therefore, quite broad as it encompassed *all* former and current NCAA athletes through the date of preliminary approval of the settlement. In other words, there was no limitation on when the student athlete played college sports or which sport the student athlete played. The class was estimated to encompass over four million individuals.

The settlement class was, therefore, quite broad as it encompassed all former and current NCAA athletes through the date of preliminary approval of the settlement.

The preliminary settlement resolved all medical monitoring claims on a class-wide basis. Specifically, the NCAA and its insurers agreed to provide $70 million to create a common fund for a medical monitoring program which included a two-step screening process: (1) a screening questionnaire, the results of which will determine whether a class member advances to the next step; and (2) a physical examination, which includes a neurological and a neurocognitive assessment. The proposed settlement required participating class members to waive class claims for personal injury, but permitted members to bring personal injury claims on an individual basis. *See NCAA MDL*, Dkt. No. 91.

The preliminary settlement also contemplated the creation of a Medical Science Committee comprised of four medical experts with expertise in the diagnosis, care, and management of concussions in sport and mid- to late-life neurodegenerative disease. *Id.* The Medical Science Committee was largely responsible for the oversight of the medical monitoring program locations and determining, among other things, the substance of the screening questionnaire, the algorithm for scoring responses to the questionnaire, and the eligibility criteria for a medical evaluation. *Id.* A class member was permitted to complete the questionnaire once every five years until age fifty (50) years and then once every two years after age fifty (50) years but no more than five times during the medical monitoring period. Additionally, a class member was able to qualify for at least two medical evaluations. *Id.*

Certain plaintiffs' attorneys opposed the medical monitoring settlement and argued, among other things, that the vast majority of class members (a) received no benefit at all from the settlement; and (b) forfeited the ability to bring personal injury claims on a class-wide basis essentially resulting in class members being unable to bring personal injury claims at all, as it will be extremely difficult to do so on an individual basis. *See NCAA MDL*, Dkt. No. 83. At a hearing on July 29, 2014, the Court ordered the parties to submit additional briefing on certain issues of concern: (1) the ability of the proposed medical monitoring settlement class to waive their rights to pursue class-wide personal injury relief; and (2) the ascertainability of the settlement class and the reasonableness of the proposed notice and related procedures. *See NCAA MDL*, Dkt. No. 74.

Thereafter, the parties filed substantive briefing on these issues. With respect to the first issue, the parties argued that the ability to pursue claims on a class basis is not a substantive right, class treatment is not itself a remedy, and the proposed settlement includes the additional procedural protections of class notice and the opportunity to opt out of the settlement class. *See NCAA MDL*, Dkt. Nos. 77 and 81. With respect to the second issue, the parties alleged that the settlement class is ascertainable and that the proposed notice plan will reach approximately eighty percent (80%) of the settlement class. In support, the parties filed a notice plan which detailed the numerous aspects of the proposed "phased" or "incremental" approach to notice – that is, to spend a portion of the notice budget at the onset of the notice period on different types of notice (e.g., print publications, settlement website, internet publication, press releases, etc.), monitor each notice vehicle to evaluate its effectiveness, and spend the balance of the budget on the vehicle(s) which proved to be the most effective. *See NCAA MDL*, Dkt. Nos. 84, 85 and 86.

On October 23, 2014, the NCAA MDL judge held a hearing on the parties' motion for preliminary approval and supplemental submissions. At this hearing, the judge expressed a number of concerns about the terms of the proposed settlement, including the following:

1. The scope of the putative class (specifically, the inclusion of a non-contact sports in the putative class despite there being no plaintiff representative who played a non-contact sport, and that certain new guidelines to be implemented by NCAA member institutions applied only to contact sports);

2. Whether notice can be accomplished due to the lack of temporal limitation on the putative class;

3. The likelihood that personal injury lawyers will take moderately valued concussion-related injury claims on an individual basis;

4. The propriety of the class waiver for personal injury claims;

5. The likelihood that NCAA member schools will comply with the NCAA's request for contact information for all student athletes (for purposes of direct notice) and fairly expensive new guidelines (e.g., having a physician present at all contact sport games and practices), especially where the NCAA cannot mandate compliance;

6. Specifics regarding the medical monitoring program, including the criteria for evaluating the questionnaire and determining who will receive a medical examination and class members' accessibility to testing centers; and

7. Certain provisions in the settlement agreement, including the NCAA's right to a reversion of any unused funds and the NCAA's right to withdraw from the settlement prior to final approval.

After questioning counsel for all parties regarding these concerns, the judge advised that he would take the parties' responses at the hearing and previously submitted briefs under advisement and issue a ruling.

Specifically, the court questioned the ability of the proposed class representatives, all of whom participated in contact sports, to represent class members who played non-contact sports.

As indicated above, one of the concerns expressed by the court was adequacy of representation, given that the settlement class included all NCAA athletes. Specifically, the court questioned the ability of the proposed class representatives, all of whom participated in contact sports, to represent class members who played non-contact sports. In an effort to address this concern, the plaintiffs filed a motion in late November 2014 to add two non-contact sport class representatives (a member of a NCAA women's golf team and a member of a NCAA men's cross country and track and field team). *See NCAA MDL*, Dkt. No. 96. The NCAA filed a supplemental submission regarding the adequacy of representation and the scope of the proposed settlement class, in which it noted, among other things, that the only difference in the settlement between contact and non-contact sports was the requirement for contact sports that medical personnel with concussion training be present at games and available at practices. *See NCAA MDL*, Dkt. No. 101.

At the hearing on the plaintiffs' motion, the court sought further explanation as to how the proposed new class representatives represented the interests of other non-contact sport athletes. The court also expressed concern that the proposed new representatives had not had sufficient time to review and analyze the proposed settlement. Thereafter, on December 17, 2014, the court denied preliminary approval of the medical monitoring settlement based, at least in part, on the court's continued concerns about, most significantly, (1) the adequacy of representation; and (2) ascertainability of class members and the proposed notice plan. *See NCAA MDL*, Dkt. No. 115. The court also expressed concerns regarding the following issues: (1) the NCAA's ability to bind its member institutions; (2) the criteria used to evaluate and score the screening questionnaires; (3) the limitations on the questionnaires and medical evaluations; (4) medical monitoring program locations; and (5) the reversion provision (where unused funds revert to the NCAA after 50 years). *Id.*

Throughout the first few months of 2015, the plaintiffs and the NCAA filed numerous submissions in an effort to address the court's concerns. Specifically, in early January 2015, the plaintiffs filed a renewed motion to add, as named plaintiffs and class representatives, former athletes who played non-contact sports (e.g., members of golf, track & field, softball, baseball, and volleyball teams). In support of this renewed motion, the plaintiffs filed a declaration of the retired federal judge who helped facilitate the medical monitoring settlement. In late February 2015, the parties filed a joint submission regarding the feasibility and cost of direct notice. *See NCAA MDL*, Dkt. No. 142. Finally, on April 15, 2015, the parties filed additional submissions, including an updated report from the plaintiffs' expert regarding sufficiency of the fund amount using the NCAA's reported concussion data; an updated notice plan; a report from the Medical Science Committee setting out a screening questionnaire to be used to determine if an athlete should be subject to a physical exam; a specific procedure governing physical exams; and a report regarding overall program administration. *See NCAA MDL*, Dkt. No. 171.

Finally, the parties also filed a second Joint Motion for Preliminary Approval of the Class Settlement and Certification of the Settlement Class. *See NCAA MDL*, Dkt. No. 154 and exhibits. In this motion, the parties stated that they revised provisions in the settlement agreement that the court found problematic (e.g., any excess amount in the fund after the lifespan of the program is now to be used for concussion research instead of reverting back to the NCAA), and accordingly, filed an amended class action settlement agreement. Finally, the parties filed a proposed Fourth Amended Complaint, which named former

students who participated in contact sports as well as non-contact sports as defendants and named representatives. *Id.*

On May 20, 2016, the parties filed a Joint Motion for Preliminary Approval and a Second Amended Class Action Settlement Agreement and Release which incorporated a "carve-out" to the class waiver in the settlement agreement for "single-school, single-sport" bodily injury classes only.

The core terms of the amended settlement agreement were virtually the same as the prior agreement, and required the NCAA to accomplish the following: create a $70 million fund for medical monitoring of current and former athletes in contact and non-contact sports (which will be used to monitor athletes for brain trauma, both through a written screening test and physical examinations); toughen return-to-play rules after an athlete sustains a concussion; require medical personnel at NCAA-sponsored events and practices to promptly treat an athlete who sustains a concussion; and require all athletes to take baseline neurological tests at the start of each year to help doctors determine the severity of any brain injuries sustained during the season. On January 26, 2016, the court approved the amended settlement agreement, subject to certain modifications. *See NCAA MDL*, 314 F.R.D. 580 (2016) [Dkt. No. 246]. The most significant modification was that the court declined to approve a blanket bar to all class members' ability to bring future personal injury claims as a class action. Instead, the court limited the scope of the release of class-wide personal claims to those instances where the plaintiffs or the claimants seek a nationwide class or where the proposed class is comprised of student athletes from more than one NCAA affiliated school. *Id.* at 605. Other proposed modifications included revisions to the notice program and the way in which certain settlement funds were to be utilized. On May 20, 2016, the parties filed a Joint Motion for Preliminary Approval and a Second Amended Class Action Settlement Agreement and Release which incorporated a "carve-out" to the class waiver in the settlement agreement for "single-school, single-sport" bodily injury classes only. *See NCAA MDL,* Dkt. Nos. 266, 267 and 268.

On July 14, 2016, the court approved the Second Amended Class Settlement Agreement and the class notice process commenced *See NCAA MDL,* Dkt. No. 278 (Motion orally approved at oral argument on July 14, 2016, and formal Order entered on July 15, 2016). To date, the parties are still in the process of providing notice to all class members of the medical monitoring settlement. The parties expect that the judge will grant final approval once the notice process has been effectuated.

Shortly after the parties agreed to the medical monitoring class action settlement agreement with the above-described "carve-out" to class waiver, various plaintiffs' lawyers began filing purported "single-school, single-sport" bodily injury class actions across the country. In September 2016, the NCAA MDL judge created a "separate track" for these lawsuits and ordered all "single-school, single-sport" bodily injury class actions pertaining to football be consolidated before him for pretrial purposes and all responsive pleadings stayed. *See NCAA MDL,* Dkt. No. 291 (Order entered on September 8, 2016 creating *In re: National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation - Single Sport/Single School (Football)*, No. 1:16-cv-08727 (N.D. Ill.)(the "single-sport, single-school track")). As of mid-February 2017, more than fifty (50) purported "single-school, single-sport" bodily injury class actions have been filed across the nation. The MDL judge will address how to proceed with these actions at a status hearing which was scheduled for late March 2017. *See* Single-School, Single-Sport Track, Dkt. No. 113 (minute entry dated 1/20/17).

2. Status of Litigation - Individual Actions

As of the date of this article's publication there are thirteen (13) known individual concussion-related injury lawsuits pending against the NCAA: (1) *Wells v. NCAA,* No. 02-CV-2013-902657.00 (Mobile Cty. Cir. Ct., Ala.) (filed 9/30/13); (2) *Anderson v. NCAA, et al.,* No. 631093 (East Baton Rouge Parish, 19th Jud. Dist. Ct.) (filed 6/6/14, but originally filed in federal court on 3/3/14); (3) *Onyshko v. NCAA*, No. C-63-CV-201403620 (Wash. Cty. Ct. Comm. Pleas, PA) (filed 6/27/14, but originally filed in federal court on 12/17/13); (4) *Bradley v. NCAA, et al.*, No. 1:15-cv-005350-RBW (D.D.C.) (removed 4/10/15, originally filed in state court on 8/8/14); (5) *Schmitz v. NCAA*, No. CV 14 834486 (Cuyahoga Cty., Oh.) (filed 10/20/14, but originally filed in federal court on 6/26/14); (6) *Calderone v. NCAA*, No. 706941/2014 (N.Y. Sup. Ct., Queens Cty.) (filed 9/26/14); (7) *Whalley v. NCAA, et al.*, No. 2015-11600-CIDL (Volusia Cty. Cir. Ct., Fla.) (filed 9/28/15); (8) *Geishauser v. NCAA*, No. 15-C-723 (Monongalia Cty. Cir. Ct., W. Va.) (filed 11/4/15); (9) *Neff v. NCAA*, No. GD-16-20465 (Allegheny Ct. Comm. Pleas, Pa.) (filed 10/20/16); (10) *Landry v. NCAA, et al.*, No. 2016-11484-CIDL (Volusia Cty., Fla.) (filed 9/28/16); (11) *Greiber v. NCAA,* No. 600400-2017 (Sup. Ct., N.Y.) (filed 1/16/17/); (12) *Ploetz v. NCAA*, DC-17-00676 (Dallas Cty. Dist. Ct., Tex.) (filed 1/19/17); and (13) *Alford v. Wilson, et al.*, No. 7:17-cv-00009 (E.D.N.C.) (filed 1/19/17). These individual actions are almost all pending in state, rather than federal, court because the NCAA has claimed that, as an unincorporated association, it is a citizen of every state. Therefore, when the

NCAA is a defendant, the diversity requirement is not met. In addition to the pending individual actions, at least five (5) previously filed lawsuits have been resolved or dismissed: (1) *Sheely v. NCAA, et al.,* No. 380-569-V (Montgomery Cty. Cir. Ct., Md.) (filed 8/22/13); (2) *Walen v. NCAA, et al.*, No. 14-cv-12218 (Multnomah Cty. Cir. Ct., Or.) (filed 8/28/14); (3) *Cunningham v. NCAA,* No. DC-14-12249 (Tex. Dist. Ct., Dallas Cty.-160th) (filed 10/19/14); (4) *Zegel v. NCAA, et al.*, No. 5804-2015 (Westmoreland Cty. Ct. Comm. Pleas, Pa.) (filed 11/15/15); and (5) *Flasher v. NCAA, et al.*, No. 14-0009698 (Broward Cty. Cir. Ct., Fla.) (filed 5/20/14).

This is likely because the NCAA's strongest substantive defense is arguably the most problematic from a public relations standpoint – that is, the NCAA does not owe a legal duty to the student athletes who play sports at its member schools ...

The individual actions are varied. For example, some plaintiffs name only the NCAA as a defendant, while others name member schools, individuals (e.g., coaches, trainers, etc.), and equipment manufacturers. Some plaintiffs seek compensatory or punitive damages, while others also seek medical monitoring. These individual actions are also in different stages of litigation, and, in certain cases, the parties have begun to engage in discovery or substantive motion practice. In one case – the *Schmitz* action – the court granted the NCAA's motion to dismiss on September 1, 2015, and the plaintiffs appealed the dismissal. *See Schmitz v. NCAA, et al.*, 67 N.E.3d 852 (Ohio. Ct.App. 2016). On December 8, 2016, the appellate court affirmed the trial court's dismissal of the plaintiffs' breach of contract and constructive fraud claims, but reversed the dismissal of the plaintiffs' negligence, fraudulent concealment, and loss of consortium claims. *Id.* The case has been remanded to the trial court to proceed as to the three surviving claims. *Id.*

3. Legal Theories, Defenses and Other Considerations

In the numerous class action complaints filed against the NCAA, the plaintiffs generally allege that the NCAA acted negligently and breached its duty to its college athletes by not taking reasonable steps to prevent head injuries despite knowing how severe the repercussions may be for an athlete who suffers a head injury. The plaintiffs further allege that the medical science community has long recognized the debilitating effects of concussions and other traumatic brain injuries. On numerous occasions, the medical science community has noted that repeated impact to the head can cause permanent brain damage and increase the risk of long-term cognitive decline and disability.

According to the plaintiffs, the NCAA was aware of, but disregarded, the general consensus of the medical science community and the mounting scientific literature regarding the long-term effects of concussions and head trauma and the link between concussions and certain sports. The NCAA allegedly failed to implement any guidelines or rules to prevent repeated concussions or educate players about their increased risk, refused to endorse any of the recommended return-to-play procedures (and, instead, continued to allow players to play on the days immediately following receipt of a concussion), and failed to take any action to educate its student athletes on the risks of repeated head traumas.

The NCAA has abstained from litigating its substantive defenses in the class actions and the NCAA MDL. This is likely because the NCAA's strongest substantive defense is arguably the most problematic from a public relations standpoint – that is, the NCAA does not owe a legal duty to the student athletes who play sports at its member schools because the NCAA has very little control over how its member schools educate, train, and care for student athletes. Rather, the control is left to the member schools themselves.

However, in late January 2015, the NCAA filed its Answer to the plaintiffs' Third Amended Complaint in the NCAA MDL asserting twenty-eight (28) affirmative defenses, including, but not limited to, the following: the plaintiffs' claims are barred by assumption of the risk; the plaintiffs' claims are barred by the contact sports exception to the ordinary standard of care doctrine; all of a plaintiff's claims are barred to the extent that the alleged injuries were caused by his or her own conduct; and all of a plaintiff's claims are barred to the extent he/she "did not actually sustain a concussion and therefore suffered no injury." *See NCAA MDL*, Dkt. No. 134. The NCAA has made similar arguments in certain individual cases. For example, in the *Onyshko* action, *supra.*, the NCAA filed preliminary objections to the plaintiffs' complaint on July 17, 2014, in which it argued: (1) the NCAA owes no legal duty to prevent risks inherent in an activity; and (2) the plaintiffs have not plead the legal source of any alleged duty owed by the NCAA (specifically, (a) the NCAA did not assume a legal duty to the plaintiff student athlete; (b) neither the NCAA's aspirational mission statements nor its practice of making safety recommendations create a legal duty; and (c) there is no special relationship between the plaintiff student athlete and the NCAA). The court overruled the NCAA's preliminary objections on December 3, 2014.

Subsequently, on August 26, 2016, the NCAA filed a summary judgment motion in the *Onyshko* action, arguing, among other things, that the NCAA did not undertake a legal duty to protect the plaintiff student athlete from the long-term risk of concus-

sions. *Id.* In their opposition, which was filed on September 27, 2016, the plaintiffs argued, among other things, that the NCAA owed a legal duty to those foreseeably affected by its conduct. The NCAA's summary judgment motion was heard on November 30, 2016, but, to date, the *Onyshko* court has not yet issued a ruling. *Id.*

In addition to the argument that it has no duty, the NCAA's other substantive defenses include assumption of the risk, contributory or comparative negligence on the part of the student athlete, and lack of causation. Again, the NCAA has refrained from litigating these defenses in the class actions and the NCAA MDL, but has teed up one or more of these defenses in certain individual cases. For example, in the *Wells* action, *supra.*, the NCAA filed a summary judgment motion on August 30, 2016, based, at least in part, on the lack of causation and assumption of the risk. Similarly, in the *Whalley* action, *supra.*, the NCAA filed a responsive pleading on August 5, 2016 asserting multiple affirmative defenses including lack of proximate cause, the plaintiff's failure to mitigate her damages, and the plaintiff's voluntary participation in a contact sport. Additionally, in the *Bradley* action, *supra.*, the NCAA filed a motion to dismiss on March 15, 2016 in which it argued, among other things, that plaintiff assumed the risk.

At present, the NFL MDL involves more than three hundred consolidated actions with over five thousand plaintiffs.

Although not yet known, plaintiffs will likely argue that there is sufficient evidence to indicate that the NCAA owed student athletes a duty and that the NCAA breached that duty. For example, with respect to duty, the plaintiffs may point to the following statement which appeared on the NCAA's website: "… the NCAA is leading a national effort to partner with member schools, the Department of Defense and the public sector to conduct research, promote policies and develop educational materials that benefit the safety, excellence and wellness of all athletes." *See* http://www.ncaa.org/health-and-safety (as of May 27, 2015). With respect to breach of duty, it is anticipated that the plaintiffs will argue that the NCAA failed to adopt various suggested international guidelines for concussion management, including those in the 2002 Vienna Protocol, which arose from the First International Symposium on Concussion in Sport held in Vienna in 2001. *See "Summary and Agreement Statement of the First International Conference on Concussion in Sport, Vienna 2001,"* The Physician and Sports Medicine, Vol. 30, No. 3 (Feb. 2002) available at www.impacttest.com/pdf/ViennaGuidelines.pdf.

Causation will be determined on an individual basis. Plaintiffs will likely argue that the NCAA should have foreseen that coaches and trainers might allow (or even encourage) student athletes to return to play before they fully recovered from their head injuries or before all of their concussion symptoms subsided. Based on the ongoing publicity regarding concussions, there may be sympathy for the argument that the NCAA was in a unique position to legislate rules that would protect student-athletes, that the NCAA knew these types of rules were necessary, and that the NCAA's failure to promulgate appropriate rules caused foreseeable injuries to student athletes whose concussions could have been prevented or who were improperly treated after being injured.

B. Concussion-Related Injury Litigation Against The NFL

1. Status of Litigation - Class Actions

In July 2011, seventy-three (73) former NFL players filed an action, *Maxwell, et al. v. NFL, et al.*, No. BC465842 (Cal.Super. Ct. July 19, 2011), against the NFL, its licensing department, and various helmet-manufacturers, alleging that concussions and other injuries sustained during their NFL careers had resulted in brain and other neurological damage, and that, at its highest management levels, the NFL negligently failed to protect players against such long-term injuries. Less than one month later, the putative class action of *Easterling, et al. v. NFL, et al.,* No. 11-cv-05209-AB (E.D. Pa.), was filed by seven former players who brought similar allegations on behalf of a proposed class of former NFL players.

On January 31, 2012, the JPML centralized the *Maxwell* action, the *Easterling* action, and several other NFL concussion injury cases into a federal multi-district litigation in the Eastern District of Pennsylvania before the Honorable Anita B. Brody for coordinated pretrial proceedings. *In re: Nat'l Football League Players' Concussion Injury Litigation*, 842 F.Supp.2d 1378 (J.P.M.L. 2912)(the "NFL MDL"). Thereafter, hundreds of class action concussion-related injury lawsuits were filed by former NFL players and their spouses. Notable plaintiffs include Ray Easterling, Eric Allen, Mark Rypien, Alex Karras, Mark Chmura, Jamal Anderson, Art Monk, Danny White, Jim Everett, and Junior Seau. At present, the NFL MDL involves more than three hundred consolidated actions with over five thousand plaintiffs. *See NFL MDL*, Dkt. 6083.

Throughout 2013, the plaintiffs and the NFL engaged in settlement discussions which were highly publicized in the media. In August 2013, just days before the start of the 2013 NFL sea-

son, the parties announced that they had reached a tentative $765 million settlement. *See, e.g.*, Belson, Ken, "*NFL Agrees to Settle Concussion Suit for $765 Million,*" New York Times (August 29, 2013) available at www.nytimes.com/2013/08/30/sports/football/judge-announces-settlement-in-nfl-concussion-suit.html. In early January 2014, Class Counsel for the plaintiffs filed a motion in the NFL MDL for an order granting preliminary approval of the proposed class action settlement agreement and conditional certification of the settlement class and subclasses. *See NFL MDL*, Dkt. No. 5634-5. The NFL MDL judge, however, quickly rejected the proposed agreement because she was concerned that there would not be enough money to cover all of the claims of the entire class, which was estimated to be 20,000 former players. *In re: Nat'l Football League Players' Concussion Injury Litigation*, 961 F.Supp.2d 708 (E.D.Pa. 2014). The judge requested that the parties provide additional information so that the court could evaluate the fairness and adequacy of the proposed settlement, and specifically, the actuarial data supporting how a $765 million fund with a 65-year lifespan could adequately compensate the proposed class. *Id.*

In August 2013, just days before the start of the 2013 NFL season, the parties announced that they had reached a tentative $765 million settlement.

The parties subsequently provided additional information regarding the proposed settlement which satisfied the court, as well as a slightly revised settlement agreement. On July 7, 2014, the NFL MDL judge granted preliminary approval of the settlement. *In re: Nat'l Football League Players Concussion Injury Litigation,* 301 F.R.D. 191 (E.D.Pa. 2014). The revised settlement provides for a nationwide settlement class which consists of three types of claimants:

1. Retired NFL Football Players: Generally defined as all living NFL football players who, prior to the date of the Preliminary Approval and Class Certification Order, retired – formally or informally – from playing professional football with the NFL or any Member Club, including the American Football League, World League of American Football, the NFL Europe League, and the NFL Europa League players…;

2. Representative Claimants: Generally defined as authorized representatives of deceased, legally incapacitated, or incompetent retired NFL Football Players; and

3. Derivative Claimants: Generally defined as close family members of retired NFL Football Players who properly assert the right to sue independently or derivatively by virtue of their relationship with a Retired NFL Football Player or deceased Retired NFL Football Player.

See NFL MDL, Docket No. 6083-1. The revised settlement also outlines the following types of "qualifying diagnoses" and the maximum monetary award levels for each diagnosis:

- Level 1.5 Neurocognitive Impairment (early dementia) – $1.5 million;
- Level 2 Neurocognitive Impairment (moderate dementia) – $3 million;
- Alzheimer's Disease – $3.5 million;
- Parkinson's Disease – $3.5 million;
- Death with CTE (Chronic Traumatic Encephalopathy) – $4 million; and
- Amyotrophic Lateral Sclerosis ("ALS"), commonly referred to as Lou Gehrig's Disease – $5 million.

Id. These awards may be reduced based on a retired player's age at the time of diagnosis, the number of NFL seasons played, and other applicable offsets outlined in the settlement agreement. *Id.*

In addition to granting preliminary approval of the revised settlement, the judge stayed all actions consolidated in the NFL MDL and enjoined all proposed settlement class members from commencing, prosecuting, or participating in any way in any other lawsuit or legal action based on the facts and circumstances at issue in NFL MDL until the proposed settlement class members have opted out of the settlement class or the settlement has been denied. *See NFL MDL*, Dkt. No. 6083. Proposed class members are not, however, precluded from bringing litigation relating to cognitive injuries against the NCAA or any other collegiate, amateur, or youth football organizations, a point which the judge noted in granting preliminary approval. *Id.*

Certain former players objected to the proposed revised settlement prior to the grant of preliminary approval, arguing, among other things: the revised settlement leaves many injured class members uncompensated, as it only compensates a small subset of mild traumatic brain injury ("MTBI")-related injuries; the proposed notice is false and misleading; the settlement establishes unduly burdensome procedural requirements; the

settlement negotiation process lacked transparency; and the lack of discovery is problematic. *See NFL MDL*, Dkt. No. 6084. These same objectors filed a petition for review with the United States Court of Appeals for the Third Circuit after the grant of preliminary approval, based on the inadequacy of the class, but their request for leave to appeal was denied. *See* Case No. 14-8103, Dkt. 003111686114 (3d. Cir). Other plaintiffs have filed objections to the settlement since the grant of preliminary approval. *See NFL MDL*, Dkt. No. 6201.

A final fairness hearing was held in the NFL MDL on November 19, 2014. After hours of testimony from counsel for the NFL, class counsel and counsel for various objectors, the judge declined to grant preliminary approval, and instead permitted those who had previously filed timely and valid objections to file supplemental briefing. Quite a few voluminous objections were filed in early December 2014, many of which outlined numerous alleged deficiencies with the NFL settlement.

On April 22, 2015, Judge Brody granted final approval of the amended class action settlement agreement... Judge Brody held that the settlement agreement was "fair, reasonable and adequate," ordered that it be approved in its entirety, and that any related lawsuits be dismissed with prejudice.

For example, one set of objectors argued that class counsel and the NFL have not refuted the showing that the settlement is unfair. These objectors' "unfairness" argument is based, in part, on the fact that the settlement releases the NFL for all CTE claims, but fails to compensate the vast majority of class members for CTE. *See NFL MDL*, Dkt. No. 6455. In support of this argument, the objectors argued that the experts hired by class counsel improperly ignore the medical science concerning CTE, are biased, and express opinions which are inconsistent with the opinions they expressed before being retained as experts in this case and contrary to those of the generally accepted medical community. *Id.* Interestingly, the objectors filed supporting affidavits of more than ten (10) medical experts, none of whom were compensated and all of whom agree that the settlement is problematic for the reasons discussed in the objection. *Id.* The objectors also argued that the various offsets in the settlement are unfair; lack of adequate representation; significant procedural hurdles which will prevent many class members from ever recovering; no guarantee that funds will be available to pay claims during the full term of the settlement; and settlement against public interest and opinion. *Id.*

On February 2, 2015, the judge issued an Order raising numerous concerns with the settlement terms and directing the parties to file a joint submission to address the court's concerns. *See NFL MDL*, Dkt. No. 6479. Among the judge's concerns were (a) the settlement does not provide credit for seasons played in other football leagues (e.g., NFL Europe); (b) the settlement may be insufficient to provide funding for all qualifying members; (c) class members who die as a result of CTE prior to final approval of the settlement will not be compensated; and (d) certain requirements may be onerous for class members (e.g., the $1,000 fee to appeal determinations of monetary awards and the requirement that class members submit medical records). *Id.*

On February 13, 2015, the plaintiffs and the NFL filed a joint submission responding to each of the court's concerns and advising that the settlement agreement had been amended to address those concerns. *See NFL MDL*, Dkt. No. 6481. For example, the parties advised that they amended the agreement to provide for a "half credit" for seasons played in other leagues and to provide a grace period for the deadline to file claims in recognition that it may take several months post-death to obtain a diagnosis of CTE, among other things. *Id.* The parties also filed an Amended Class Action Settlement Agreement and requested that the court grant preliminary approval of the settlement, as amended. *Id.*

On April 22, 2015, Judge Brody granted final approval of the amended class action settlement agreement. *See NFL MDL*, 307 F.R.D. 351 (E.D.Pa. 2015). In the Order, Judge Brody found that the settlement class satisfied the applicable prerequisites for class treatment under Federal Rules of Civil Procedure 23(a) and (b), and further, that class notice was properly and effectively implemented. *Id.* Judge Brody held that the settlement agreement was "fair, reasonable and adequate," ordered that it be approved in its entirety, and that any related lawsuits be dismissed with prejudice. *Id.*

Beginning in mid-May 2015, several appeal notices were filed in the United States Court of Appeals for the Third Circuit, and these appeals were consolidated. In a nutshell, the appellants argued as follows:

- The settlement class includes both currently injured players with cognizable claims against the NFL, as well as those whose concussion-related injuries have not yet manifested and who therefore cannot state a claim against the NFL. However, the named plaintiffs did not adequately represent the former players without current claims, and rather, traded off their recovery for increased immediate payments to the currently injured players;

- The settlement impermissibly treats identically situated class members differently, based upon an arbitrary

cutoff date. Specifically, class members who die with CTE on or before July 7, 2014 may recover up to $4 million, but those who die with CTE after that date are ineligible for any recovery; and

- The settlement improperly releases future claims for CTE and death with CTE, despite the fact that the district court stated on the record that CTE was "nascent" and "in its infancy."

The total NFL payout for these three components, as well as an additional $112.5 million in attorneys' fees, is expected to be $1 billion.

The Brain Injury Association of America filed an amicus brief in support of the appellants, also seeking reversal of the settlement. The NFL and the plaintiff appellees, in their response briefing, argued that the settlement's offsets are fair and reflect the underlying strength of the class members' claims.

On November 19, 2015, the Third Circuit's three-judge panel held oral arguments on the appeal. Reportedly, objectors focused primarily on their argument that the settlement did not compensate players who died of CTE after the July 7, 2014 preliminary approval date or players who may develop CTE in the future. The three-judge panel pushed back and questioned the objectors about how ex-players can be treated and compensated for CTE when they are living, since CTE can only be diagnosed by autopsy. Counsel for the objectors reportedly argued that a way to diagnose CTE in living patients may soon develop, and the settlement failed to take into account any evolution of the science regarding CTE.

On April 18, 2016, almost six months after oral arguments, the Third Circuit Court of Appeals approved the NFL settlement. *In re: NFL Players' Concussion Injury Litigation*, 821 F.3d 410 (3d Cir. 2016). Ten days later, on April 28, 2016, a group of nine objectors filed a Petition for Rehearing *en banc*, again arguing that the science regarding CTE – which, at present, can only be diagnosed posthumously – is too immature to justify the settlement. *See* Case No. 15-2206 (3d Cir.), Doc. 00311226221. On June 1, 2016, the Third Circuit Court of Appeals denied the objectors' rehearing petition.

Once all appellate avenues to the Third Circuit had been exhausted, former players who wanted to challenge the settlement were forced to appeal to the United States Supreme Court. On August 30, 2016, the Estate of former running back Carlton "Cookie" Gilchrist filed a petition for writ of certiorari, and on September 28, 2016, thirty-one (31) petitioners – including 1996 Super Bowl MVP Larry Brown and Hall of Famer Charles Haley – filed a similar petition. *See* Case No. 16-283 (U.S.S.Ct), 2016 U.S.S.Ct. Briefs LEXIS 3564 and Case No. 16-413 (U.S.S.Ct.), 2016 U.S.S.Ct. Briefs LEXIS 3528, respectively. On December 12, 2016, the Supreme Court denied certiorari. *See Gilchrist v. NFL,* 137 S.Ct. 591 (2016) and *Armstrong v. NFL,* 137 S.Ct. 607 (2016). The Court did so in an order list and did not provide any further information or explanation regarding its decision. The effect of its decision, however, is that the approval of the NFL settlement stands and no further appeal avenues are available.

The NFL MDL settlement has three components:

- An uncapped Monetary Award Fund, which will remain in place for sixty-five (65) years and will provide compensation for retired players who submit proof of certain "Qualifying Diagnoses;"

- A $75 million Baseline Assessment Program that provides eligible retired players with free baseline assessment examinations of their objective neurological functioning; and

- A $10 million Education Fund to instruct football players about injury prevention.

See In re: NFL Players' Concussion Injury Litigation, 821 F.3d at 423. The total NFL payout for these three components, as well as an additional $112.5 million in attorneys' fees, is expected to be $1 billion. On January 7, 2017, the settlement became final and effective. The settlement covers former professional football players who retired from NFL by July 7, 2014 (approximately 22,000 retirees). The Settlement Class Member registration process is now open, and notices regarding the registration process were sent to class members by email and regular mail. The deadline for class members to register is August 7, 2017. At a recent hearing in the NFL MDL, counsel for the NFL advised that the NFL is moving the first $65 million in payments into trust funds that cover injury claims, baseline assessment testing, and education. Reportedly, the NFL will pay an additional $120 million into the injury fund over the next six months. The NFL has stated that it expects more than 6,000 of the approximately 22,000 former players will eventually be diagnosed with a compensable injury like dementia or Alzheimer's disease.

2. Status of Litigation - Individual Actions

Unlike the proposed medical monitoring settlement in the NCAA MDL, the settlement in the NFL MDL includes all medical monitoring *and* all personal injury claims. Therefore, the

NFL now only needs to defend any individual actions that might be brought by class members who have opted out of the settlement. Between 160 and 200 class members have reportedly opted out of the settlement.

3. Legal Theories, Defenses and Other Considerations

The plaintiffs generally allege that the NFL failed to protect its players, misrepresented that there was no link between concussions and later-life cognitive disorders or brain injuries, fraudulently concealed the risks of head injuries and other facts and information which caused players to be exposed to harm, failed to regulate the sport in a manner that would prevent brain injuries, conspired to discount and reject the causal connection between concussions and the long-term effects of those injuries, negligently failed to warn of risks, failed to disclose risks, and failed to adopt and enforce rules to minimize risks to players. The plaintiffs also generally allege that, for decades, the NFL made statements contrary to the vast majority of peer-reviewed evidence on concussions, and it was not until 2010 that the NFL began to properly warn players about how concussions could affect their brain functions long after they retired. Many players alleged they sustained multiple concussions that were improperly treated by team medical personnel.

The plaintiffs generally allege that the NFL's licensing department failed to ensure that the equipment licensed and approved for players' use was sufficient to protect players against the risks of concussive brain injuries.

As noted above, the plaintiffs also brought suit against the NFL's licensing department and various equipment manufacturers. The plaintiffs generally allege that the NFL's licensing department failed to ensure that the equipment licensed and approved for players' use was sufficient to protect players against the risks of concussive brain injuries. The plaintiffs further allege that the equipment manufacturers are strictly liable for design and manufacturing defects because the helmets designed, manufactured, sold, and distributed by these entities were unreasonably dangerous and unsafe for their intended purposes because they did not provide adequate protection against the foreseeable risks of concussive brain injuries. Further, the equipment manufacturers allegedly failed to warn of substantial dangers involved in the reasonable and foreseeable use of their helmets and failed to provide adequate safety and instructional materials to minimize the risks of concussive brain injuries.

Like the NCAA, the NFL's potential liability defenses include lack of a legal duty owed to athletes, assumption of the risk, comparative or contributory negligence, proportionate or comparative fault, and lack of causation. Arguably, the former players' actions on the field or refusal to properly deal with injuries contribute to the former players' health issues. Quite a few players have stated on record that they would conceal a concussion to stay in the game. *See, e.g.*, The Dan Patrick Show, *"Troy Polamalu says he's had eight or nine recorded concussions, lied to get in games,"* (July 18, 2012) available at www.danpatrick.com/2012/07/18/troy-polamalu-says-hes-had-eight-or-nine-recorded-concussions-explains-why-he-plays-if-hes-not-100-percent/. The NFL will likely assert these defenses in any individual actions which are filed.

C. Concussion-Related Injury Litigation Against The NHL

1. Status of Litigation – Class Actions

On November 25, 2013, *Leeman, et al. v. NHL, et al.*, No. 1:13-cv-01856 (D.D.C.) was filed by over two dozen former NHL players against the NHL regarding traumatic brain injuries (the "*Leeman* action"). The *Leeman* action is the first of nineteen proposed class action concussion-related injury cases filed against the NHL to date. *Leeman, supra.; LaCouture, et al. v. NHL,* No. 1:14-cv-02531 (S.D.N.Y.), filed on 4/11/14; *Christian, et al. v. NHL*, No. 0:14-cv-01140 (D. Minn.), filed on 4/15/14; *Fritsche, et al. v. NHL,* No. 1:14-cv-05732 (S.D.N.Y.), filed on 7/25/14; *Rohloff, et al. v. NHL*, No. 0:14-cv-03038 (D. Minn.), filed 7/29/14; *Larose, et al. v. NHL*, No. 0:14-cv-03410 (D. Minn.), filed 9/8/14; *Populok, et al. v. NHL*, No. 0:14-cv-03477 (D. Minn.), filed 9/14/14; *Murphy, et al. v. NHL*, No. 0:14-cv-04132 (D. Minn.), filed 10/2/14; *Adams, et al. v. NHL,* No. 0:15-cv-00472 (D. Minn.), filed 2/9/15; *Blue, et al. v. NHL,* No. 8:15-cv-00621 (C.D. Cal.), filed 4/20/15; *Ludzik, et al. v. NHL,* No. 1:15-cv-04816 (N.D. Ill.), filed 6/1/15; *Severson, et al. v. NHL,* No. 0:15-cv-03645 (C.D. Cal.), filed 8/21/15; *Petit, et al. v. NHL,* No. 0:15-cv-03666 (D. Minn.), filed 9/14/15; *Oliwa, et al. v. NHL,* No. 0:15-cv-03904 (D. Minn.), filed 1/20/15;*Muni, et al. v. NHL*, No. 0:15-cv-04191 (D. Minn.), filed 10/20/15; *Montador, et al. v. NHL*, No. 1:15-cv-10989 (N.D. Ill.), filed 12/08/15; *Ledyard, et al. v. NHL*, No. 0:16-cv-00248 (D. Minn.), filed 2/3/16; *Veitch, et al. v. NHL,* No. 0:16-cv-02683 (D. Minn.), filed 8/9/16; and *Zeidel, et al. v. NHL*, No. 0:16-cv-03156 (D. Minn.), filed 9/22/16.

On August 19, 2014, the JPML centralized the *Leeman* action and the other NHL players' concussion injury cases an action styled as *In re: National Hockey League Players' Concussion Injury Litigation*, MDL No. 2551, Case No. 0:14-md-02551-SRN (D. Minn.), before the Honorable Susan Richard Nelson for coordinated or consolidated pretrial proceedings (the "NHL MDL"). Pursuant to an Order of the NHL MDL, any subse-

quent similar case filed in federal court will be transferred to the District of Minnesota and become part of the NHL MDL as a "tag along" case. *See NHL MDL*, Dkt. No. 1.

Thereafter, in November 2014, the NHL filed two motions to dismiss: one based on the grounds of preemption and another based on the failure to state a claim.

On October 20, 2014, the plaintiffs filed a Master Administrative Long-Form Class Action Complaint ("Master Complaint") and a proposed Short-Form Complaint and Jury Demand on behalf of all former NHL players. *See id.*, Dkt. Nos. 28 and 28-1. Thereafter, in November 2014, the NHL filed two motions to dismiss: one based on the grounds of preemption and another based on the failure to state a claim. *See id.,* Dkt. Nos. 37 and 43, respectively. In its first motion to dismiss, the NHL argued that the plaintiffs' claims are preempted under § 301 of the Labor Management Relations Action ("LMRA"), 29 U.S.C. § 185, due to the operation of the collective bargaining agreements ("CBAs") between the NHL and the players. In its second motion to dismiss, the NHL argued the following: all of the named plaintiffs' claims are untimely and, therefore, time-barred; the plaintiffs' fraud-based claims (specifically, negligent misrepresentation by omission, fraudulent concealment, and fraud by omission/failure to warn) are not pled with particularity because the plaintiffs have not alleged a duty to disclose; and certain plaintiffs' medical monitoring claims fail because none of the applicable jurisdictions recognize a stand-alone claim for medical monitoring. *See id.,* Dkt. No. 43. On January 8, 2015, the court heard oral arguments on the NHL's motions, and on March 25, 2015, entered an order denying in part and denying (without prejudice) in part the NHL's motion to dismiss for failure to state a claim. *See id.,* Dkt. No. 126. The court did not, however, rule on the NHL's preemption motion. On December 21, 2015, the NHL filed a notice of supplemental authority in support of its preemption motion advising the MDL court that a federal court in Illinois granted summary judgment in favor of the NHL in an individual concussion-related injury lawsuit based on labor law preemption. *See NHL MDL,* Dkt. No. 321 citing *Boogaard, Successor Personal Representative of the Estate of Derek Boogaard, Deceased v. NHL, et al.*, No. 1:13-cv-04846 (N.D. Ill.) (The *Boogaard* action and the referenced summary judgment ruling are discussed in greater detail in below.).

A few weeks later, on January 12, 2016, the NHL filed a motion to stay further discovery pending resolution of its preemption motion. In support of its motion to stay discovery, the NHL argued that the court should not force the NHL to expend significant sums of money on discovery until the court determines whether the plaintiffs' claims are preempted or will proceed. *See NHL MDL,* Dkt. No. 344. Three days later, on January 15, 2016, the plaintiffs filed an Amended Master Administrative Complaint ("Amended Complaint") asserting many of the same claims and allegations as the original complaint and additional claims for loss of consortium and wrongful death and survival actions. *See id.,* Dkt. No. 351. In response, the NHL supplemented its previously filed motion to dismiss on preemption grounds and argued that the Amended Complaint should be dismissed on the grounds that the new claims for relief – like the prior claims – are preempted under § 301 of the LMRA. *See id.,* Dkt. No. 361. On February 8, 2016, the NHL filed a separate motion to dismiss in which it sought dismissal of the plaintiffs' claims for loss of consortium and wrongful death and survival actions for lack of standing. *See id.,* Dkt. No. 374. The plaintiffs voluntarily dismissed these two claims without prejudice in March 2016. *See id.,* Dkt. No. 413.

Subsequently, on May 18, 2016, the MDL Court denied the NHL's preemption motion. *See id.,* Dkt. No. 486. In fairly strident terms, Judge Nelson held that it would be premature at the present pre-discovery stage to determine which CBAs, if any, are relevant to the case and "discovery is necessary to shed light on the nature of Plaintiffs' claims, when those claims accrued, and which – if any – CBAs might be relevant." *Id.* In light of its denial of the NHL's preemption motion to dismiss, the MDL Court denied the NHL's motion to stay discovery as moot. *Id.*

On October 17, 2016, the plaintiffs filed a Second Amended Complaint, which contained an additional class representative – specifically, the estate of a former player who had been diagnosed with CTE post-mortem – and a revised description of the subclasses. *See id.,* Dkt. No. 615. The proposed class, as defined in the Second Amended Complaint, is "all Retired NHL Hockey Players and their Representative Claimants." *See id.,* Dkt. No. 615 at ¶ 394. Relevant to this class definition, "Retired NHL Hockey Players" is defined as "NHL hockey players who retired from playing professional hockey with the NHL or any Member Club or affiliate, or who were under contract with or on any roster, including preseason, regular season, or postseason, of any such Member Club or affiliate, and who no longer are under contract to a Member Club or affiliate and are not seeking active employment as players with any Member Club or affiliate[,]" and "Representative Claimants" is defined as "Retired NHL Hockey Players' respective executors or equivalent legal representatives under applicable state law." *See id.,* Dkt. No. 615 at ¶ 397 and ¶ 398, respectively. Additionally, the proposed class is comprised of two subclasses:

- Subclass 1: "All living Class members who have not been clinically diagnosed with a Neurological Disease,

Disorder, or Condition." *See id.,* Dkt. No. 615 at ¶ 394 (emphasis added).

- Subclass 2: "All Class members who have been clinically diagnosed with a Neurological Disease, Disorder, or Condition." *See id,* Dkt. No. 615. at ¶ 395 (emphasis added).

Relevant to both of these subclasses, "Neurological Disease, Disorder, or Condition" is defined as "ALS, Alzheimer's, Parkinson's, CTE, Frontotemporal Dementia, Lewy Body Dementia, Parkinson's Dementia, or other neurodegenerative disease or condition, as well as any cognitive, mood, or behavioral conditions where such conditions arose after retirement from the NHL." *See id.*, Dkt. No. 615 at ¶ 399. On December 1, 2016, the NHL filed its Answer with Affirmative Defenses to the Second Amended Complaint. *See NHL MDL,* Dkt. No. 634 (The NHL's Affirmative Defenses are discussed in greater detail below).

The plaintiffs further allege that the NHL knew, or should have known, that the Enforcers/Fighters in the NH had an increased risk of brain damage due to concussive and sub-concussive brain trauma and were particularly susceptible to addiction.

On December 8, 2016, the plaintiffs filed a motion for Class Certification and Appointment of Class Representatives and Class Counsel. *See id.,* Dkt. No. 638. The NHL's response to the plaintiffs' class certification motion is due on April 27, 2017. A hearing on the plaintiffs' class certification motion is to be held on July 11, 2017. In the interim, the parties are engaging in class-related expert discovery and have had heated disputes about fact discovery issues, including production of medical records, depositions of NHL and club personnel, and medical examinations of named plaintiffs.

2. Status of Litigation - Individual Action

At present, the *Boogaard* action*, supra.,* is the only known individual concussion-related injury action against the NHL. Like the NHL MDL, the *Boogaard* plaintiffs allege that Boogaard suffered concussion-related injuries; however, unlike the class action, the plaintiffs also allege that Boogaard became addicted to pain medication prescribed by the NHL's staff members and eventually died of a drug overdose. *See Boogaard*, Dkt. No. 170. The plaintiffs further allege that the NHL knew, or should have known, that the Enforcers/Fighters in the NHL had an increased risk of brain damage due to concussive and sub-concussive brain trauma and were particularly susceptible to addiction. *Id.*

On March 12, 2015, the NHL filed a motion to dismiss on preemption grounds, arguing – as it did in the NHL MDL – that the plaintiffs' claims are preempted under § 301(a) of the LMRA. *See id.*, Dkt. No. 86. The court converted the motion into one for summary judgment and, on December 18, 2015, granted summary judgment in favor of the NHL on the grounds that all of the plaintiffs' claims against the NHL are preempted. *See NHL MDL,* 126 F.Supp.3d 1010 (N.D.Ill. 2015) available at www.leagle.com/decision/InFDCO20151221989/Boogardv.Nat.HockeyLeague. The court explained its rationale as follows:

Counts I and II

- Plaintiffs' claims: The NHL negligently failed to prevent Boogaard from becoming addicted to opioids and sleeping pills.
- Court's rationale and holding: The plaintiffs' claims are preempted because resolution of these claims would require a determination as to whether the NHL was Boogaard's custodian, and this depends largely on genuinely contested interpretations of the applicable CBA.

Counts III and IV

- Plaintiffs' claims: The NHL breached its voluntarily undertaken duty to curb and monitor Boogaard's drug addiction while he was enrolled in the NHL's substance abuse program, including by failing to provide Boogaard with a chaperone for his second temporary release from the rehabilitation facility, and by failing to warn him of the risks associated with leaving the facility.
- Court's rationale and holding: The plaintiffs' claims are preempted because the agreement creating the NHL's substance abuse program was created as a result of collective bargaining, and therefore, the resolution of these claims would require interpretation of that agreement (previously determined by the court in denying plaintiffs' motion to remand).

Counts V and VI

- Plaintiffs' claims: The NHL was negligent in failing to protect Boogaard from brain trauma during his career, violating its voluntarily undertaken duty to protect his health.
- Court's rationale and holding: The plaintiffs' claims are preempted because resolving these claims would require the court to interpret the applicable CBA to determine the true scope of the NHL's voluntarily assumed duties.

Counts VII and VIII

- Plaintiffs' claims: The NHL breached its voluntarily undertaken duty to protect Boogaard's health by failing to prevent team doctors from injecting him with Toradol, an intramuscular analgesic that, according to Boogaard, makes concussions more likely and more dangerous.

- Court's rationale and holding: The plaintiffs' claims are preempted because resolving these claims would require the court to interpret the applicable CBA to determine the true scope of the NHL's voluntarily assumed duties.

Id. at 1017. The plaintiffs sought leave to amend their pleadings to add new allegations and information gleaned from discovery exchanged in the NHL MDL. *See NHL MDL*, Dkt. Nos. 143, 144 and 145. The NHL opposed the plaintiffs' request, and the court heard oral arguments on the issue in April 2016. *See id.*, Dkt. No. 151 (filed 3/10/16) and Dkt. No. 161 (status hearing held 4/14/16), respectively.

More specifically, in the master complaint, the plaintiffs allege that in spite of the fact that the NHL knew that the medical community had focused on hockey players' brain injuries, the NHL continued to promote unnecessary brutality and violence as a "dominant element" of hockey.

In late September 2016, the court permitted the plaintiffs to file a Second Amended Complaint, but dismissed Counts V-XII and specific portions of Counts I-IV, with prejudice, based on its decision that these claims were completely pre-empted and barred on limitations grounds. *See Boogaard v. NHL,* 2016 WL 5476242 (N.D.Ill. 2016)(order entered 9/29/16). In November 2016, the NHL filed a motion for reconsideration. *See id.*, Dkt. No. 177 (filed 11/4/16). One month later, on December 15, 2016, the plaintiffs filed a motion to remand the case to state court. *See id.*, Dkt. No. 182. The court heard oral arguments on these motions on February 8, 2017, and advised that it hopes to issue written rulings on both motions before the next status hearing, which is presently set for early April 2017.

3. Legal Theories, Defenses and Other Considerations

Like the plaintiffs in the NCAA and NFL actions, the plaintiffs generally allege that the NHL was aware of the short-term and long-term effects of repeated concussions and head trauma, yet failed to warn hockey players of these risks. The plaintiffs further allege these and other actions and inactions by the NHL resulted in players suffering from, or increased the risk of contracting, serious brain diseases (such as Alzheimer's, dementia, and Parkinson's) and accelerated the speed and severity of players' post-retirement mental decline.

More specifically, in the master complaint, the plaintiffs allege that in spite of the fact that the NHL knew that the medical community had focused on hockey players' brain injuries, the NHL continued to promote unnecessary brutality and violence as a "dominant element" of hockey. *See NHL MDL*, Dkt. No. 615, ¶¶ 274-335. According to the plaintiffs' allegations, the NHL failed to use its resources to protect players from known dangers. Instead, the NHL capitalized on violence while downplaying risks, and in doing so, undertook a duty of care to its players. *See id*. at ¶¶ 336-371. Plaintiffs further allege that current NHL players still face a significant risk of head trauma. *See id.* at ¶¶ 372-386.

In the master complaint, the plaintiffs identify seven common questions, which they allege "are each separate issues that should be certified for classwide resolution[,]" -- e.g., the scope of the NHL's duty to hockey players and whether the NHL breached that duty. *See id.* at ¶ 402. The plaintiffs assert causes of action against the NHL for declaratory relief, medical monitoring, negligence, negligent misrepresentation by omission, fraudulent concealment, and fraud by omission/failure to warn. *See id*. at ¶¶400-464.

As evidenced by the NHL's motions and responsive pleadings, many of the NHL's defenses and other considerations are similar to those asserted or available to the NFL. The NHL has, however, asserted some additional defenses. Specifically, in its Answer to the plaintiffs' Second Amended Complaint, the NHL asserted twenty-six (26) affirmative defenses, including, among other things: preemption under federal labor law (and/or requirement to submit to arbitration under federal labor law); violation of the First Amendment of the United States Constitution (to the extent the plaintiffs seek to impose tort liability on the NHL in connection with its promotion and marketing of the game of hockey); statute of limitations (as to certain named plaintiffs); lack of cognizable injury or damages (as to certain named plaintiffs); plaintiffs' assumption of the risk; the alleged injuries or damages were caused by others for whom the NHL has no responsibility or control; violation of the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution due to joinder of disparate personal injury claims; certain plaintiffs' failure to mitigate damages; failure to join necessary and indispensable parties; failure to plead fraud claims with particularity; improper venue; and spoliation of evidence. *See id.,* Dkt. No. 634.

D. Concussion-Related Injury Litigation Against the WWE

1. Status of Litigation – Class Actions

Various concussion-related injury class actions are pending against World Wrestling Entertainment, Inc. ("WWE"). *See, e.g., McCullough, et al. v. World Wrestling Entertainment, Inc.*, 172 F.Supp.3d 528 (D.Conn. 2016); *Laurinaitis, et al. v. WWE, et al*, No. 3:16-cv-0120- (D. Conn.) These actions largely resemble the class claims against the NFL and NHL.

2. Legal Theories, Defenses and Other Considerations

As evidenced by the WWE's responsive pleadings, many of the WWE's defenses and other considerations are similar to those in the NFL and NHL concussion litigations. *See, e.g., McCullough,* Dkt. No. 197.

The plaintiffs in the Mehr action generally alleged that FIFA and the other soccer organizations were negligent in the following particulars: the manner in which they dealt with head injuries, failure to provide adequate concussion management, and failure to adopt proper rules for protecting players under age seventeen (17) from head injuries.

E. Concussion-Related Injury Litigation Against FIFA

1. Status of Litigation – Class Actions

On August 27, 2014, an action styled as *Mehr, et al. v. Federation Internationale Football Ass'n, et al*, No. 4:14-cv-03879 (N.D. Cal.) (the "*Mehr* action") was filed by the parents of seven youth soccer players against FIFA and numerous other soccer organizations engaged in promoting and sponsoring youth soccer regarding traumatic brain injuries. The purported class is defined as:

> All current or former soccer players who from 2002 to the present competed for a team governed by FIFA, The United States Soccer Federation, U.S. Youth Soccer, American Youth Soccer Organization, U.S. Club Soccer, or California Youth Soccer Association.

Id. In January 2015, the defendants filed motions to dismiss on various grounds, including lack of personal jurisdiction, lack of standing, and failure to state a claim. *See id*., Dkt. Nos. 53, 55 and 56. On July 16, 2015, the court dismissed the claims against FIFA with prejudice for lack of personal jurisdiction. The Court also dismissed the claims asserted against the other defendants for failure to state a claim, but granted the plaintiffs leave to amend. *See id*., Dkt. No. 104. Subsequently, on November 5, 2015, the plaintiffs advised the court that they were not planning to file an amended complaint, and the action was dismissed with prejudice on November 9, 2015. *See id*., Dkt. No. 117.

2. Legal Theories, Defenses and Other Considerations

The plaintiffs in the *Mehr* action generally alleged that FIFA and the other soccer organizations were negligent in the following particulars: the manner in which they dealt with head injuries, failure to provide adequate concussion management, and failure to adopt proper rules for protecting players under age seventeen (17) from head injuries. *See id*., Dkt. No. 1. The plaintiffs brought causes of action for negligence, breach of voluntary undertaking, and medical monitoring. *Id.* The plaintiffs sought rule changes that ranged from limiting the amount of times a minor is allowed to head the ball during play to changing FIFA's substitution policies. *Id.*

F. Other Concussion-Related Injury Litigation

Quite a few other concussion-related injury lawsuits have been filed around the nation, and some have already been resolved. For example, individual and class action lawsuits have been filed against high schools, youth organizations, and coaches and other individuals involved in these schools and organizations. *See, e.g., Jobe, et al. v. NCAA, et al.*, No. 3:13-cv-00799 (S.D. Miss.) (filed 12/23/13 and dismissed 9/30/26); *Ripple v. Marble Falls Independent School District, et al.*, No. 1:12-cv-00827 (W.D. Tex.) (filed 9/7/12 and order granting summary judgment for defendants entered 3/27/15); *Alt v. Shirey, et al*., No. 2:11-cv-004680 (W.D. Pa.) (filed 4/4/11 and entry of judgment in favor of plaintiffs for $20,000 on 2/4/14); *Pierscionek, et al. v. Illinois High School Ass'n*, No. 2014-CH-19131 (Cook Cty. Cir. Ct., Il.) (filed 12/1/14 and dismissed 9/30/16). Former professional athletes have filed lawsuits against the teams for which they played. *See, e.g., Namoff, et al. v. D.C. Soccer LLC d/b/a D.C. United, et al*., No. 0067050-12 (D.C. Sup. Ct.) (filed 8/29/12 and (case closed as of 10/23/14). Finally, athletes have also filed individual and class action lawsuits against helmet manufacturers. *See, e.g., Enriquez, et al. v. Easton-Bell Sports, Inc., et al.*, No. 1:12-cv-20613 (S.D. Fla.) (filed 2/14/12 and order of dismissal entered 8/4/12).

III. Related Insurance Coverage Litigation

A. The NCAA Coverage Litigatio

1. Status of Litigation

In December 2012, the NCAA filed a declaratory judgment action styled as *NCAA v. TIG Ins. Co., et al.*, No. 49D13-1212-

PL-048782 (Marion Cty. Super. Ct., Ind.), in Indiana state court against all the insurers that had issued primary or excess liability policies to the NCAA since the mid-1960's (the "NCAA Coverage Action"). Six months before the NCAA Coverage Action was filed, TIG filed a declaratory judgment action in Kansas federal court against the NCAA and certain of the NCAA's primary insurers; however, TIG voluntarily dismissed the lawsuit in August 2013. *See TIG Ins. Co., et al. v. NCAA, et al.*, No. 2:12-cv-02361 (D. Kan.), Dkt. Nos. 1 and 48.

The parties in the NCAA Coverage Action engaged in extensive mediation and settlement negotiations. As a result, the NCAA advised the court that it had reached agreements in principle with several insurers and was in the final stages of negotiation. *See NCAA Coverage Action*, NCAA's Motion to Continue (filed 10/16/14), ¶ 5. Some of these settlements are dependent upon approval of the settlement in the NCAA MDL. *Id.* In mid-2014, the NCAA proposed to the insurers a case management plan that contemplated a phased approach with litigation of defense obligations and costs through December 2016 and litigation of indemnity issues to follow, if necessary. *See id.* at ¶ 7. According to the NCAA, once the settlements in the NCAA MDL and the NCAA Coverage Action are finalized, the parties to the settlements are prepared to dismiss the insurers who have settled the NCAA Coverage Action without further litigation. *See id.* at ¶ 8.

In addition to case law, issues to be considered in analyzing the number of occurrences include the temporal, geographic, and sport diversity of the named plaintiffs and the fact that the NCAA MDL plaintiffs arguably allege multiple causes as the basis for the NCAA's liability ...

At least one non-settling insurer filed a motion to dismiss the NCAA Coverage Action, but the court granted the NCAA's request to continue the hearing on that motion pending approval of the settlement in the NCAA MDL and the resolution of all pending settlements in the NCAA coverage action. *See NCAA Coverage Action*, Order on NCAA's Motion to Continue October 29, 2014 Hearing (entered 10/23/14). In mid-May 2015, the NCAA filed a motion to stay the coverage action indefinitely with respect to all the underlying class actions consolidated into the NCAA MDL. *See NCAA Coverage Action*, NCAA's Motion to Stay (filed 5/14/15). According to the NCAA, it has entered into a defense cost sharing agreement with the primary insurers to fund the NCAA's defense against the underlying class actions and, as a condition of this agreement, "the NCAA agreed to move to stay the [c]overage [l]itigation … with the understanding and agreement that if the Court grants [the stay], any party to the agreement may move to lift the stay at any time." *Id.* On June 2, 2015, the court granted the NCAA's motion to stay the coverage action. *See NCAA Coverage Action*, Order (entered 6/2/15). Pursuant to the Court's order, the NCAA Coverage Action is stayed indefinitely with respect to all of the underlying actions for medical monitoring which have been consolidated into the NCAA MDL. *Id.*

In September 2016 – in light of a settlement reached with one of its primary insurers – the NCAA dismissed its claims against that insurer. *See NCAA Coverage Action*, NCAA's Motion to Dismiss (filed 8/25/16) and Court's Order (entered 9/1/16). Thereafter, in November 2016, the NCAA substituted itself for that insurer so that the NCAA could handle the cross-claims that had been asserted against that insurer by other insurers. *See NCAA Coverage Action*, NCAA's Motion to Substitute (filed 11/21/16) and Court's Order (entered 11/23/16). The parties have agreed to extend deadlines for responsive pleadings to the NCAA's complaint and the insurers' cross-claims and counter-claims.

2. Coverage Issues and Other Considerations

There are many coverage issues in the NCAA Coverage Action. Some of these issues are as follows:

(a) Choice of law. Although the NCAA Coverage Action is pending in Indiana and the NCAA is headquartered in Indiana, other jurisdictions arguably have a connection to the coverage dispute, including Illinois (where the NCAA MDL is pending), the states in which each insurer is located, and the state in which the NCAA's broker is located.

(b) Whether there was an occurrence.

(c) Was there an occurrence? If so, how many? In addition to case law, issues to be considered in analyzing the number of occurrences include the temporal, geographic, and sport diversity of the named plaintiffs and the fact that the NCAA MDL plaintiffs arguably allege multiple causes as the basis for the NCAA's liability (e.g., the NCAA failed to address the coaching of tackling, checking or playing methodologies that cause head injuries; the NCAA failed to implement regulations which prohibit techniques likely to lead to concussions and head injuries; the NCAA failed to educate coaches, trainers and student athletes as to concussions symptoms; and the NCAA failed to implement system-wide "return-to-play" guidelines for athletes who have sustained concussions.

(d) Whether medical monitoring costs are damages on account of bodily injury. Many states have not recognized a cause of action for medical monitoring, other

states will recognize medical monitoring only when accompanied by a present physical injury, and courts across the nation are divided as to whether medical monitoring is covered by insurance. *Compare, e.g., HPF, LLC v. General Star Indem. Co.,* 788 N.E.2d 753, 758 (Ill.Ct.App. 2003) (Request for medical monitoring fund was not an allegation of bodily injury where complaint did not contain any allegations that the allegedly defective product caused injury. Therefore, no coverage afforded by policies at issue.) with *Baughman v. U.S. Liability Ins. Co.*, 662 F.Supp.2d. 386 (D.N.J. 2009) (Medical monitoring constituted "damages" in a case alleging that exposure to mercury at a daycare center constituted "bodily injury" which triggered an insurer's duties to defend and indemnify under a standard commercial general liability policy).

(e) Whether, for excess insurers, underlying limits have been properly exhausted.

(f) Whether applicable "other insurance" has been exhausted.

Many states have not recognized a cause of action for medical monitoring, other states will recognize medical monitoring only when accompanied by a present physical injury, and courts across the nation are divided as to whether medical monitoring is covered by insurance.

(g) Whether the NCAA satisfied all applicable retentions and deductibles.

(h) Appropriate allocation of aggregate limits.

(i) Trigger of coverage.

(j) Applicability of "professional liability" or "professional services" exclusions. Some class action lawsuits, as well as some individual lawsuits, contain allegations against the NCAA which arguably arise from acts of a professional nature or the failure to perform acts of a professional nature, including allegations against doctors and athletic trainers as well as the NCAA itself.

(k) Applicability of the "athletic participants" exclusion. Some policies issued to the NCAA contain an exclusion for injury sustained while participating in an athletic event sponsored by the NCAA.

(l) Whether certain exclusions will apply if there is a general finding of negligence on behalf of the NCAA. If so, who bears the burden to apportion between covered and non-covered claims?

(m) Subrogation and contribution issues. Depending on the particular language of a policy at issue, there may be a potential for subrogation or contribution actions against other insurers, and there also may be a potential for contribution based on the doctrine of equitable contribution.

Of course, some of the above issues are relevant to all of the NCAA's insurers. Others are relevant only to certain insurers based on, at least in part, whether the insurer issued primary or excess policies, the time period covered by each policy, and the particular language of each insurer's policy or policies.

B. The NFL Coverage Litigation

1. Status of Litigation

In August 2012, certain of the NFL's insurers filed declaratory judgment actions against the NFL styled as *Alterra Am. Ins. Co. v. NFL, et al*., 2016 N.Y.Slip.Op. No. 32221 (U) (N.Y. Sup. 2016) (the "*Alterra* action") and *Discover Prop. & Cas. Co., et al v. NFL,* No. 652933-2012 (N.Y. Sup.) (the *"Discover* action") in New York state court. In these actions, the NFL's insurers seek a declaration that they have no obligation to defend or indemnify the NFL for concussion-related injury claims ("the NFL Coverage Actions"). Two days later, the NFL filed a declaratory judgment action in California state court against thirty-three (33) of its insurers alleging that these insurers issued applicable primary, umbrella, and/or excess insurance policies to the NFL between 1968 and 2012. *See NFL, et al. v. Fireman's Fund Ins. Co., et al.,* No. BC490342 (Cal. Sup., L.A. Cty.). The insurers filed a motion to dismiss this case on the grounds that venue was improper. The California Court of Appeals affirmed the Superior Court's order staying the California state case pending the outcome of the NFL Coverage Actions in New York state court. *See id.,* Order entered 5/28/13.

While the settlement in the NFL MDL was being negotiated, the parties in the NHL Coverage Actions agreed to an informal stay of discovery. Once the NFL MDL court granted final approval of the NFL settlement, the insurers sought to resume discovery. In response, the NFL sought to prevent discovery going forward until after all appeals related to the NFL MDL settlement had been concluded.

On May 11, 2016 – shortly after the Third Circuit Court of Appeals approved the NFL MDL settlement – the NFL filed a motion requesting a stay of prosecution of all indemnity-related

claims, or in the alternative, a stay pending appeal and until there is a full and final resolution of the NFL MDL settlement. *See Alterra,* Dkt. Nos. 361 and 362. In support of its motion, the NFL argued that a stay was necessary to prevent prejudice to the NFL. More specifically, the NFL claimed that any determination of the insurers' duty to indemnify necessarily requires an inquiry into the same facts being litigated in the underlying NFL MDL litigation. If the claims regarding the insurers' duty to indemnify proceeded in advance of the underlying NFL MDL litigation, it would deprive the MDL court of its jurisdictional authority to manage and control discovery and result in a misallocation of resources. *Id.*

On May 23, 2016, the insurers filed an opposition to the NFL's motion and argued that the NFL had engaged in a "crystal clear" strategy to impede progress in the coverage actions. *See Alterra*, Dkt. No. 390. In support of their opposition, the insurers argued that parallel tort and coverage litigation is commonplace and serves the important function of allowing insureds and insurers to gather relevant information and obtain a determination of the coverage issues without unnecessary delay. The insurers also argued that the pursuit of discovery in the coverage action did not prejudice the NFL, especially in light of the parties'; agreed-upon confidentiality order. Further, any purported prejudice to the NFL is substantially outweighed by the prejudice to the insurers (many of whom are paying millions of dollars in defense cost on behalf of the NFL, but are being deprived of their due process right to develop their coverage defenses through discovery and, ultimately, have those defenses heard in court). *Id.*

Finally, the court concluded that the "insurers have waited long enough" to commence discovery, and accordingly, "[t]he time is now."

On October 28, 2016, the court denied the NFL's motion to stay indemnity-related discovery in the coverage actions. *See Alterra*, Dkt. No. 403. The court rejected the NFL's assertion and held that New York law did not require the court to stay discovery in the coverage actions until there is a final resolution of the NFL MDL action. The court also held that NFL will not be prejudiced by allowing the indemnity-related discovery to go forward. *Id*. Specifically, the court explained: "The NFL entities' concern – that absent a stay, they will be prejudiced in defending the MDL Action given that discovery in the indemnity-related claims would assist the MDL Action plaintiffs with respect to establishing the NFL entities' liability – is unfounded. Indeed, there is always unavoidable discovery tension between declaratory actions concerning coverage issues and the underlying actions for which coverage is sought. The fact that discovery in these consolidated actions could be sought to be used in the MDL Action is not, in and of itself, a basis for a stay." *Alterra,* 2016 N.Y.Slip.Op. No. 32221 (U) at 13. Finally, the court concluded that the "insurers have waited long enough" to commence discovery, and accordingly, "[t]he time is now." *Id.* at 14. Since then, the parties have filed responsive pleadings and are progressing with discovery. *See, e.g. Discover, supra.,* Dkt. Nos. 280, 281, 283, 387 and 388. Many of the insurers entered into a stipulation that "counterclaims and cross-claims for declaratory relief, contribution and indemnity among them [the insurers] will be deemed made, denied and stayed pending further request of the parties or the Court." *See Alterra,* Dkt. No. 407.

2. Coverage Issues and Other Considerations

There are many coverage issues in the NFL Coverage Actions, the majority which are similar to those at issue in the NCAA Coverage Action. Some additional coverage issues specific to the NFL Coverage Actions include:

(a) Applicability of the Employers' Liability Exclusion. Some policies may contain an exclusion that precludes coverage for bodily injury to an employee of an insured arising out of and in the course of the employee's employment by the insured.

(b) Applicability of the exclusion for workers' compensation and similar laws. Some policies expressly exclude coverage for any obligation of the insured arising out of workers' compensation, disability benefits, or unemployment compensation laws or any similar laws.

(c) Applicability of the Participant Liability Exclusion. Some policies may contain an exclusion which may apply to exclude coverage when a former or current player and/or his spouse sues another former or current player and/or his spouse for concussion-related injuries.

(d) Applicability of the Fellow Employee Exclusion or the Employees and Volunteers Exclusion.

(e) The NFL's obligation under any applicable workers' compensation laws and any collective bargaining agreements.

Like in the NCAA Coverage Action, some of the coverage issues in the NFL Coverage Actions are relevant to all of the NFL's insurers. Other coverage issues are relevant only to certain insurers based on, at least in part, whether the insurer issued primary or excess policies to the NFL, the applicable coverage period, and the particular language of each insurer's policy or policies.

In early 2017, the insurers filed Answers asserting multiple affirmative defenses. The affirmative defenses asserted by various insurers include lack of an "accident" or "occurrence" as those terms are defined in the policy(ies), lack of "bodily injury" during the insurer's policy period(s), no coverage for expected or intended injury, the insured's failure to cooperate as required by the insurer's policy, the insured's failure to provide proper notice, lack of exhaustion of underlying insurance, the insured's failure to mitigate damages, and voluntary payments. *See Discover, e.g.*, Dkt. Nos. 280, 281, 283, 387, and 388.

For example, a former Arena Football player sued Arena Football, its commercial general liability insurer ("CGL insurer"), and its professional liability insurer ("PL insurer") in federal court in Louisiana and argued that the policies issued by these insurers should cover his underlying claims for misrepresentation, negligence, fraud, and breach of contract.

C. The NHL Coverage Litigation

1. Status of Litigation

On April 25, 2014, TIG Insurance Company ("TIG"), one of the NHL's insurers, filed a declaratory judgment action against the NHL and eleven other insurers. *TIG Ins. Co. v. National Hockey League, et al.*, No. 651162/2014 (N.Y.Sup.Ct.)(the "NHL Coverage Action"). However, in mid-April 2015, the court stayed the NHL Coverage Action pursuant to TIG's unopposed motion because the parties executed a tolling agreement. *See id.*, Dkt. No. 24. As of February 2016, the tolling agreement is still in effect, and the case remains stayed.

2. Coverage Issues and Other Considerations

The coverage issues and other considerations in the NHL Coverage Action are likely to be similar to those in the NCAA and NHL Coverage Actions. The applicability of the expected or intended injury exclusion may also be at issue, given the violent nature of the sport of hockey.

D. Other Concussion-Related Injury Coverage Litigation

1. Status of Litigation

A few other coverage lawsuits related to concussion injuries have been filed throughout the country. For example, a former Arena Football player sued Arena Football, its commercial general liability insurer ("CGL insurer"), and its professional liability insurer ("PL insurer") in federal court in Louisiana and argued that the policies issued by these insurers should cover his underlying claims for misrepresentation, negligence, fraud, and breach of contract. *Breland v. Arena Football One, LLC, et al.*, 2016 WL 6821953 (E.D. La. 2016) (complaint filed 6/22/15). In November 2016, the court found that the PL insurer need not defend Arena Football against the player's bodily injury claims because "[t]he D&O policy [issued by the PL insurer] is simply not intended for that purpose." *Id.* (order entered 11/18/16). The court is still considering the claims against the CGL insurer, which argued that the exclusions in its policy for "employer's liability" and "workers' compensation and similar laws" apply to preclude coverage. *Id.* at *13. (motion filed 1/26/17).

2. Legal Theories, Defenses and Other Considerations

The coverage issues raised in *Breland*, as well as any other coverage actions pertaining to professional sports, are generally similar to those raised in the NCAA, NFL, and NHL Coverage Actions.

IV. Medicine Pertinent To Concussion-Related Litigation

Having explained the landscape of sports-related concussion litigation, we now consider the medicine regarding such injuries. This section first explains concussion and sub-concussive impacts and the long-term consequences some researchers believe result from the types of brain injuries sustained repeatedly while playing sports. Next, this section reports on the medical monitoring plan proposed for current and former NCAA athletes as an example of the relief sought in concussion-injury litigation.

A. Brain Injuries

There is a wide spectrum of traumatic brain injuries ("TBI"). A TBI may result from an impact to one's head or a penetrating head injury that disrupts the normal function of the brain. *See Basic Information about Traumatic Brain Injury and Concussion*, Centers for Disease Control and Prevention, available at http://www.cdc.gov/traumaticbraininjury/basics.html (last updated March 23, 2017). The Centers for Disease Control and Prevention ("CDC") describes a mild TBI as "a brief change in mental status or consciousness." *Id.* A severe TBI is marked by "an extended period of unconsciousness or amnesia after the injury." *Id.*

1. Concussions

Concussions are a form of mild TBI, but not all mild TBIs are concussions. A "mild" concussion is typically not life threatening, is limited in duration, and resolves on its own over time.

See Facts about Concussion and Brain Injury, CDC, available at http://www.cdc.gov/traumaticbraininjury/pdf/fact_sheet_concusstbi-a.pdf. The CDC reports that between 1.6 and 3.8 million sports-related concussions occur each year in the United States. Harmon, Kimberly G., et al., *American Medical Society for Sports Medicine position statement: concussion in sport*, 47 British J. Sports Med. 15 (2013) available at www.bjsm.bmj.com/content/47/1/15 (p. 3 of pdf). Some researchers contend that many athletes fail to report concussions, meaning the true incidence of concussions is likely higher than documented. *Id.* Some athletes have admitted to lying about experiencing a concussion to remain on the field of play or retain a starting position. *See, e.g.*, Katzowitz, Josh *"Troy Polamalu says he's suffered 'eight or nine' concussions, would lie to stay on field,"* CBS Sports (July 18, 2012), available at http://www.cbssports.com/nfl/eye-on-football/19608448/troy-polamalu-has-suffered-eight-or-nine-concussions-would-lie-to-stay-on-field.

Concussions have two phases of injury: (1) the moment of impact, and (2) the indirect result of trauma on processes of the brain.

Concussion is difficult to define because it has many causes and may result when there is no apparent injury to one's head. The American Academy of Neurology defines concussion as "a clinical syndrome of biomechanically induced alteration of brain function, typically affecting memory and orientation, which may involve loss of consciousness (LOC)." Giza, Christopher C. and Kutcher, Jeffrey S., et al., *Summary of Evidence-based Guideline Update: Evaluation and Management of Concussion in Sports*, 80 Neurology No. 242250 (June 11, 2013), *reaff'd* July 16, 2016, available at www.neurology.org/content/80/24/2250.full. Concussion can occur due to "a bump, blow, or jolt to the head" or blow to another part of the body "that causes the head and brain to move rapidly back and forth." *Id.* Inside one's skull, the brain floats in cerebral spinal fluid, which acts as a shock absorber for minor impacts. *See Concussion Facts*, Sports Concussion Institute, available at http://concussiontreatment.com/resources/ (last visited March 30, 2017). Concussions can occur when the brain moves rapidly inside the skull, impacting first one side of the inner skull and then the other when the brain decelerates. *Id.* Concussions may also occur due to rotational forces where "the head rapidly rotates from one side to another causing shearing and straining of brain tissues." *Id.* Researchers are coming to believe that violent rotation of the head is the more likely cause of concussions. Chipman, Ian, *"David Camarillo: There is Hope for Concussion Prevention,"* Stanford Engineering (May 11, 2016), available at https://engineering.stanford.edu/news/david-camarillo-there-hope-concussion-prevention.

Concussions have two phases of injury: (1) the moment of impact, and (2) the indirect result of trauma on processes of the brain. Dashnaw, M.D.Pharm.D., Matthew L., et al., "*An overview of the basic science of concussion and subconcussion: where we are and where we are going*," 33 Neurosurgical Focus (Issue 6) E5 (December 2012), available at thejns.org/doi/full/10.3171/2012.10.FOCUS12284.pdf. Concussion may be manifested by any one of the following: "…a loss of consciousness [not to exceed 30 minutes], a loss of memory for events immediately preceding or following the injury [that lasts less than 24 hours], an alteration in mental status (feeling dazed, confused, or disoriented) at the time of injury, or focal neurological signs that may or may not be transient." Wortzel, Hal S. et al., *Forensic Applications of Cerebral Single Photon Emission Computed Tomography in Mild Traumatic Brain Injury*, 36 J. Am. Acad. Psychiatry and the Law, Number 3, 310, 311 (September 2008). An athlete with concussion may experience many symptoms that are non-specific to a head injury, such as headache (the most commonly reported symptom of concussion) or nausea, vomiting, and dizziness. Harmon, *supra*. at p. 3. For eighty to ninety percent (80-90%) of athletes, the physical symptoms of concussion resolve within seven days of injury. *Id.*

There are several assessment protocols for determining if an athlete has experienced concussion. Some of the assessment tools include balance tests and questioning athletes to determine if they are oriented to place and time. *See Sport Concussion Assessment Tool – 3rd Edition (SCAT 3)*, B. J. Sports Med. (2013), available at http://bjsm.bmj.com/content.bjsports/47/5/259.full.pdf. A CT or MRI scan may be used to aid in the diagnosis of a head injury. *See Heads Up: Facts for Physicians About Mild Traumatic Brain Injury (MTBI)*, p. 11, Centers for Disease Control and Prevention, available at www.stacks.cdc.gov/view/cdc/12340/cdc_12340_DSI.pdf. Additionally, neuropsychological tests, which involve performance of specific cognitive skills, may indicate that an athlete has a concussion. *Id.* Such tests assess a range of abilities including memory, concentration, information processing, executive function, and reaction time. Physicians may use these neuropsychological tests to confirm self-reported symptoms and track recovery, including determining when an athlete should return to participation in sports. *Id.*

Short-term altered brain function underlies the clinical signs of concussion. When the brain strikes the interior of the inner skull, neural cells may be squeezed, stretched, and sometimes torn. *See Mild Brain Injury and Concussion*, Brain Injury Ass'n of America, available at http://www.biausa.org/mild-brain-injury.htm (last visited March 30, 2017). Neural cells function best when precisely balanced and spaced. *Id.* Stretching, squeezing, and tearing of neural cells can change that precise

balance, which may affect how the brain processes information. Further, the interior surface of the skull is a rough, uneven, hard surface that may damage brain tissue upon impact, which may also affect the brain's ability to process information. *Id*. During injury, the brain may rotate and the resulting "… friction can also stretch and strain the brain's threadlike nerve cells called axons." *Id.* Axons are the infrastructure attached to nerve cells in the brain that transmit nerve impulses from the cell body of the neuron to terminals at the end of the axon, which then transmit the nerve impulses to other nerve cells. *See* Definition: Axon, Medilexicon, available at www.medilexicon.com/dictionary/8994 (last visited March 30, 2017).

Consequently, an athlete's outward physical symptoms of concussion may resolve before normal brain function returns.

Concussion indicates "…a complex cascade of ionic, metabolic and pathophysiological events that is accompanied by microscopic axonal injury." Harmon, *supra*, at 3 (citations omitted). The ionic and metabolic imbalance that results from concussion requires energy to re-establish equilibrium within the brain, or homeostasis. But, "…the need for increased energy occurs in the presence of decreased cerebral blood flow and ongoing mitochondrial dysfunction." *Id.* Just when the brain urgently needs energy for healing, energy is in short supply. Consequently, an athlete's outward physical symptoms of concussion may resolve before normal brain function returns. If the athlete returns to play before normal brain function returns and sustains a second brain injury, the brain may experience even worse metabolic changes and the likelihood of experiencing significant cognitive defects increases. *Id*. The disruptions to brain function may be more severe in youth because the immature brain may be more susceptible to repeat concussions before complete recovery. *Id.* Repeated concussions in youth or adult brains could result in long term diminished brain function.

A number of risk factors may influence whether an athlete develops a concussion after a head impact. "A history of prior concussion, a greater number, severity or duration of symptoms after a concussion, female sex, genetic pre-disposition, a history of a learning disorder, ADD, migraines or mood disorder, and playing certain positions have all been suggested to affect the risk of sustaining a concussion or having a more protracted course." Harmon, *supra*, at 4.

2. Sub-Concussive Impacts

A sub-concussive hit is an impact to the head that is less forceful and does not result in concussion. Graham, Robert, et al, *Sports-Related Concussions in Youth, Improving the Science Changing the Culture*, The National Academies Press (2014) at pp. 203-04. But, to be classified as sub-concussive, hits must occur repeatedly. *Id.* For example, the impacts to a football player's head as he repeatedly blocks and tackles or the impacts to a hockey player's head due to contact with other players and the boards are sub-concussive impacts. *Id.* at 206. These types of hits occur multiple times throughout the normal course of participation in many contact sports and are considered to be "just part of the game." Unlike concussion, sub-concussive hits are not the same as "getting your bell rung." Over time, sub-concussive impacts may accumulate. "[An] athlete's risk of experiencing long-standing effects of repetitive blows is likely measured as a cumulative dose over a lifetime, and could include factors such as age at exposure, type and magnitude of exposure, recovery periods as well as differential rates of recovery, genotype, and others." Dashnow, *supra*, at 2. Some researchers believe that the cumulative effect of these smaller impacts may lead to the same type of damage in the brain that are linked to concussions.

TBI may cause disruption in the blood-brain barrier ("BBB"). Graham, *supra*, at 206. The BBB is a protective barrier between the bloodstream and the brain. When working properly, the BBB "holds in proteins and molecules that bathe the brain and protect it from foreign substances." *See Study Suggests New Way of Thinking about Brain Injury – As Autoimmune Disorder*, Univ. of Rochester Med. Ctr. (Mar. 6, 2013), available at https://www.urmc.rochester.edu/news/story/3767/study-suggests-new-way-of-thinking-about-brain-injury-as-autoimmune-disorder.aspx. TBI, however, causes disruption in the BBB that allows some proteins to leak into the bloodstream. *Id.* Rupture of the BBB means that brain proteins "released from damaged brain cells enter the bloodstream where they may trigger an immune response." Zhang, Zhiqun and Zoltewicz, J. Susie, et al., *Human Traumatic Brain Injury Induces Autoantibody Response against Glial Fibrillary Acidic Protein and Its Breakdown Products*, 9 PLoS ONE, 1, 2 (2014) available at www.journals.plos.org/plosone/article?id=10.1371/journal/pone.0092698. When a sub-concussive impact occurs, damaged cells in the brain may secrete a protein labeled S100B, which may cross the BBB and enter one's bloodstream. *Id.* When S100B crosses the BBB, the body has an autoimmune response and produces the S100B antibody. The human body's autoimmune system is one of its best defenses against disease; however, it can also cause the body to attack itself. The presence of S100B antibodies may be harmful because these antibodies may cross back into the brain through the damaged BBB and attack the healthy cells that produce S100B throughout the body, including in the brain. *See Study Suggests New Way of Thinking about Brain Injury – As Autoimmune Disorder, supra*.

The S100B protein has many beneficial uses in the body, including cell growth, cell structure, energy metabolism, calcium stability, and nerve signal transmission. Nishiyama, Hiroshi and Knopfel, Thomas, et al., *Glial protein S100B modulates long-term neuronal synaptic plasticity*, 99 Proceedings of the Nat'l Academy of Sciences in the United State of America, No. 6, 4037 (March 19, 2002), available at http://www.pnas.org/content/99/6/4037.full.pdf. When auto immune antibodies attack this protein, it is impeded from performing its functions. As such, brain cell structure may break down more easily. *See Study Suggests New Way of Thinking about Brain Injury – As Autoimmune Disorder, supra.*

Only recently have the routine hits experienced in contact sports become a source of concern. The studies that exist involve small samples of athletes, and therefore, the results are not conclusive and cannot be applied to broader populations of athletes.

One study followed a group of college football players who sustained repeated head injuries that did not result in concussion. Graham, *supra*, at 206. Over the course of a season, the group showed elevated S100B and S100B antibodies. The study authors noted that sources of S100B exist in the human body outside of the central nervous system, but the authors also stated that the data suggests a link between S100B and S100B antibodies in the bloodstream of these football players and sub-concussive impacts. *Id.* Based on this study and other studies involving football and hockey players, some researchers assert that repeated sub-concussive hits may cause some cognitive impairment and long-term changes to the brain. *Id.* at 207-08. However, there are few studies on the effects of sub-concussive impacts. Only recently have the routine hits experienced in contact sports become a source of concern. The studies that exist involve small samples of athletes, and therefore, the results are not conclusive and cannot be applied to broader populations of athletes.

B. Disease Associated with Concussion and Sub-Concussive Impacts

After even one concussion or a number of sub-concussive impacts, an athlete may develop post-concussion syndrome ("PCS"). It is unclear why some athletes develop PCS after only one concussion or after a mild concussion, while other athletes who have suffered a greater number or more severe concussions do not develop PCS. Further, consensus does not yet exist regarding the diseases that may develop from multiple concussions and long-term sub-concussive impacts. Some medical experts have linked the occurrence of multiple concussions to neurodegenerative conditions such as Chronic Traumatic Encephalopathy ("CTE"), mild cognitive impairment, and depression. *See "What is CTE?"* Boston Univ., CTE Center, available at http://www.bu.edu/cte/about/what-is-cte/ (last visited March 30, 2017). Each of these conditions has been alleged to exist in some athletes that purportedly suffered several concussions while playing sports. Because plaintiffs in concussion litigation seek medical monitoring for signs of PCS and CTE, both of these conditions are discussed more fully below.

1. Post-Concussion Syndrome

Post-concussion syndrome ("PCS") is the term used when, after a head injury, one experiences at least three of the main symptoms of concussion, such as headache, dizziness, fatigue, loss of concentration and memory, insomnia, and irritability. *See* "*Post-concussion syndrome,"* Mayo Clinic (Aug. 19, 2014), available at http://www.mayoclinic.org/diseases-conditions/post-concussion-syndrome/basics/symptoms/con-20032705. PCS may occur within days or weeks of the concussive hit, but typically PCS resolves within three months. *Id.*; Bowman, Joe, *"Post-Concussion Syndrome,"* Healthline (Jan. 27, 2014), available at http://www.healthline.com/health/post-concussion-syndrome#Overview1. Not all who experience concussion will develop PCS. No single method, analysis, or test exists to diagnose PCS. Additionally, due to the variety of symptoms one may experience due to PCS, no single treatment exists. Instead, a physician typically treats the symptoms specific to a patient believed to have PCS. Depending on the patient's symptoms, treatment may include psychotherapy counseling, cognitive therapy, and prescription medication for depression, anxiety, and/or headaches. *Id.*

Some experts attribute PCS symptoms to structural damage to the brain. Other experts believe PCS symptoms are attributable to psychological conditions, such as depression, anxiety, and post-traumatic stress disorder, because the symptoms of these conditions mirror the symptoms of PCS. *See* "*Post-concussion syndrome,"supra.*

2. Chronic Traumatic Encephalopathy

Chronic Traumatic Encephalopathy ("CTE"), perhaps, has garnered the most recent media attention as researchers have found CTE in the brains of deceased NFL and NHL players. *See* Linshi, Jack, *"Study: 96% of Deceased NFL Players' Brains Had Degenerative Disease,"* Time (Sept. 30, 2014), available at http://time.com/3450674/nfl-brain-disease/; *"Brain Disease CTE Hits Athletes Differently, Brain and Behaviour Study Suggests*," The Hockey News (Aug. 21, 2013), available at http://www.thehockeynews.com/articles/53089-Brain-disease-CTE-hits-athletes-differently-brain-and-behaviour-study-suggests. While there is some treatment for the symptoms

associated with CTE, there is no known treatment or "cure" for CTE which often results in death. *See "I Think I Have CTE. What Do I Do?"* available at www.concussionfoundation.org/learning-center/I-think-I-have-CTE.

Generally, encephalopathy describes "any diffuse disease of the brain that alters brain function or structure." *See Encephalopathy Information Page*, Nat'l Inst. of Neurological Disorders and Stroke, available at https://www.ninds.nih.gov/disorders/All-Disorders/encephalopathy-information-page/ (last visited March 30, 2017). Encephalopathy may result from a number of causes, including bacteria, brain tumor, prolonged exposure to toxic elements, multiple incidences of trauma, poor nutrition, and other causes. *Id.* Repeated trauma to the brain may cause progressive degeneration of brain tissue. *See "What is CTE?", supra.* Multiple concussions may cause an abnormal build-up of tau, a protein in the brain. *Id.* The normal function of tau protein is to stabilize microtubules, which are cylindrical hollow parts of a cell that play a role in the cell's shape and serve as conduits between brain cells. *See* Definition: Tau Protein, Medilexicon, available at http://www.medilexicon.com/dictionary/73051 (last visited March 30, 2017); Leavy, Jane, *"The Woman Who Would Save Football,"* Grantland (Aug. 17, 2012), available at http://grantland.com/features/neuropathologist-dr-ann-mckee-accused-killing-football-be-sport-only-hope/. Excess tau builds up in the area of the brain where injury has repeatedly occurred and spreads to other cells in a web like fashion. Once the spread of the web invades enough areas of the brain, certain areas of the brain atrophy. As the disease advances, it attacks the hippocampus, the part of the brain instrumental for memory and learning, as well as the amygdala, which regulates aggressiveness and rage. Leavy, *supra.*

Chronic Traumatic Encephalopathy, perhaps, has garnered the most recent media attention as researchers have found CTE in the brains of deceased NFL and NHL players.

Researchers have created a "clinical picture" of CTE by various retrospective study methods. Baugh, Christine M., Stamm, Julie M., et al., *Chronic traumatic encephalopathy: neurodegeneration following repetitive concussive and subconcussive brain trauma*, Boston Univ. (May 3, 2012), available at http://www.bu.edu/cte/files/2012/08/Baugh_Chronic-Traumatic-Encephalopathy_2012.pdf. While the only conclusive method for confirming CTE is by studying the brain after death, scientists have begun developing tests for measuring CTE in living brains. *Id.*; *see also* Small, M.D., Gary W. et al., *PET Scanning of Brain Tau in Retired National Football League Players: Preliminary Findings*, 21 American J. Geriatric Psychiatry (Issue 2), 138 (Feb. 2013), available at www.espn.com/pdf/2013/0122/espn-otl-CTELiving.pdf. (Researchers at UCLA diagnosed eight former, living players as having signs of CTE, including Hall of Famers Tony Dorsett and Joe DeLamielleure, marking the first time that signs of the debilitating disease had been discovered in those still alive. Weinbaum, William and Delsohn, Steve, *"Dorsett, Others Show Signs of CTE,"* ESPN (April 7, 2017) available at www.espn.com/espn/otl/story/-/id/9931754/former-nfl-stars-tiny-dorsett-leonard-marshall-joe-delamiel-leure-show-indicators-cte-resulting-football-concussions.) Injections of a radioactive ligand ("FDDNP") that crosses the BBB and binds to tau deposits have been shown to measure distributions of tau in a manner that can distinguish CTE from Alzheimer's disease and other neurodegenerative diseases. *See* Small, *supra*; Safinia, Cyrus, et al., *Chronic Traumatic Encephalopathy in Athletes Involved with High-impact Sports*, 9 J.Vasc.Interv.Neurol. (Issue 2) 34 (Oct. 2016) available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5094259/. Indeed, the challenge in diagnosing CTE is that its core clinical symptom areas (cognition, mood, behavior, and motor) overlap with the symptoms of Alzheimer's disease, dementia, and other chronic post-concussive syndromes. *Id.*

Researchers believe that the signs of CTE may manifest years after the last trauma-producing injury occurs and classify the effects of CTE as altering one's cognition, mood, and behavior. *Id.* Cognitive and behavioral symptoms reported in athletes believed to have CTE are closely associated with the areas of the brain determined to be affected by CTE. *See* Baugh, *supra.* The symptoms in each of the symptom categories (cognition, mood, behavior, and motor) progress in severity, and neurodegeneration increases over time. The earliest stages of CTE may not result in any discernible symptoms. Later, as CTE progresses, some may experience learning and memory impairment, depression, apathy, irritability, suicidality, poor impulse control, aggression, and increased violence. *Id.* Some research indicates that disinhibition may also occur, resulting in a greater likelihood of substance abuse. As CTE progresses, symptoms worsen. Dementia is almost always evident in cases of athletes over sixty-five years of age with advanced CTE symptoms. *Id.*

Researchers, some of whom are serving as experts for plaintiffs in concussion litigation, report that once CTE destroys a certain amount of brain tissue, it is nearly impossible to differentiate whether the cause of dementia is attributable to CTE or some other common cause such as Alzheimer's disease. *Id.* But, according to these researchers, "the early presentation and course of CTE can distinguish it from most other causes of dementia." *Id.* They believe certain characteristics of CTE distinguish it from other causes for dementia, including the onset of symptoms between ages thirty and fifty; slow, prolonged course of progression; no familial risk; and history of repeated head trauma. Even so, the researchers acknowledge that these factors do not definitively indicate CTE over other

causes for dementia. *Id.* Moreover, they acknowledge that the onset and symptoms of PCS, an acute response to mild brain injury, may closely overlap the symptoms of CTE. As a result, differentiating between PCS and CTE remains difficult.

> The earliest stages of CTE may not result in any discernible symptoms. Later, as CTE progresses, some may experience learning and memory impairment, depression, apathy, irritability, suicidality, poor impulse control, aggression, and increased violence.

Finally, researchers admit that not all athletes with a history of concussions will show clinical signs of CTE. While at death an athlete's brain may have increased levels of tau proteins, he/she will remain symptom-free, which may be due to his/her brain's ability to rewire itself or overcome the disease in other ways. Schwarz, Alan, "*The Next Step for Researchers Is Not Finding Brain Trauma",* N.Y. Times (May 7, 2011), available at www.nytimes.com/2011/05/08/sports/football//08duerson.html?_r=0. Like so many things in life, genetics may play a role in determining why some individuals with a history of repetitive brain trauma develop CTE, but others do not. *See Chronic Traumatic Encephalopathy*, Harvard Med. School, Psychiatry, Neuroimaging Laboratory, available at http://pnl.bwh.harvard.edu/education/what-is/chronic-traumatic-encephalopathy/. Studies are currently underway to determine whether carrying a certain allele of the apolipoprotein E (ApoE4) gene, carried on chromosome 19, is a risk-factor for CTE. *Id.* Forty percent (40%) of those with Alzheimer's disease have the double ApoE4 allele, suggesting there may also be a link to CTE. *Id.*

C. Medical Monitoring Proposal in NCAA Litigation

In the NCAA litigation, Dr. Robert C. Cantu states the premise for a medical monitoring program for current and former NCAA contact sport athletes and outlines the parameters of such a program. *See Arrington, et al., v. NCAA.*, supra, Dkt. No. 180, Report of Dr. Robert C. Cantu (filed 7/19/13) (After Dr. Cantu's expert report was filed, the NCAA settlement expanded to include non-contact sport athletes). This section summarizes Dr. Cantu's highly detailed plan below as exemplary of medical monitoring programs sought in similar concussion litigation discussed above.

1. The Premise for a Medical Monitoring Program

Based on his research and examination of various NCAA athletes, Dr. Cantu opines that NCAA athletes in contact sports have suffered unrecognized concussive and sub-concussive impacts. Consequently, these athletes can suffer permanent decreases in brain function, including "memory loss, early Alzheimer's-like disease called CTE, movement disorders such as parkinsonism, and emotional disturbances." *Id.* at ¶ 304. Dr. Cantu expresses concern regarding not only primary head injury impacts, but also second impact syndrome, which is a complication of concussions. He describes second impact syndrome as when an athlete suffers a concussion and "sustains subsequent concussive injury, resulting in diffuse brain swelling and severe, permanent neurological dysfunction or death." *Id.*

Dr. Cantu states that timely diagnosis of concussion and prompt treatment can help prevent more serious concussion complications. *Id.* Because former and current NCAA players have sustained unrecognized concussions and potentially second impact syndrome, the athletes who have played contact sports should be monitored to determine whether they have symptoms of PCS or "other cognitive impairments or mental disturbances." *Id.* at ¶ 305. Once these athletes and their healthcare providers have more information about their conditions and symptoms, the athletes can seek appropriate treatment, ranging from physical and cognitive therapy to prescription medication.

2. The Basic Components of a Medical Monitoring Program

According to Dr. Cantu, a complete neurological assessment will yield the type of information an NCAA contact sport athlete needs to determine if he/she suffers from disorders associated with concussive or sub-concussive impacts. This assessment will occur at the outset of the program and be repeated every five years, or when an athlete is symptomatic. Monitoring physicians will conduct "focused neurocognitive, visual, and balance assessments." *Id.* at ¶ 306. Another key to identifying any long-term effects of brain injury will be the athlete's prior concussion history and conditions that affect recovery. Physicians in the monitoring program will also obtain a symptom checklist from each athlete. All athletes being monitored will take a neurocognitive test, which includes computer-based tests and paper and pencil tests to assess cognitive skills, mood, and behavior. *Id.*

V. Medical Monitoring Claims And Class Certification Obstacles

Certification of a medical monitoring class is a component of each of the class actions discussed above; however, there are differences in the scope of monitoring or the definition of the athletes included in a proposed medical monitoring class. This section provides a general explanation of medical monitoring claims and the differing views concerning whether such claims are actionable as individual torts. This section also briefly re-

minds readers of general class certification principles and analyzes some of the issues that may prevent class certification of medical monitoring classes in concussion-related litigation.

A. Medical Monitoring Claims

Traditionally, medical monitoring claims seek a monitoring program of tests and services to each class member. *See, e.g. In re Fosamax Prods. Liab. Litig.*, 248 F.R.D 389, 395 (S.D.N.Y. 2008). "The purpose of medical monitoring compensation is to enable the plaintiff to obtain information about his or her future disease as early as possible. That information, in turn, enables the plaintiff to seek early treatment, so that the injuries will be minimized." 25 Am.Jur.3d *Proof of Facts* 313 § 8. But, if disease is diagnosed, treatment is beyond the medical monitoring class. *Id.* at § 11.

When no physical injury is present, courts have wrestled with the issue of whether medical monitoring claims are actionable as independent torts, are merely a component of damages, or are not recognized under the law at all.

In the concussion-related litigation, the proposed medical monitoring classes include those athletes who do not have a present physical injury. When no physical injury is present, courts have wrestled with the issue of whether medical monitoring claims are actionable as independent torts, are merely a component of damages, or are not recognized under the law at all. *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011). "Only a handful of states have allowed plaintiffs to recover the costs of medical monitoring without other physical injury." *Id.* at 262 n.10 (citations omitted). The United States Supreme Court rejected a medical monitoring claim under the Federal Employers' Liability Act for a railroad worker who alleged infliction of emotional distress due to asbestos exposure, but did not exhibit physical symptoms or disease. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 439-41 (1997). The court held that the plaintiff employee could not demonstrate any "physical impact" from asbestos exposure as required for an infliction of emotional distress claim, and therefore, he could not recover damages for extra medical tests required to detect cancer attributable to any asbestos exposure. In its analysis, the court noted that little consensus existed among federal courts applying state law or among state courts regarding whether medical monitoring alone was actionable absent present injury. *Id.* There is still no widespread agreement in this respect or other aspects of "medical monitoring law."

For example, some states, such as Michigan, require a present physical injury to person or property to establish a negligence claim. *See e. g. Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 690 (Mich. 2005). Generally, states requiring present physical injury do not recognize medical monitoring as a separate cause of action when physical injury is absent. *Id.* On the other hand, some states dispense with the requirement for present injury and recognize medical monitoring as a separate tort. *See e.g., Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431-433 (W. Va. 1999) (Court concluded that a cause of action exists under West Virginia law for recovery of medical monitoring costs for a plaintiff who does not allege a present physical injury). In many of the jurisdictions that accept medical monitoring as a separate cause of action, the courts have expressed belief that economic harm may occur to those exposed to toxic substances, despite the fact that the physical harm from such exposure may not manifest for a considerable amount of time. *Id.* at 429-30. Compensation for such future harm -- the expense of medical monitoring -- is compensable as future damages. *Id*.

Generally, courts in states recognizing medical monitoring without a present injury as an independent cause of action require a plaintiff to prove the following elements in order to sustain a medical monitoring claim:

(1) exposure greater than normal background levels;

(2) to a proven hazardous substance;

(3) caused by the defendant's negligence;

(4) as a proximate result of the exposure, plaintiffhas a significantly increased risk of contracting a serious latent disease relative to the general population;

(5) a monitoring procedure exists that makes the early detection of the disease possible;

(6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and

(7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.

Id.; see also Redland Soccer Club, Inc. v. Dep't of the Army, 696 A.2d 137, 145-46 (Pa. 1997. But, the elements of a medical monitoring claim are not always uniformly stated or applied in jurisdictions recognizing the claim. *See* Manual for Complex Litig. (4th) § 22.74 (2004). For example, courts have articulated different standards for the magnitude of increase in risk a plaintiff must show to trigger medical monitoring relief. *Compare, e.g., In re Paoli R. Yard PCB Litig.* 916 F.2d 829, 851 (3rd Cir. 1990) (stating the standard for recovery on a medical

monitoring claim is whether the medical monitoring is, to a reasonable degree of medical certainty, necessary to diagnose properly the warning signs of disease) and *Ayers v. Jackson*, 525 A.2d 287, 312 (N.J. 1987) (articulating that plaintiffs seeking medical monitoring for cancer may only need to demonstrate a "slightly higher [chance] than the national average").

B. Class Certification Principles

Plaintiffs in concussion-related litigation must demonstrate that the class is ascertainable and satisfy all of the requisite elements of class certification under Federal Rule of Civil Procedure 23. For a class to be certified, it must be determined that it exists and is identifiable as a class. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). Rule 23, F.R.Civ.P., also requires a plaintiff to establish numerosity, commonality, typicality, and adequacy of representation and demonstrate that the class fits within one of the applicable categories of Rule 23(b) – either an injunctive class (F.R.Civ.P. 23 (b)(2)) or a damages class (F.R.Civ.P. 23 (b)(3)). "The remedy of medical monitoring has divided courts on whether plaintiffs should proceed under Rule 23(b)(2) or Rule 23(b)(3)." *Gates*, *supra.*, 655 F.3d at 262-63. Medical monitoring classes have been proposed as injunctive or damages classes and have been rejected under both of these categories. *See* Scheuerman, Sheila B., *Article: The NFL Concussion Litigation: A Critical Assessment of Class Certification*, 8 FIU L. Rev. 81, 102-04 (Fall 2012).

"The remedy of medical monitoring has divided courts on whether plaintiffs should proceed under Rule 23(b)(2) or Rule 23(b)(3)." Gates, supra., 655 F.3d at 262-63. Medical monitoring classes have been proposed as injunctive or damages classes and have been rejected under both of these categories.

In 2011, the United States Supreme Court closely examined the commonality element required for class certification. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011). The plaintiffs in *Wal-Mart* alleged that the discretion exercised by local supervisors concerning compensation and advancement decisions was discriminatory as to current and former female employees. *Id.* at 342, S.Ct. at 2546. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id.* at 349-50, S.Ct. at 2551. Class members' claims must "depend upon a common contention, … [which] must be of such a nature that it is capable of classwide resolution…." *Id.* at 350, S.Ct. at 2551. The court explained that if, for example, the class alleged discrimination by the same supervisor, then the resolution of that question resolves an issue central to the validity of class members' claims, and therefore the commonality element is satisfied. *Id.* The *Wal-mart* court held that the plaintiffs' allegations did not satisfy the commonality element of Rule 23, F.R.Civ.P., because the claims were based upon "literally millions of employment decisions." "Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.* at 352, S.Ct. at 2552 (emphasis in original).

Certification of Rule 23(b)(2) classes for injunctive relief requires a plaintiff to demonstrate that final injunctive relief is appropriate for the whole class. In other words, where a single injunction or declaratory relief will provide relief to each and every class member, certification under this subcategory is appropriate. *Id.* at 360, S.Ct. at 2557. An indivisible injunction under Rule 23(b)(2) benefits all members of a class at once. *Id.* at 362, S.Ct. at 2559. A plaintiff seeking certification of a class under this sub-category must demonstrate that the class claims are cohesive, which focuses on a lack of individual issues. *Gates,* 655 F.3d at 264 n.12 ("It is well established that a Rule 23(b)(2) class should actually have more cohesiveness than a Rule 23(b)(3) class."); *see also Govatt v. St. Jude Med. Inc. (In re St. Jude Med., Inc.),* 425 F.3d 1116, 1121 (8th Cir. 2005) ("Because 'unnamed members are bound by the action without the opportunity to opt out' of a Rule 23(b)(2) class, even greater cohesiveness generally is required than in a Rule 23(b)(3) class"). A plaintiff must prove that the class' injuries must be "'group, as opposed to individual injuries.'" *In re St. Jude Medical,* 425 F.3d at 1122. Additionally, certification under Rule 23(b)(2) is inappropriate where certification prevents a defendant from asserting plaintiff-specific defenses to the putative class members' individual claims. *Wal-Mart*, 564 U.S. at 367, 131 S. Ct. at 2561.

To achieve class certification under Rule 23(b)(3), F.R.Civ.P., a plaintiff must convince the court that common questions of law or fact predominate over individual issues and that the class action device is a superior method to fairly and efficiently adjudicate the controversy. These requirements are straightforward in theory. Under the predominance analysis, factual or legal differences may present individual issues. "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (citations omitted). For example, if individual issues concerning causation or application of differing state's laws predominate over common questions of law and fact, a class should not be certified.

C. Obstacles to Class Certification of Medical Monitoring Claims

1. Commonality

Of the basic elements of Rule 23, F.R.Civ.P., commonality is likely the most problematic element for plaintiffs to establish. The plaintiffs allege a range of misconduct by the sports organization pertinent to each case -- the organization ignored or concealed information from athletes about the dangers of sustaining multiple concussions or sub-concussive impacts; encouraged players to continue participating in the various sports immediately after head injury occurred; issued concussion protocols that were not followed; and other malfeasance. Read in a vacuum, these allegations appear to satisfy the commonality requirement.

Like *Wal-mart v. Dukes*, it would seem that the defendant sports organizations have a colorable argument that the potentially millions of decisions made over the years – by the athletes themselves and personnel employed by a team or school – concerning how an athlete who sustained a head injury was treated during and after the contest is too varied to satisfy the commonality element.

If the allegations were proven to be true, the answers would likely resolve an issue central to the class members' claims – namely causation. *See In re NFL Players Concussion Injury Litig.*, 821 F.3d at 427 ("Even if players' particular injuries are unique, their negligence and fraud claims still depend on the same common questions regarding the NFL's conduct. For example, when did the NFL know about the risks of concussion? What did it do to protect players? Did the League conceal the risks of head injuries? These questions are common to the class and capable of classwide resolution."). However, the plaintiffs' allegations ignore the realities of athletes' knowledge of the effects of head injuries independent of representations made by or concealment of information by the sports organizations regarding head injuries. The allegations in the various complaints ignore the individual athletes' decisions to continue playing despite knowing they had suffered some level of head injury including, in some instances, an understanding that they had suffered a concussion. The allegations ignore the decisions concerning an impact to an athlete's head made by numerous individuals employed by professional sports teams or NCAA member schools over the years during which an athlete participated in a particular sport.

Applying the *Walmart v. Dukes* standard of commonality, plaintiffs in these cases may not be able to establish a common practice by each of the relevant sports organizations. Like *Wal-mart v. Dukes,* it would seem that the defendant sports organizations have a colorable argument that the potentially millions of decisions made over the years – by the athletes themselves and personnel employed by a team or school – concerning how an athlete who sustained a head injury was treated during and after the contest is too varied to satisfy the commonality element. This is particularly true of the NCAA concussion litigation and any other concussion litigation that might involve hundreds or thousands of independent organizations, such as high schools or Pop Warner leagues (Pop Warner leagues have been named as defendants in class action concussion litigation, with respective subclasses seeking damages and medical monitoring. *Archie v. Pop Warner Little Scholars, Inc.,* No. 2:16-cv-6603 (C.D. Cal.)). Unlike the NFL litigation, which concerned approximately 20,000 former NFL players, the NCAA litigation counted nearly 4.4 *million* athletes who had participated in forty-three different men's and women's sports among more than a thousand NCAA member institutions. *In re NCAA Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 593 (N.D. Ill. 2016). While the NFL litigation was governed by a centralized concussion policy, evidence from the (now-settled) NCAA litigation showed that concussion policies could vary, not simply from school-to-school, but, from team-to-team within a school. As coaches came and went, the concussion policy could even vary within a particular team of that school. *Id.* at 594-95. "Individual issues" of causation and injury were, therefore, likely to "overshadow any common ones." *Id.* at 595.

2. Rule 23(b)(3): Individual Questions of Law and Fact Overwhelm Common Issues

For the concussion-related class actions seeking certification under Rule 23(b)(3), plaintiffs face many difficulties in establishing predominance of common questions of law and fact. First, putative class member athletes, who are situated in jurisdictions throughout the United States, could face a number of challenges concerning the application of the laws of different states. As discussed above, there are significant differences concerning whether a state recognizes a claim for medical monitoring. *In re: NCAA Student-Athlete Concussion Injury Litig.*, 2016 WL 3854603, *6 (N.D. Ill. 2016) ("Considering that many states disallow medical monitoring as a form of relief in the absence of present physical injury, the ability of the Settling Plaintiffs to negotiate the creation of the Medical Monitoring Program for all class members nationwide is a substantial achievement."). Even in those states that recognize medical monitoring as an independent claim, differences exist regarding the elements of the claim and the standards by which the claim is established. *In re: NCAA Student-Athlete Concussion Injury Litig.,* 314 F.R.D. at 604. Further, the availability and

applicability of affirmative defenses such as statutes of limitations and comparative negligence principles vary among jurisdictions. *Id.* Taken together, "it is far from certain that every student-athlete within the settlement class could obtain relief in the form of medical monitoring even after years of litigation…." *Id.*

While it was pending, the NFL MDL attempted to circumvent this "applicable law" problem by alleging a medical monitoring claim only under New York law. In *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), the United States Supreme Court found that every state has an interest in having its laws applied to the claims of residents of each state. With plaintiffs in concussion class actions alleging claims by residents of all fifty states, it is likely that the laws of all fifty states must be applied to the proposed class actions. Because of the differences among those laws pertaining to medical monitoring, a national class action may not be viable in any of the concussion-related class actions.

Additionally, individual issues such as health history, exposure during the relevant period, frequency of exposure during the relevant period, causation, and the proposed monitoring plan overwhelm any common issues

Additionally, individual issues such as health history, exposure during the relevant period, frequency of exposure during the relevant period, causation, and the proposed monitoring plan overwhelm any common issues. Most athletes, who have reached a level of proficiency sufficient to play college or professional sports, began participating in sports at a young age. Each professional athlete will need to prove that his condition was caused by head injuries sustained while playing professional sports rather than during college, high school, or in youth sports. *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 439 ("[S]pecific causation would be even more troublesome because a player would need to distinguish the effect of hits he took during his NFL career from the effect of those he received in high school football, college football, or other contact sports."). Likewise, college athletes will be required to demonstrate that causation is related only to head injuries while playing at the college level.

Further, medical inquiries, particularly regarding brain injury, which as stated above is still a somewhat mysterious area of health care, are highly complex and individualized. *Id.* (Even though "[a] consensus is emerging that repetitive mild brain injury is associated with the Qualifying Diagnoses," the "available research is not nearly robust enough to discount the risks" of having to prove general causation in litigation.). Some people are genetically pre-disposed to experience concussions more easily or suffer the effects more severely. Additionally, as mentioned above, concussion alone is not necessarily enough to cause CTE. Development of CTE may also be affected by age, gender, race, genetic predisposition, and the position played in a sport. This fact also brings into question whether putative class members would rather have one-size-fits-all monitoring programs or consultation with their own physicians about the risks and benefits of diagnostic tests in the context of their own health histories. As such, it is possible that the proposed monitoring plans raise individual issues that predominate over common issues. Finally, because players under-report symptoms of concussion or lie about whether they sustained a head injury, the defenses of comparative negligence and assumption of the risk are likely to pose significant individual issues as well. And it is worth noting that many players have done much more than merely "assumed the risk" of personal injury; they strive for a place on the team, whether be it for personal glory or financial gain, or both. *See "Hugo Lloris Admits He Was Wrong to Play Through a Concussion Last Season*," Skysports (Aug. 24, 2014) (Lloris conceded that a player's competitive spirt may lead him/her to make decisions that are detrimental to his/her long-term health), available at http://www.skysports.com/football/news/11661/9438056/lloris-admits-he-was-wrong-to-play-through-a-concussion-last-season. Thus, for example, it will take individual inquiries to determine whether any one player would have foregone his career had the NFL or other sports organization provided more or different warnings about the risks of concussion.

3. Rule 23(b)(2): Individual Issues Prevent Cohesiveness

Many of the same individual issues discussed above that prevent certification under Rule 23(b)(3), F.R.Civ.P., also would prohibit certification under Rule 23(b)(2), F.R.Civ.P. A number of federal circuit courts have denied class certification of medical monitoring claims under this sub-category because cohesiveness of the class claims is missing. *See* Scheuerman, *supra*, 8 FIU L. Rev. 81, 104 (2013) (citing *Gates*, 655 F.3d at 264 (holding "medical monitoring classes may founder for lack of cohesion because causation and medical necessity often require individual proof"); *In re St. Jude Medical, Inc.*, 425 F.3d at 1122 (stating "each plaintiff's need (or lack of need) for medical monitoring is highly individualized" and depends on the individual's medical history, general health, personal choice, and other factors)).

Demonstrating cohesion in a national medical monitoring class action based on the risk of concussions and sub-concussive impacts will be difficult. The lack of consensus as to the causes of CTE (discussed more fully above) prevent cohesion. Individual issues related to pre-existing concussion history and damage that defeat Rule 23(b)(3) certification also prevent

Rule 23(b)(2) certification. Further, according to *Walmart v. Dukes*, the various defendant sports organizations must be allowed to present plaintiff-specific defenses. As the United States Supreme Court explained, a class under Rule 23(b)(2) must have an indivisible injury. *Wal-Mart*, *supra.* It is difficult to see how plaintiffs in the concussion-related class actions could establish indivisible injury when CTE symptoms are similar to symptoms of other neurological conditions and diseases, there are no diagnostic tools to diagnose CTE in a living person, and no treatment options exist to reverse the CTE-related effects in one's brain. As such, a single monitoring plan does not appear to provide relief to every class member as required by Rule 23(b)(2), F.R.Civ.P.. Indeed, courts remain "skeptical that the necessity for individuals' medical monitoring regimes can be proven on a class basis." *Gates,* 655 F.3d at 268.

Viewed through the lens of litigation, these factual differences appear to be significant to the analysis of whether a court should certify the medical monitoring classes proposed by the athletes involved in concussion-related litigation.

The information discussed above demonstrates the lack of consensus regarding development of CTE and other neurocognitive effects that may be related to concussive and sub-concussive hits. Many mysteries remain unsolved concerning the causes, risk factors, symptoms, and diagnosis of the effects of TBI's. Numerous individual issues exist among the athletes alleged to be in each putative class. Exposure to concussive and sub-concussive hits throughout one's lifetime and while playing youth, high school, college, or professional sports differs. A number of factors from one's genetic predisposition and choices an individual makes regarding health habits affects how the brain receives and copes with concussive and sub-concussive hits. Viewed through the lens of litigation, these factual differences appear to be significant to the analysis of whether a court should certify the medical monitoring classes proposed by the athletes involved in concussion-related litigation. Additionally, as described above, certification would violate several well-established class certification principles. Not every athlete is at risk for brain injuries or the effects that may result from brain injuries. Thus, certification of the proposed medical monitoring classes would appear to be premature and inappropriate. *In re: NCAA Student-Athlete Concussion Injury Litig.*, 2016 WL 3854603, *2 (Court noted, based on the record presented, it was "highly unlikely that a nationwide class of current or former NCAA student-athletes or a class consisting of current or former NCAA student-athletes from multiple schools could be certified under Rule 23(b)(3) … for the purpose of asserting bodily injury claims for damages.").

VI. Trial Considerations: Lessons From The Past And A Glimpse Of The Future Of Helmet Litigation

Recent years have seen a series – but not necessarily a large number – of jury trials of product liability claims involving helmets and a variety of alleged brain injuries sustained during sports or recreational activities. According to one verdict and settlement database, the majority of products cases against helmet manufacturers that have been actually tried to juries in recent years have resulted in defense verdicts. *See, e.g.*, *Acuna v. Riddell, Inc.*, L.A. Cnty. Super. Ct., Mar. 2014 (football); *Sohn v. Bell Sports, Inc.*, L.A. Cnty. Super. Ct., Aug. 2013 (bicycle); *A.K.W. v. Riddell, Inc.*, S.D. Miss., Oct. 2012 (football); *Eubanks v. KBC Corp.*, L.A. Cnty. Super. Ct., Oct. 2010 (BMX); *Covell v. Bell Sports, Inc.*, E.D. Pa., July 2010 (bicycle); *Suglia v. Lifestyle Custom Cycles, LLC*, Riverside Cnty. Super. Ct., June 2009 (motorcycle); *Jones v. Bell Sports, Inc.*, Palm Beach Cnty. Cir. Ct., Apr. 2005 (bicycle). Source: http://www.verdictsearch.com.

The types of helmets at issue in these product cases include football, bicycle, bicycle motocross ("BMX"), snow, and motorcycle helmets. The brain injuries at issue range from severe traumatic brain injury ("STBI"), such as acute subdural hematoma and diffuse axonal injury, to mild traumatic brain injury ("MTBI"), such as concussions and repetitive concussion-related trauma. There are similarities and differences in the trial of both STBI and repetitive MTBI cases. Both types of cases are fact-intensive and fact-driven; however, the issues and evidence presented in cases involving STBI and MTBA can be significantly different.

A. Evidence and Issues in Helmet Cases Involving STBI

1. Examples of STBI

Simply put, a successful defense at trial of a products case involving STBI turns on the ability to explain to the jury what a helmet can and cannot do. Severe traumatic brain injury can include large acute subdural hematoma ("ASDH") or diffuse axonal injury ("DAI"), severe depressed skull fracture, contusions to the brain known as "coup" or "contrecoup" contusions, or a bridging vein tear in the brain. STBI cases usually involve a single violent impact to or motion of the head, as opposed to the repetitive and comparatively "mild" concussions experienced in MTBI cases. For trial in these cases, understanding the nature of the blow is paramount.

The forces that cause the types of skull fractures or bridging vein tears that, in turn, result in ASDH or DAI are gener-

ally characterized as either *translational* (linear) or *rotational* (angular) blows or accelerations. Translational blows pass through the head's center of gravity – think of the phrase "to hit something head on." Rotational movements, on the other hand, apply rotational or angular forces to the head and brain – think of an uppercut in boxing that causes a fighter's head to whip backwards harshly. And it is important to remember that, while injury-causing forces tend to be characterized (particularly by litigants) as either translational or rotational, every blow to the head involves the application, to some degree, of both translational and rotational forces.

This is significant in helmet cases because the consensus among many experts – on both the plaintiffs' and defense side – is that while helmets may be expected to mitigate, to some degree, translational forces, there is little that helmets can do to mitigate rotational movement of the head.

2. Types of Evidence in STBI Trials

Expert testimony, particularly from a neurologist or neurosurgeon, is critical. Analysis, and clear and effective explanation to the jury, of the CT scans, MRIs, or other medical imaging taken of the plaintiff in the hours and days following the subject injury sets the stage for the more specific causation evidence to come.

For example, a neurologist or neurosurgeon can both identify an ASDH secondary to a bridging vein tear shown on the plaintiff's CT or MRI and explain to the jury how research tends to indicate that, more often than not, bridging vein tears are the result of rotational forces. *See* Reeves, Alexander G. & Swenson, Rand S., *Disorders of the Nervous System: A Primer*, Ch. 29 Cranial and Spinal Trauma, available at http://www.dartmouth.edu/~dons/part_3/chapter_29.html. This is significant in helmet cases because the consensus among many experts – on both the plaintiffs' and defense side – is that while helmets may be expected to mitigate, to some degree, translational forces, there is little that helmets can do to mitigate rotational movement of the head. Notably, in recent years, some experts have opined that current helmet designs are flawed in that they could do more to limit rotational velocity and the injuries that result from motion of the head. These experts criticize the past standards for football helmets, for example – claiming these standards only tested and measured head acceleration from direct blows.

Equally important is testimony by experts in biomechanics, typically Ph.D.-level engineers who specialize in injury kinematics. The biomechanist functions in essentially the same way an accident reconstructionist does in a traffic collision case – inspecting both the helmet and the site of the injury, identifying any physical evidence of damage (including to the helmet, to the ground, or to the clothing the plaintiff was wearing at the time of the injury), connecting the documented injuries with cause of injury, and calculating the movement of the head and body, the change in velocity (Δv), and the vectors and forces applied to the head.

Even the weather comes into play, and meteorologists have been retained as testifying experts in helmet cases. Ambient temperature on the playing field or on the roadway may be used, particularly by the plaintiff's counsel, to posit that the impact energy attenuating properties of the helmet padding or liner were somehow compromised.

In a case involving a sports injury – particularly one sustained in a football or hockey game – film or video of the injury is often available. The video can provide the basis for a computer simulation or photogrammetric analysis of the moment the injury occurred, noting minute details such as a player's foot position and lean angle before, during and after a collision. These types of computer simulations are based on measurements and other actual data obtained from the evidence. As such, they are distinguished from computer animations and treated as substantive evidence admissible at trial, not merely illustrative or demonstrative evidence. *See, e.g.*, *People v. Duenas*, 281 P.3d 887 (Cal. 2012).

One effective form of evidence in defending helmet cases where a skull fracture is involved is a three-dimensional print of the plaintiff's skull, showing the precise location of the fracture. The print is based directly and completely on a CT scan or MRI and can be admitted as substantive, as opposed to merely illustrative, evidence. The 3-D print gives the jurors tangible evidence of where the impact likely occurred. In many cases of skull fracture, medical experts can opine that the blow occurred at the location of the fracture. This is particularly valuable in design defect cases where the plaintiff argues that the helmet should have provided greater "coverage." A lack-of-coverage argument can be effectively neutralized if the 3-D print of the skull shows the fracture (and likely the impact) occurred underneath an area of the head covered by the helmet.

3. Issues in STBI Cases: Telling the "Testing Story"

Particularly in design defect trials where the plaintiff has sustained STBI, much of the trial will focus on the applicable helmet standard. A variety of government agencies and non-governmental organizations offer performance standards for helmets. The National Operating Committee on Standards for

Athletic Equipment ("NOCSAE") provides performance standards and detailed testing protocols for both football and ice hockey helmets. The United States government provides similar standards for motorcycle and bicycle helmets: Department of Transportation ("DOT") Federal Motor Vehicle Safety Standard No. 218 (49 C.F.R. § 571.218) applies to motorcycle helmets, while Consumer Product Safety Commission ("CPSC") 1203 (16 C.F.R. pt. 1203) governs bicycle helmets. Private organizations, such as the Snell Memorial Foundation, also provide their own performance standards for motorcycle and bicycle helmets.

In such cases, having the helmet manufacturer tell the full "testing story" – what types of prototypes were created, what isolated test failures mean, how the final design came to be, and certificationof the final design – can help establish a commitment to and record of safety in helmet design.

Protective helmets for sports or recreational activities sold in the United States are typically certified by independent laboratories for compliance with the applicable standards. Many motorcycle and bicycle helmets are also certified to comply with Snell standards, in addition to the DOT and CPSC requirements. Certification requires passing the testing protocol set out in the standard, which protocol typically involves some form of impact test and a retention system test.

In most cases, particularly those involving established helmet manufacturers with a long history of helmet design, the manufacturers have a wealth of evidence establishing regular, intensive testing of helmets in both the design and production phases. Company witnesses and engineers can often provide effective explanations of the "testing story" for each helmet. This often neutralizes the more selective testing evidence that a plaintiff may offer at trial. For example, a plaintiff may focus exclusively on a single or small handful of non-conforming test results (i.e., test failures) and will present the selective results to the jury without the necessary context. However, the context of a test failure is significant. A test failure noted early in the design or research and development process is far less probative, in a design defect case, than a test failure at the certification stage or after a helmet has been put on the market. Prototype helmets, after all, are usually intentionally tested to failure. In such cases, having the helmet manufacturer tell the full "testing story" – what types of prototypes were created, what isolated test failures mean, how the final design came to be, and certification of the final design – can help establish a commitment to and record of safety in helmet design. Moreover, a helmet's overall design and testing story must be told to show that the helmet optimized the protection it could provide under the existing limitations provided by the standards.

Helmet consumers have a wide variety of preferences in terms of helmet weight, ventilation, removability, visibility, aesthetics, and other features. A consumer may select a particular helmet in order to address his/her preference – for example, a competitive cyclist may prefer a lighter, more ventilated helmet than a casual rider. In litigation, a helmet manufacturer's company witnesses can and must establish that, regardless of the interplay of various helmet design features, the helmet meets or exceeds applicable standards in all respects.

Warnings and instructions also play a key role in the design and testing story. Here again, the well prepared company witness can be effective in laying out the proper sizing, fit, adjustment, and use of a helmet. In helmet ejection and coverage cases, especially those involving bicycle and motorcycle helmets, a plaintiff's failure to follow all warnings and instructions on how to select, adjust, fasten, and wear the helmet (and what, if anything, to wear under the helmet) can be particularly important for the defense. And, to loop back to the discussion of video and photographic evidence above, images of both the accident site and a plaintiff wearing the helmet on prior occasions can be critical to establishing whether he/she was following the instructions or warnings at the time of the incident.

4. What a Helmet Can and Cannot Do

All of the above factors – physical evidence, medical testimony, accident reconstruction, and testing and design story – must be carefully connected to show that the injury was not preventable by the existing helmet design. This can be effectively communicated to the jury by drawing a distinction between what a helmet can and cannot reasonably be expected to do. Helmets can, within the applicable standards, provide an optimal level of impact protection while balancing the factors that are important to different types of helmet consumers – weight, ventilation, visibility, aesthetics, etc. But, perhaps most importantly in design defect cases involving STBI, helmets cannot provide protection for certain catastrophic injuries, such as those involving rotational acceleration.

B. Evidence and Issues in Helmet Cases Involving MTBI and Repetitive Injury

In contrast to STBI cases, MTBI cases involve different evidence and issues. MTBI cases typically involve claims that a helmet design failed to protect from the effects of years of repetitive mild head trauma, such as concussion. In MTBI trials, there will not be one accident to reconstruct, but rather the exploration of a lifetime of football, hockey, or other sports injuries, as well as lifestyle, habits, health, potential drug or alcohol abuse, and family history.

One major difference between STBI and MTBI cases is product identification. To use the example of football, an injured plaintiff may have worn helmets by many different manufacturers through decades of youth, high school, collegiate, and professional football. For sports league defendants (such as the NCAA, NFL, and NHL), it is important to determine whether the alleged injuries occurred either entirely during, in part before, or in part after a player's time in the league. In short, investigating whether a player suffered the debilitating condition during the time the league allegedly failed to implement an effective medical monitoring program or failed to advise players of a risk will be an important part of the case.

> In MTBI trials, there will not be one accident to reconstruct, but rather the exploration of a lifetime of football, hockey, or other sports injuries, as well as lifestyle, habits, health, potential drug or alcohol abuse, and family history.

Moreover, the performance of any one helmet or one particular impact incident will likely not be the issue in the MTBI case. Thus, instead of physical evidence and medical documentation to connect a condition to a specific event, there will be a reliance on assumptions and competing scientific opinions to connect a player's condition to his/her exposure to head contact in the sport or to the time he/she spent in the league. Similarly, claims for medical monitoring are more likely to be seen in the MTBI cases, rather than the STBI case (See discussion above). In the latter, a plaintiff's claimed damages are typically identifiable and attributable to a single accident or hit.

The limitation that no helmet can prevent concussions or all brain injuries is found on almost all helmet warnings. Players frequently sign waivers acknowledging the risk of injury, but the specifics of what players appreciated and when they were advised will be important facts. Additionally, the threshold legal question of whether a waiver between the player and the league inures to the benefit of a helmet manufacturer is likely to be an issue.

One emerging issue is the role of a plaintiff's history, if any, of drug or alcohol abuse in causing the disease at issue. For example, scientists are currently researching the role of abnormal proteins or tau proteins in diseases such as CTE, which may be caused by repeated concussion. There have also been discussions regarding a connection, if any, between anabolic steroid use and tau proteins, although a causal link between steroids and diseases such as Alzheimer's or CTE has not been established. *See* Roth, Mark "*Scientists hunt for ways to untangle damage of chronic traumatic encephalopathy*," Pittsburgh Post-Gazette (May 13, 2013), available at http://www.post-gazette.com/news/health/2013/05/13/Scientists-hunt-for-ways-to-untangle-damage-of-chronic-traumatic-encephalopathy/stories/201305130194. Unlike STBI cases, a plaintiff's history of drug or alcohol abuse or steroid abuse may be relevant to the issue of causation in MTBI cases.

So far, helmet manufacturers have a strong track record in defending design defect claims in trials involving single-incident cases of severe traumatic brain injury. As the study of the effects of repetitive MTBI or concussions advances, the future may see an increasing number of claims for repetitive MTBI and medical monitoring. But both types of cases require diligent pursuit of the facts and early retention of qualified experts.

VII. Conclusion

Concussion-related injury litigation by current and former professional, collegiate and even high school athletes, as well as the related insurance coverage litigation, is far from over. Although many of the currently pending medical monitoring lawsuits may be resolved in class action settlements, there is still a significant likelihood of individual concussion-related injury suits for damages. Past head injury litigation provides some insight into what types of issues will be faced in those cases. Meanwhile, the medical science that is at the heart of the concussion-related injury litigation continues to be the subject of debate among medical professionals. One thing is certain: football and other contact sports in America have changed, as concussive and sub-concussive impacts – and their related injuries – are now at the forefront for players, coaches, governing bodies and, ultimately, those in the legal and medical professions.