

INTERCOLLEGIATE CONCUSSIONS: WHAT THE NCAA CAN DO TO EASE THE PAIN FROM AN INEVITABLE HEADACHE*

I. INTRODUCTION

The progression of concussion research in recent years and the long-term effects of traumatic brain injuries (TBI) manifesting in ex-athletes have brought concerns about concussions to the forefront of athletics.¹ Suicides by retired professional athletes and diseases associated with cognitive decline have brought the issue of concussion liability to the legal system.² Due to settlement agreements, the courts have not yet determined whether athletic governing bodies are liable for the concussion-related injuries and diseases affecting their athletes.³

The lack of adequate regulations and protections that exist at the intercollegiate level leaves the National Collegiate Athletic Association (NCAA) vulnerable to mass tort concussion litigation.⁴ While some NCAA conferences have taken proactive measures with regard to concussion prevention, the organization as a whole has not taken steps to deter future concussion litigation.⁵ Yet, the cognitive decline and

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1. See, e.g., Nyaz Didehbani et al., *Depressive Symptoms and Concussions in Aging Retired NFL Players*, 28 ARCHIVES OF CLINICAL NEUROPSYCHOLOGY 418, 419 (2013) (stating that the suicides of retired athletes are bringing attention to the issue of concussions and TBIs in athletics); Brandon E. Gavett, Robert A. Stern & Ann C. McKee, *Chronic Traumatic Encephalopathy: A Potential Late Effect of Sport-Related Concussive and Subconcussive Head Trauma*, 30 CLINICAL SPORTS MED. 1, 1 (2011) (discussing the link between head trauma sustained as a result of athletic participation and CTE); Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 128, 131 (2005) (exposing the existence of CTE in a deceased former athlete who had a history of athletically related head trauma).

2. See Plaintiff's Amended Master Administrative Long-Form Complaint at 1–2, *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191 (E.D. Pa. July 7, 2014) (No. 12-md-2323-AB), 2014 WL 3054250 (alleging the NFL was aware of, and actively concealed, a strong connection between concussions and long-term health effects suffered by its players from the 1970s until the 2011 collective bargaining agreement); Didehbani, *supra* note 1, at 419 (discussing the suicides of retired NFL players).

3. See Ken Belson, *Concussion Suit to Cost NFL \$765 Million*, N.Y. TIMES, Aug. 30, 2013, at A1 (discussing the decision by the NFL to settle its latest concussion lawsuit before a judge could rule on the NFL's liability).

4. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2013–14 NCAA DIVISION I MANUAL 11–12 (2013) [hereinafter NCAA 2013–14 DIVISION I MANUAL] (requiring member institutions to have a concussion management plan but not providing consequences for failure to comply). The 2013-14 NCAA manual was in force at the time this Comment was drafted. Since then, the NCAA has released its 2014-15 manual. While this Comment relies on the prior manual, the conclusions expressed within are not affected by the updated manual.

5. See Associated Press, *Ivy League Hopes to Limit Concussions*, NAT'L COLLEGE ATHLETIC ASS'N (last updated July 16, 2012, 3:27 PM), <http://www.ncaa.com/news/lacrosse-men/article/2012-07-16/ivy->

diseases that can manifest later in life from concussions sustained as a student-athlete are analogous to the injuries sustained in the mass tort claims stemming from asbestos and Agent Orange exposure.⁶ Compensation for those exposed to asbestos and Agent Orange has been alarmingly expensive to the entities liable for the exposed individuals' injuries, and continues to grow.⁷ With the pool of former student-athletes consistently becoming larger, a court decision could force the NCAA to compensate tens of thousands of claimants if it is found to be liable for these severe injuries.

This Comment addresses the need for the NCAA to take a proactive approach to concussion litigation. In doing so, the NCAA should create a fund that is modeled after the court-established trust funds that stemmed from asbestos exposure litigation and the governmentally established Agent Orange Settlement Fund created to compensate veterans exposed to Agent Orange.⁸ Accordingly, it must have a two-prong goal: (1) deter future concussion litigation, and (2) compensate qualifying former and current student-athletes for the injuries and diseases from which they suffer due to concussions and TBIs.

Section II reviews the history of asbestos and Agent Orange exposure and how the respective funds were created. Further, this Section provides an in-depth review of concussion injuries and concussion litigation and discusses how the NCAA has treated concussion management. Although the courts have not spoken on concussion liability, Section III discusses the NCAA's potential liability and the claims that are likely to arise against the NCAA based upon claims that have previously been brought against the National Football League (NFL). Finally, Section III draws parallels between injuries from concussions and injuries from asbestos and Agent Orange exposure and discusses why the NCAA should establish a fund modeled after the asbestos trust funds and the Agent Orange Settlement Fund.

II. OVERVIEW

The nature of concussion-related injuries is analogous to injuries contracted from exposure to asbestos and Agent Orange. Through the legal system and the federal government, funds have been created to compensate those injured from asbestos and Agent Orange exposure.⁹ Accordingly, Parts II.A and II.B discuss the injuries and diseases contracted by individuals who have been exposed to asbestos and Agent Orange. Part II.C closes with a discussion of concussions sustained during athletically

league-hopes-limit-concussions (detailing the Ivy League's newly imposed methods for attempting to limit concussions, including altering the practice rules for multiple contact sports).

6. See *infra* Part III.B for an analysis of the parallels between asbestos exposure, Agent Orange exposure, and concussion-related injuries and diseases.

7. See *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 639 (2d Cir. 1988) (describing how the high number of lawsuits filed and judgments against the asbestos manufacturers led the manufacturers to declare bankruptcy); *Agent Orange Settlement Fund*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/compensation/claims-postservice-agent_orange-settlement-settlementFund.asp (last updated Oct. 22, 2013) (stating that the Agent Orange Settlement Fund distributed \$197 million in cash payments to class members during its operation).

8. See *infra* Part III.C for a discussion of the creation of the NCAA's concussion fund and the elements that it should draw from the asbestos trust funds and the Agent Orange Fund.

9. See *infra* Part II.A.2 for a discussion of the establishment of asbestos trust funds and Parts II.B.2 through II.B.3 for a discussion of the Agent Orange Settlement Fund.

related activity. Part II.C.1 details the severity of concussion-related injuries and the diseases that have been directly linked to athletes who have suffered from athletically related concussions. Part II.C.2 discusses how the NCAA has treated concussions sustained by its student-athletes to date. Part II.C.3 closes with a discussion of concussion litigation at the professional football level, specifically the claims that have been brought against the NFL, and its defenses.

A. *Asbestos Claim Funds*

Exposure to asbestos in the workplace has been referred to as “one of American history’s worst industrial disasters.”¹⁰ Inhaling asbestos fibers, the smallest naturally occurring fiber, has been proven to lead to respiratory diseases such as lung cancer and mesothelioma.¹¹ Accordingly, asbestos-related litigation is the longest-running mass tort litigation in the history of the United States.¹² For years, Congress has tried, continuously and unsuccessfully, to pass legislation that would effectively put an end to asbestos-related lawsuits by creating a federal trust fund to compensate asbestos exposure victims.¹³ Bankruptcy courts, however, have worked around the lack of approved legislation by ordering asbestos manufacturers to set up trust funds during the manufacturers’ bankruptcy proceedings to pay the prevailing plaintiffs.¹⁴

1. Background

As early as the 1930s, researchers presented evidence linking asbestos exposure to respiratory problems.¹⁵ However, Congress did not impose federal asbestos exposure limits until 1972, after millions of individuals in the American workforce had already been exposed at length.¹⁶ Leading research on the issue identified those that manufactured pipe, gaskets, textiles, floor tiles, sealing devices, insulation, roofing, heating equipment, furnaces, and ovens as well as automotive mechanics, power station operators, shipbuilders, and those in construction as industries at high risk for exposure to asbestos.¹⁷

In 1973, asbestos manufacturers were found to be strictly liable to the exposed workers who had been injured as a result of asbestos inhalation.¹⁸ As a result of this

10. Kirk Johnson, *Trial to Decide if Asbestos Poisoning of a Montana Town Was a Crime*, N.Y. TIMES, Feb. 19, 2009, at A15.

11. Katherine M.A. O’Reilly et al., *Asbestos-Related Lung Disease*, 75 AM. FAM. PHYSICIAN 683, 683 (2007).

12. STEPHEN CARROLL ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT iii, v (2002), available at http://www.rand.org/content/dam/rand/pubs/documented_briefings/2005/DB397.pdf [hereinafter CARROLL ET AL., 2002].

13. STEPHEN CARROLL ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION 131–32 (2005), available at http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf [hereinafter CARROLL ET AL., 2005].

14. Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 862–63 (2005).

15. Daniel J. Penofsky, *Asbestos Injury Litigation*, 60 AM. JUR. TRIALS 73, § 9.5 (1996).

16. Brickman, *supra* note 14, at 836.

17. CARROLL ET AL., 2002, *supra* note 12, at 14.

18. *Id.* at 2. See also *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973) (finding that asbestos products were unreasonably dangerous due to a failure to warn on the part of asbestos companies and manufacturers).

ruling, numerous products liability claims began to flood both state and federal courts.¹⁹ However, plaintiffs had difficulty meeting the requirements for class action certification as the courts determined that the class could not be adequately represented.²⁰ As a result, the 1980s began a period of large settlement agreements between exposed plaintiffs and defendant manufacturers.²¹ Over seven hundred thousand claims have been filed to date.²²

Asbestos litigation is a topic that consistently receives nationwide media attention.²³ Two factors resulted in the surge in asbestos litigation: (1) the manifestation of diseases and symptoms in those exposed in the decades prior to manifestation, and (2) the availability of nationwide health screenings for those exposed.²⁴

2. Establishment of Trust Funds

As the number of asbestos lawsuits and large settlements grew, many manufacturing companies sought bankruptcy protection.²⁵ Beginning in the 1980s, some asbestos manufacturers directly cited asbestos liability as the reason for reorganization.²⁶ Manufacturers like the Johns-Manville Corporation were the primary defendants in tens of thousands of products liability cases seeking multimillion-dollar damage awards.²⁷ By 1982, Johns-Manville had been named in approximately twelve thousand five hundred asbestos liability lawsuits.²⁸

As part of its Chapter 11 bankruptcy, Johns-Manville was required to set up a trust fund during reorganization.²⁹ This fund would be used to fulfill the company's obligations to future asbestos claimants.³⁰ Through the course of litigation, the courts found that future claimants were "parties in interest" and that their interests were not dischargeable in bankruptcy.³¹ In accordance with the trust fund, the court appointed a legal representative to represent those individuals with future asbestos claims against

19. CARROLL ET AL., 2002, *supra* note 12, at 2.

20. Brickman, *supra* note 14, at 851–52 (noting that the Supreme Court rejected class certification due to a lack of adequate representation for class members, resulting from conflicts of interest between currently injured members and unidentified future claimants).

21. *Id.*

22. CARROLL ET AL., 2005, *supra* note 13, at xviii.

23. Mark H. Reeves, Note, *Makes Sense to Me: How Moderate, Targeted Federal Tort Reform Legislation Could Solve the Nation's Asbestos Litigation Crisis*, 56 VAND. L. REV. 1949, 1985 (2003).

24. CARROLL ET AL., 2002, *supra* note 12, at 23.

25. *Id.* at 6.

26. *Id.* at 6–7.

27. *See, e.g.*, Hansen v. Johns-Manville Prods. Corp., 734 F.2d 1036, 1037–38 (5th Cir. 1984) (holding that constitutional protection against double jeopardy did not prohibit asbestos manufacturers previously subject to multiple punitive damages awards from being liable for punitive damages in subsequent litigation); Gogol v. Johns-Manville Sales Corp., 595 F. Supp. 971, 975–76 (D.N.J. 1984) (finding that awards for punitive damages in asbestos products liability actions were permitted under New Jersey law); Fischer v. Johns-Manville Corp., 512 A.2d 466, 468 (N.J. 1986) (holding that plaintiffs may introduce evidence of defendant's knowledge of asbestos dangers to support punitive damage awards).

28. Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636, 639 (2d Cir. 1988).

29. *Id.* at 639–40.

30. *Id.*

31. Robinson v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 52 B.R. 940, 941–43 (Bankr. S.D.N.Y. 1985)

Johns-Manville.³² The court-appointed representative was authorized to “exercise the powers and perform the duties of a [creditors’] [c]ommittee” as permitted under § 1103(c) of the Bankruptcy Code.³³

Accordingly, the Bankruptcy Reform Act of 1994 amended the U.S. Bankruptcy Code to allow asbestos manufacturing companies with considerable liabilities from asbestos litigation to seek bankruptcy protection for future claims.³⁴ The Bankruptcy Reform Act of 1994 was modeled after the Johns-Manville Trust for companies to settle future claims.³⁵ This amendment resulted in the addition of subsection (g) to § 524 of the Bankruptcy Code.³⁶ Section 524(g) established a procedure for proceeding with future asbestos-related personal injury claims against the companies that reorganized under Chapter 11.³⁷ The procedure established a trust fund for future claims with injunctive relief available to prevent the debtor from being sued.³⁸ Congress must take into consideration any due process implications when faced with the rights of those who will have injuries in the future as a result of asbestos exposure.³⁹ Those future claimants are those whose illnesses and symptoms have not yet manifested at the time of the manufacturing company’s bankruptcy.⁴⁰ Thus, § 524(g) contains due process safeguards.⁴¹ These safeguards include the appointment of a representative for future claimants.⁴² Section 524(g) also requires that a seventy-five percent majority of claimants whose claims are to be addressed by the trust vote in favor of the bankruptcy reorganization plan.⁴³ When issuing a § 524(g) injunction, a court must also determine that the injunction is “fair and equitable to future claimants” and that the plan “treats present claims and future demands that involve similar claims in substantially the same manner.”⁴⁴

Nearly one hundred companies that are susceptible to asbestos-related lawsuits have filed for bankruptcy due in part to asbestos-related liability.⁴⁵ Since 2006, approximately thirty new trust funds have been established during the bankruptcy reorganization process.⁴⁶ Since the Johns-Manville Trust Fund was first established in

32. *Id.* at 943.

33. *Id.* at 942. *See* 11 U.S.C. § 1103(c) (2014) (requiring that a bankruptcy fund plan be structured to take future claimants’ interests into account as a substantial factor).

34. H.R. 5116, 103rd Cong. § 111 (2nd Sess. 1994).

35. H.R. REP. NO. 103-835, at 40 (1994); *see also* Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636, 639 (2d Cir. 1988) (discussing the rights of future claimants prior to the amendment to the Bankruptcy Code).

36. H.R. REP. NO. 103-835, at 40 (1994).

37. *Id.*

38. *Id.*

39. Jeld-Wen Inc. v. Brunt (*In re* Grossman’s Inc.), 607 F.3d 114, 127 (3d Cir. 2010).

40. *Id.*

41. *Id.*

42. *Id.* (citing *In re* Combustion Eng’g, Inc., 391 F.3d 190, 234 n.45 (3d Cir. 2004)).

43. *In re Combustion Eng’g, Inc.*, 391 F.3d at 234 n.45.

44. *In re Grossman’s Inc.*, 607 F.3d at 127 (internal quotation marks omitted) (citing 11 U.S.C. §§ 524(g)(4)(B)(i)–(ii) (2012)).

45. Mark D. Plevin, Leslie A. Davis & Tacie H. Yoon, *Where Are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, MEALEY’S ASBESTOS BANKR. REPORT, Feb. 2012, at 1, 17–18 chart 1.

46. Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets*,

1988, approximately \$17 billion has been paid to claimants out of these funds.⁴⁷ As it is believed that between only one-fifth and one-half of the total possible claimants have brought suit thus far, it was once estimated that the total costs of all claims, past, present, and future, would be between \$200 and \$265 billion.⁴⁸

B. Agent Orange Claim Funds

Agent Orange exposure led to other mass injury claims that spawned heavy litigation.⁴⁹ Similar to the asbestos trust funds created by the bankruptcy courts, Agent Orange litigation resulted in established payment plans.⁵⁰ These payment plans were established by court order and administered through the Agent Orange Settlement Fund, which was managed by court-appointed officers.⁵¹ Recovery through these plans results from being assessed and approved by exposure consultants.⁵² Agent Orange, defined by the U.S. military as a “blend of tactical [noncommercial-grade] herbicides,” is a chemical comprised of dioxins that the military sprayed over the land of the opposition during the Vietnam War.⁵³ Those military personnel exposed have suffered adverse health effects and can be compensated for damages suffered as a result of their service-related exposure to Agent Orange.⁵⁴ The Agent Orange Act of 1991 regulates veterans’ benefits and Agent Orange compensation.⁵⁵

1. Background

Of the 8,744,000 men and women who served in the armed forces during the Vietnam War, 3,403,000 were at risk of Agent Orange exposure in Southeast Asia.⁵⁶ Between 1962 and 1971, the U.S. military sprayed Agent Orange throughout Vietnam and over neighboring countries to kill trees and foliage that provided cover for the opposition.⁵⁷ During the war, Agent Orange was the most commonly sprayed

Compensation & Governance, MEALEY’S ASBESTOS BANKR. REPORT, June 2012, at 1, 1.

47. *Id.* at 4.

48. CARROLL ET AL., 2002, *supra* note 12, at vii.

49. See, e.g., Harvey P. Berman, *The Agent Orange Veteran Payment Program*, 53 LAW & CONTEMP. PROBS. 49, 50–51 (1990) (discussing the litigation that resulted in the establishment of the Agent Orange veteran payment program).

50. See *id.* (detailing the logistics of administering the payment program).

51. *Id.* at 51.

52. *Id.* at 54–56.

53. *Facts About Herbicides*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.publichealth.va.gov/exposures/agentorange/basics.asp> (last updated Jan. 3, 2014).

54. *Agent Orange*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.publichealth.va.gov/exposures/agentorange/index.asp> (last updated Nov. 3, 2014).

55. See 38 U.S.C. § 101 (2014) (defining benefits for which Vietnam veterans are eligible); *id.* § 1110 (providing basic entitlement for wartime disability compensation); *id.* § 1116 (detailing the presumptions available to those exposed to Agent Orange); *id.* § 1805 (providing monthly allowances to children of Vietnam veterans born with spina bifida); H.R. 556, 102d Cong. (1991) (detailing the Agent Orange Act of 1991 and those who qualify for compensation for Agent Orange-related diseases).

56. *Military Health History Pocket Card for Clinicians*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.va.gov/oaa/pocketcard/vietnam.asp> (last updated Nov. 5, 2013) (statistics based on those who served between August 4, 1964 and January 27, 1973).

57. *Facts About Herbicides*, *supra* note 53. See also *Exposure to Agent Orange by Location*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.publichealth.va.gov/exposures/agentorange/militaryexposure.asp>

herbicide. It was transported in fifty-five-gallon drums that were identified with an orange stripe.⁵⁸

The U.S. Department of Veterans Affairs (VA) has recognized that exposure to Agent Orange may result in a wide array of severe injuries that may not be readily apparent.⁵⁹ The VA offers a presumption of disability for those who have specified conditions or diseases, including cognitive and respiratory conditions, known to have been caused by Agent Orange exposure.⁶⁰ The VA also offers a spina bifida presumption for the children of those exposed to Agent Orange.⁶¹ Since the 1990s, VA researchers have been studying Vietnam veterans and their ongoing health conditions to determine if additional diseases should be added to the list of available presumptions.⁶²

Under the current procedures for filing an Agent Orange claim, eligible Vietnam veterans may receive a free health exam to discover any possible long-term health problems and may be eligible for disability compensation or health care through the VA.⁶³ As of 2012, there have been 638,846 Vietnam veterans that have received Agent Orange registry evaluations.⁶⁴ As a result of a class action lawsuit, the government has provided a safeguard to ensure affected claimants receive the full benefits to which they are entitled.⁶⁵ This safeguard provides that the VA is statutorily required to pay Agent Orange claims retroactively.⁶⁶ As of 2013, there are approximately one thousand backlogged Agent Orange claims, all of which are eligible to receive retroactive benefits.⁶⁷

2. Original Agent Orange Settlement Fund

The Agent Orange Settlement Fund (the Fund) arose from a settlement in a class

(last updated Dec. 24, 2013) (detailing the countries that were sprayed with Agent Orange and exposure for those who transported it).

58. *Facts About Herbicides*, *supra* note 53.

59. *Presumptions Available to Veterans with Agent Orange Exposure*, AGENT ORANGE REV. (Dep't of Veterans Affairs), Winter 2012, at 3.

60. *Id.* (discussing the various traits of the enumerated diseases).

61. *Presumptions Available to Children of Vietnam and of Korean DMZ Veterans*, AGENT ORANGE REV. (Dep't of Veteran Affairs), Winter 2012, at 3.

62. *VA Studies High Blood Pressure, Chronic Lung Disease Among Vietnam Veterans*, AGENT ORANGE REV. (Dep't of Veteran Affairs), Winter 2012, at 6.

63. *Agent Orange Registry Health Exam for Veterans*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.publichealth.va.gov/exposures/agentorange/registry.asp> (last updated Dec. 30, 2013); *Health Care for Veterans Exposed to Agent Orange*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.publichealth.va.gov/exposures/agentorange/benefits/health-care.asp> (last updated March. 13, 2014).

64. *Agent Orange Registry Health Evaluation for Eligible Veterans - Including Korea*, AGENT ORANGE REV. (Dep't of Veteran Affairs), Winter 2012, at 7.

65. *Nehmer v. U.S. Veterans Admin.*, 32 F. Supp. 2d 1175, 1184 (N.D. Cal. 1999); 38 C.F.R. § 3.816 (2014).

66. 38 C.F.R. § 3.816.

67. Scott Hogenson, *The VA Claims Backlog*, NAT'L REV. ONLINE (July 1, 2013, 4:00 AM), <http://www.nationalreview.com/article/352339/va-claims-backlog-scott-hogenson>; see also Benjamin Pomerance, *Fighting on Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System*, 37 HAMLINE L. REV. 19, 49 (2014) (discussing the notoriety of the VA's claims processing system and associated backlog of claims.)

action dispute between Vietnam veterans and seven Agent Orange manufacturers.⁶⁸ The 1984 settlement established a fund for \$180 million.⁶⁹ At the time, this was the largest settlement of its kind.⁷⁰ The plaintiff class consisted of an estimated ten million people, including the families of deceased Vietnam veterans who were also entitled to payments.⁷¹ The Fund operated until full distribution of its funds in 1996 and was officially closed by the district court in 1997.⁷²

The Fund was broken down into two categories for distribution: the Payment Program and the Class Assistance Foundation.⁷³ From the time the Fund was first established, three-quarters of the Fund was designated solely for the Payment Program.⁷⁴ Under the Payment Program, the only eligible claimants were those with long-term total disabilities and the surviving spouses or children of deceased veterans.⁷⁵ In addition to proving their permanent disability, claimants had to prove they had served in Vietnam, the disability or death occurred before the termination of the Payment Program, and they either (1) held a job in which they directly handled or applied Agent Orange, or (2) were stationed or located in an area where Agent Orange was sprayed.⁷⁶ The Payment Program was designed to expire after ten years, ending in 1994.⁷⁷ By the time the Payment Program ended, \$197 million had been distributed to fifty-two thousand claimants.⁷⁸

The Class Assistance Foundation was designed to meet the needs of those claimants who did not meet the requirements of the Payment Program and constituted the remaining one-quarter of the Fund.⁷⁹ The Class Assistance Foundation provided funds that were primarily designated for children with birth defects related to Agent Orange, service projects, and organizations that provided services to Vietnam veterans exposed to Agent Orange and their families.⁸⁰ Claimants receiving services through the Class Assistance Foundation had to prove their exposure to Agent Orange, but by far less restrictive means than for the Payment Program.⁸¹ Throughout the duration of the Class Assistance Foundation, \$74 million was distributed to eighty-three organizations

68. See *Ryan v. Dow Chemical Co. (In re Agent Orange Prod. Liab. Litig.)*, 611 F. Supp. 1396, 1400, 1445–47 (E.D.N.Y. 1985) (noting that the settlement reached the year prior was fair, reasonable, and adequate, and detailing the methods for the distribution of funds).

69. *Id.* at 1401. *Agent Orange Settlement Fund*, *supra* note 7.

70. *Agent Orange Settlement Fund*, *supra* note 7.

71. *Id.*

72. *Id.*

73. *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. at 1410.

74. *Id.*

75. *Id.* at 1410, 1412 (adopting the definition of long-term disability provided by the Social Security Act).

76. *Id.* at 1416.

77. *Id.* at 1417.

78. *Agent Orange Settlement Fund*, *supra* note 7.

79. *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. at 1410, 1431.

80. *Id.* at 1433–34.

81. *Id.* at 1416, 1433 (allowing claimants to prove their exposure in the broadest of ways, whereas the Payment Program required specific proof that a claimant had either handled Agent Orange or was stationed in an area where it was sprayed, excluding those who were exposed but had not been officially stationed in the area or handled the herbicide).

that provided services to over 239,000 Vietnam veterans and their families.⁸²

3. Current Requirements for Obtaining Funds

Victims of Agent Orange exposure must meet certain requirements to obtain benefits.⁸³ Disability compensation, under the current system, requires a showing of service in Vietnam during wartime.⁸⁴ The VA presumes Agent Orange exposure if the claimant can prove he or she set foot ashore or on a ship that operated on Vietnam's inland waterways.⁸⁵ Further, the VA presumes Agent Orange as the cause of the claimant's disease provided that the disease falls under the VA's enumerated list of "presumptive diseases."⁸⁶ The VA also requires "medical evidence [or] competent lay evidence" of the disease and that symptoms of certain diseases manifest within a certain timeframe.⁸⁷ However, eleven of the fourteen enumerated diseases are not required to have manifested before a set deadline.⁸⁸ Similar to asbestos exposure, some diseases resulting from Agent Orange exposure can have extensive, decades-long latency periods.⁸⁹

Claims that are granted by the VA are rated based on the severity of the claimant's disability.⁹⁰ Cognizable claims can range from 10% to 100% disabled.⁹¹ After the disability rating is established, the VA provides monthly compensation in accordance with its published rate tables.⁹² The following factors are taken into consideration in adjustment of the monthly compensation: if the disabled veteran has children, the number of children, the age of the children, the children's school status, if the disabled veteran is married, and if the disabled veteran is supporting one or both of his or her parents.⁹³ Other special circumstances, such as the loss of a limb, can allow

82. *Agent Orange Settlement Fund*, *supra* note 7.

83. *Id.*

84. *Id.* *see also* 38 C.F.R. § 3.307(a)(6)(iii)–(iv) (2014) (requiring that service must have occurred in Vietnam any time between January 9, 1962 and May 7, 1975 or in the Korean demilitarized zone between April 1, 1968 and August 31, 1971).

85. *Exposure to Agent Orange in Vietnam*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.publichealth.va.gov/exposures/agentorange/locations/vietnam.asp> (last updated Dec. 30, 2013).

86. *Veterans' Diseases Associated with Agent Orange*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.publichealth.va.gov/exposures/agentorange/conditions/index.asp> (last updated Dec. 30, 2013) (listing the "presumptive diseases") (internal quotation marks omitted); *see* 38 C.F.R. § 3.307(a) (indicating that diseases associated with exposure to certain herbicides are presumed to have been incurred in service).

87. *Exposure to Agent Orange in Vietnam*, *supra* note 85 (requiring that to receive the presumption of Agent Orange exposure, the claimant must be able to prove that they set foot ashore or on a ship that operated on Vietnam's inland waterways). *See* 38 C.F.R. § 3.307(a)(6)(ii) (providing time deadlines for the diseases chloracne, porphyria cutanea tarda, and early onset peripheral neuropathy).

88. 38 C.F.R. § 3.307(a)(6)(ii); 38 C.F.R. § 3.309(e).

89. INST. OF MED. OF THE NAT'L ACADS., VETERANS AND AGENT ORANGE: LENGTH OF PRESUMPTIVE PERIOD FOR ASSOCIATION BETWEEN EXPOSURE AND RESPIRATORY CANCER 15 (2004), *available at* http://www.nap.edu/openbook.php?record_id=10933.

90. *Agent Orange Settlement Fund*, *supra* note 7.

91. *Diseases Within One-Year Post-Service*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/compensation/claims-postservice-one_year.asp (last updated Oct. 22, 2013).

92. *Veterans Compensation Benefits Rate Tables – Effective 12/1/13*, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/compensation/resources_comp01.asp#BM05 (last updated Dec. 10, 2014).

93. *Id.*

for higher monthly compensation.⁹⁴

C. *Concussions Sustained During Athletically Related Activity*

A single concussion or a series of concussions can result in serious, irreversible neurological conditions.⁹⁵ Accordingly, laws and regulations mandated by professional leagues regarding sports-related concussions have been enacted to help safeguard those who partake in certain levels of athletic activity.⁹⁶ However, college athletes are not covered by the same laws and regulations, but instead are governed by the NCAA and its bylaws.⁹⁷ With the exception of the Ivy League's individualized efforts, the NCAA's regulation of concussions has been minimal.⁹⁸

Concussions are a significant problem that plagues every level of professional and amateur athletics in the United States.⁹⁹ Research regarding athletic-related concussions can be traced back to the late 1920s when the initial subjects were boxers.¹⁰⁰ While "concussion" is a widely used term, and research on the subject rapidly progresses, the medical profession lacks a definitive definition of what the term entails.¹⁰¹ The formal medical definition of the term "concussion" is a "clinical syndrome characterized by immediate and transient alteration in brain function, including alteration of mental status and level of consciousness, resulting from mechanical force or trauma."¹⁰² More commonly, it is a brain injury resulting from a forceful blow to the head or body.¹⁰³ Forceful body blows can jolt the brain and are

94. *Compensation*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/compensation/index.asp> (last updated Sept. 26, 2014).

95. James Kelly & Jay Rosenberg, *Diagnosis and Management of Concussion in Sports*, 48 NEUROLOGY 575, 576 (1997); see also Gavett et al., *supra* note 1, at 1 (discussing the effects of CTE on the brain).

96. See, e.g., ARIZ. REV. STAT. ANN. § 15-341(A)(24)(b) (2014) (West) (Arizona state law regarding youth sport-related concussions); Memorandum in Support of the Nat'l Football League's Motion to Dismiss the Amended Complaint at 15, *Easterling v. Nat'l Football League (In re National Football League Players' Concussion Injury Litigation)*, No. 11-CV-05209-AB (E.D. Pa. Mar. 27, 2012), 2012 WL 1386982 (discussing provisions in the Collective Bargaining Agreement that regard player safety).

97. NAT'L COLLEGIATE ATHLETIC ASS'N ELIGIBILITY CTR., 2014-15 GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 4 (2014).

98. NCAA 2013-14 DIVISION I MANUAL, *supra* note 4, at 11-12 (detailing the requirement that member institutions have a "concussion management plan" in place); Jon Solomon, *Ivy League Becomes College Football's Model for Player Safety*, AL.COM (Jan. 5, 2013, 4:30 PM), http://www.al.com/sports/index.ssf/2013/01/ivy_league_becomes_college_foo.html.

99. Alexander N. Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 SETON HALL J. SPORT L. 17, 18-19 n.4 (2002) ("Concussion-related injuries affect all levels of athletes, from grade school to college to professional.").

100. Complaint at 1-2, *Easterling v. Nat'l Football League, Inc.*, 2011 WL 3627055 (E.D. Pa. Aug. 17, 2011) (No. 11CV05209).

101. Kelly & Rosenberg, *supra* note 95, at 575.

102. *Patient Information: Concussion*, AM. ASS'N OF NEUROLOGICAL SURGEONS, <http://www.aans.org/Patient%20Information/Conditions%20and%20Treatments/Concussion.aspx> (last visited Dec. 12, 2014).

103. U.S. DEP'T OF HEALTH AND HUMAN SERVS. & CTRS. FOR DISEASE CONTROL AND PREVENTION, FACTS ABOUT CONCUSSION AND BRAIN INJURY 1 (2010), available at http://www.cdc.gov/concussion/pdf/facts_about_concussion_tbi-a.pdf.

capable of altering a person's mental and physical functions.¹⁰⁴ Sustaining repeated concussions or TBIs, a frequent occurrence in contact sports, can result in permanent, debilitating neurological conditions, such as chronic traumatic encephalopathy.¹⁰⁵ There currently is no way of determining each individual concussion's effect on the brain.¹⁰⁶ As such, there is also no way of determining when or if side effects from a single concussion or string of concussions will manifest later in life.¹⁰⁷

1. The Nationally Recognized Dangers Associated with Sports-Related Concussions and the Manifestation of Chronic Traumatic Encephalopathy

Athletic participation is one of the top five causes of concussions as seen in emergency rooms across the country.¹⁰⁸ The Center for Disease Control and Prevention approximates that between 1.6 and 3.8 million concussions occur as the result of participating in sports and recreational activities each year.¹⁰⁹ States began enacting laws addressing sports-related concussions beginning in 2009.¹¹⁰ Currently, forty-nine out of the fifty states have TBI and concussion laws that directly reference student or youth athletes as well as their school districts, school boards, school nurses, and coaches.¹¹¹ The majority of the states' sports-related TBI and concussion laws include (1) educating coaches, student-athletes, and parents about TBIs and concussions; (2) removing the athlete from play if they are believed to have suffered a head injury; and (3) requiring the athlete to obtain permission from a health care professional before returning to play.¹¹²

The harmful effects of TBIs and concussions can also emerge later in life.¹¹³ These qualities garnered national attention because of the suicides of several retired

104. *Id.* at 4.

105. *Id.* at 4; Kelly & Rosenberg, *supra* note 95, at 576; *see also* Gavett, *supra* note 1, at 1 (discussing the link between head trauma sustained during athletic participation and CTE).

106. *See* Kelly & Rosenberg, *supra* note 95, at 575–76 (citing potential side effects that may manifest in midlife and how those side effects and the timeline of their manifestation vary person to person).

107. *Id.* at 578.

108. U.S. DEP'T OF HEALTH AND HUMAN SERVICES & CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 103, at 1.

109. *Nonfatal Traumatic Brain Injuries from Sports and Recreation Activities—United States, 2001–2005*, MORBIDITY AND MORTALITY WKLY. REP. (Centers for Disease Control and Prevention, Atlanta, GA), July 27, 2007, at 733.

110. *See, e.g.*, H.R. 632, 61st Leg., 2nd Reg. Sess. (Idaho 2012) (Idaho state law regarding youth sport-related concussions); H.R. 1521, 50th Leg., Reg. Sess. (Ariz. 2011) (Arizona state law regarding youth sport-related concussions); H.R. 348, 75th Leg., Reg. Sess. (Or. 2009) (Oregon state law regarding youth sport-related concussions); H.R. 1824, 61st Leg., Reg. Sess. (Wash. 2009). Washington's Zackery Lystedt Law was introduced as a result of middle school football player Zackery Lystedt who collapsed post-game and required two emergency brain surgeries after suffering a TBI during a game and returning to play later that same game. Wash. H.R. 1824.

111. *Traumatic Brain Injury Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES, (July 28, 2014), <http://www.ncsl.org/issues-research/health/traumatic-brain-injury-legislation.aspx>.

112. *Id.*; *see also* Paul McCrory et al., *Consensus Statement on Concussion in Sport: The 3rd International Conference on Concussion in Sport Held in Zurich, November 2008*, 44 J. ATHLETIC TRAINING 434, 435–38 (2009) (recommending ways to evaluate and investigate concussions).

113. *See* Didehmani et al., *supra* note 1, at 419 (describing recent investigations into the long-term health effects of head injuries in athletes).

NFL players.¹¹⁴ Starting in 2005, independent neurologists and pathologists began studying the cognitive problems in retired and deceased NFL players who sustained multiple football-related concussions.¹¹⁵ These studies suggest that retired NFL players suffer from long-term impaired cognitive function and cerebral atrophy.¹¹⁶ Former NFL players and the families of those retired NFL players who have committed suicide have commenced negligence actions against the NFL based on these studies.¹¹⁷

The brain degeneration associated with paranoia, impulse-control problems, dementia, parkinsonism, depression, and aggression is known as chronic traumatic encephalopathy (CTE).¹¹⁸ Currently, CTE can only be diagnosed through a postmortem brain examination.¹¹⁹ Traditionally, CTE has been associated with boxers who exhibited symptoms referred to as being “punch drunk.”¹²⁰ The repetitive brain trauma causes deterioration of the brain tissue and the buildup of an abnormal protein called tau,¹²¹ with symptoms that may not manifest until years or decades after athletic participation has ceased.¹²² As research advances, evidence of CTE has been found in association with football, wrestling, hockey, soccer, lacrosse, and other contact sports.¹²³

CTE and its associated symptoms do not manifest equally among all persons.¹²⁴ The younger an individual is when he or she sustains a TBI, the more susceptible his or her brain is to injury.¹²⁵ Conversely, the “increased plasticity of the young brain may be better able to compensate for specific difficulties such as behavioral dysfunction.”¹²⁶ Typically, the onset of CTE occurs midlife, after the athlete has ceased athletic participation.¹²⁷ However, there has been at least one cited case where the autopsy of an eighteen-year-old football player who had sustained multiple concussions showed signs

114. *Id.*

115. Joseph M. Hanna & Daniel Kain, *NFL's Shaky Concussion Policy Exposes the League to Potential Liability Headaches*, 28 ENT. & SPORTS LAW. 9, 9 (2010).

116. Omalu et al., *supra* note 1, at 131 (citing both the mental and physical effects, such as atrophy, that CTE can have on the brain).

117. *See, e.g., Duerson v. Nat'l Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353, at *2 (N.D. Ill. May 11, 2012) (an action brought against the NFL for negligence and fraudulent concealment of linkage between brain trauma and permanent brain damage by family of a retired NFL player who had committed suicide). These studies exposed a link between brain trauma and permanent brain damage that can result in behavioral and personality disturbances as well as suicide. *See* Gavett et al., *supra* note 1, at 5 (discussing the link between diseases such as Parkinson's and dementia and CTE).

118. Gavett et al., *supra* note 1, at 3; *Chronic Traumatic Encephalopathy*, SPORTS LEGACY INST., <http://www.sportslegacy.org/research/cte/> (last visited Dec. 12, 2014) (stating that CTE is a progressive degenerative brain disease found in those, particularly athletes and soldiers, who have a history of repetitive brain trauma).

119. *Chronic Traumatic Encephalopathy*, *supra* note 118.

120. Gavett et al., *supra* note 1, at 2.

121. *Chronic Traumatic Encephalopathy*, *supra* note 118.

122. *Id.*

123. Gavett et al., *supra* note 1, at 2; Omalu et al., *supra* note 1, at 131.

124. Gavett et al., *supra* note 1, at 6–7.

125. *Id.* at 6.

126. *Id.*

127. *Id.* at 2.

of CTE.¹²⁸

Females may respond to concussions differently and sustain more concussions than their male counterparts.¹²⁹ In addition, current research shows that females with TBIs are inclined to have both longer residual disabilities and higher mortality rates.¹³⁰ When diagnosing concussions and TBIs in female athletes, symptoms are also easier to miss and can be attributed to different conditions such as depression and anxiety.¹³¹ Additionally, female athletes require a longer period of time to recover from concussions.¹³² This suggests that females are biologically more vulnerable to becoming concussed.¹³³ To date, the study of CTE in females is virtually nonexistent, with the only known study having been conducted on a living female twenty-year-old hockey player.¹³⁴

2. NCAA's Treatment of Concussions to Date

Notwithstanding symptoms that are visible to athletic training personnel and team physicians, NCAA student-athletes are responsible for self-reporting any concussion-like symptoms.¹³⁵ The NCAA acknowledges that student-athletes underreport concussions.¹³⁶ Prior to 2010, the NCAA did not regulate or require their member schools on any divisional level to have a concussion management plan for their student-athletes.¹³⁷ Before the NCAA enacted its concussion management bylaw, fifty percent of schools did not require their concussed athletes to see physicians or trainers, and many allowed their athletes to reenter the game after becoming concussed.¹³⁸ Further, only sixty-six percent of schools used baseline testing.¹³⁹ Those schools that

128. Robert Eme et al., *Persistent Cognitive Impairment in a Multiply Concussed Female Athlete: Is It Chronic Traumatic Encephalopathy? A Case Study*, 2 J. COUNSELING & PROF. PSYCHOL. 43, 44 (2013).

129. *Id.* at 43; Leah J. Frommer et al., *Sex Differences in Concussion Symptoms of High School Athletes*, 46 J. ATHLETIC TRAINING 76, 76–77 (2011).

130. Frommer et al., *supra* note 129, at 76–77 (citing a study that showed females had a “greater frequency of brain swelling and intracranial hypertension” than their male counterparts of the same age).

131. Libby Sander, *Female Athletes' Concussion Symptoms May Be Overlooked*, CHRON. HIGHER EDUC. (Dec. 7, 2010), <http://chronicle.com/blogs/players/female-athletes-concussion-symptoms-may-be-overlooked/27883>.

132. Eme et al., *supra* note 128, at 44.

133. *Id.* at 45.

134. *Id.* at 43. While the authors of this study acknowledge that a definite diagnosis of CTE can only be made through postmortem examination, they state that the subject's symptoms cannot be explained in any way “other than . . . the repetitive concussive head impacts” she has sustained, which “strongly suggests CTE.” *Id.*

135. *Concussion Guidelines*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/health-and-safety/concussion-guidelines> (last visited Dec. 12, 2014).

136. *Id.*

137. See Cailyn M. Reilly, Comment, *The NCAA Needs Smelling Salts When It Comes to Concussion Regulation in Major College Athletics*, 19 UCLA ENT. L. REV. 245, 274 (discussing the NCAA's failure to adopt concussion-management regulation until its implementation of the NCAA Concussion Management Plan in August 2010); Memorandum from Kathleen Brasfield, Chair, Div. II Mgmt. Council, Nat'l Collegiate Athletic Ass'n, to Div. II Dirs. of Athletics, Nat'l Collegiate Athletic Ass'n, at 1 (Aug. 13, 2010) (on file with author).

138. Nathan Fenno, *Internal NCAA Emails Raise Questions About Concussion Policy*, WASH. TIMES (July 20, 2013, 2:33 PM), <http://www.washingtontimes.com/blog/screen-play/2013/jul/20/internal-ncaa-emails-raise-questions-about-concuss/>.

139. *Id.*

chose not to utilize baseline testing cited cost and the length of time the process takes as their reasons for not testing their student-athletes in preseason.¹⁴⁰

The concussion management bylaw places several requirements on member schools in an effort to regulate concussions.¹⁴¹ They are required to include (1) an annual education process for student-athletes about concussions with student-athlete acknowledgment forms, (2) a process ensuring student-athletes exhibiting concussion symptoms will be removed from athletically related activities and be medically evaluated,¹⁴² (3) the preclusion of concussed student-athletes from returning to athletically related activity for the remainder of that calendar day, and (4) a policy requiring medical clearance before resuming athletically related activity.¹⁴³ Although proposed initially as an addition to the NCAA manual, the 2013–14 edition of the manual does not include the consequence for a violation of the concussion management bylaw.¹⁴⁴

The NCAA was founded to “protect young people from the dangerous and exploitative athletic practices of the time.”¹⁴⁵ As such, this national organization holds each of its twelve hundred member schools responsible for the welfare of their own student-athletes.¹⁴⁶ However, NCAA athletes across all sports sustained almost thirty thousand concussions between 2004 and 2009.¹⁴⁷ After such an injury, athletic trainers and team physicians are responsible for monitoring concussed student-athletes and clearing them to play when they are deemed medically ready.¹⁴⁸ However, recent research shows that half of the major college football trainers have felt pressured by coaches to clear concussed players for play prematurely.¹⁴⁹ At many NCAA member schools, the football athletic trainers either report directly to the coach or the coach has

140. *Id.*

141. NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 11–12.

142. This process would impose an affirmative duty of care on collegiate medical staff members, who are charged with possessing the knowledge and experience required to proficiently evaluate concussions. *Cf.* Dan B. Dobbs, *Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress*, 50 ARIZ. L. REV. 49, 50 (2008) (describing that, in the context of torts, the degree of duty owed by medical practitioners stems from how the practitioner holds himself out to his patients, and requires the knowledge, skill, and experience possessed by others within the relevant medical field).

143. NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 11–12; Memorandum from Kathleen Brasfield, *supra* note 137, at 1–2.

144. *Compare* Memorandum from Kathleen Brasfield, *supra* note 137, at 2 (proposing consequences of noncompliance with the concussion management plan requirement), *with* NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 11–12 (lacking the language describing consequences of noncompliance).

145. Nathan Fenno, *In Court Filing, NCAA Denies Legal Duty to Protect Athletes*, WASH. TIMES (Dec. 18, 2013), <http://www.washingtontimes.com/news/2013/dec/18/court-filing-ncaa-denies-legal-duty-protect-athlete/> (internal quotation marks omitted).

146. *Membership*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/about/who-we-are/membership> (last visited Dec. 12, 2014).

147. Travis Waldron, *Court Documents Detail NCAA’s Unwillingness to Act on Concussion Prevention and Treatment*, THINK PROGRESS (July 22, 2013, 12:40 PM), <http://thinkprogress.org/sports/2013/07/22/2334231/ncaa-concussions-lawsuit/>; *see also* Ben Strauss, *N.C.A.A. Deal Revamps Head-Injury Care*, N.Y. TIMES, July 30, 2014, at B10 (“According to N.C.A.A. documents uncovered during discovery, there were more than 30,000 concussions at colleges from 2004 to 2009.”).

148. Brad Wolverton, *Coach Makes the Call*, CHRON. HIGHER EDUC. (Sept. 2, 2013), <http://chronicle.com/article/Trainers-Butt-Heads-With/141333/>.

149. *Id.*

influence over hiring and firing decisions for their position.¹⁵⁰

a. Proactive Efforts in Concussion Management in the Ivy League Conference

In contrast to the rest of the NCAA, the Ivy League Conference is the forerunner in taking a proactive approach to concussion management.¹⁵¹ To limit concussions, the Ivy League has instituted new rules for football, lacrosse, and soccer.¹⁵² With regard to football, the Ivy League has limited full-contact practices to twice per week—three fewer than NCAA guidelines.¹⁵³ With regard to soccer and lacrosse, full-contact practices were reduced and student-athletes may now be suspended for violent hits to the head.¹⁵⁴ Along with the Big Ten Conference and the Southeastern Conference, the Ivy League has established a working group to specifically study concussions and the effects of the Ivy League’s new policies.¹⁵⁵

3. NFL Concussion Litigation

In recent years, concussion litigation in the NFL has garnered national attention.¹⁵⁶ For over ten years, the NFL has been paying disability benefits for “totally and permanently disabled” players, including those that suffer from debilitating cognitive diseases.¹⁵⁷ The proposed settlement of lawsuits against the NFL has prevented the courts from determining the NFL’s liability for concussions.¹⁵⁸

Because NFL players are employed under a collective bargaining agreement (CBA) and the NFL’s Constitution and Bylaws, these lawsuits at the professional level are governed by labor law.¹⁵⁹ However, it has yet to be determined if the players’ lawsuits regarding concussion liability are preempted under the Labor Management Relations Act (LMRA)¹⁶⁰ due to their past and present CBAs.¹⁶¹ The current NFL CBA

150. *Id.* As an example of this practice, Temple University recently fired their football athletic trainer of twenty years after a new head coach began at the school. The new athletic trainer’s bosses are a senior associate athletic director and the head football coach. *Id.*

151. Solomon, *supra* note 98.

152. See Associated Press, *supra* note 5 (detailing the new practice-related rules the Ivy League has imposed for soccer, lacrosse, and football).

153. Solomon, *supra* note 98.

154. Associated Press, *supra* note 5.

155. Solomon, *supra* note 98.

156. Joseph M. Hanna, *Concussions May Prove to be a Major Headache for the NFL: Players’ Class Action Suit Places a Bounty on the League*, N.Y. St. B.J., Oct. 2012, at 10.

157. See Alan Schwarz, *Duerson’s Case Highlights the Limits of the N.F.L.’s Disability Plan*, N.Y. TIMES, May 5, 2011, at B15 (describing the benefits afforded to players who qualify as totally and permanently disabled); Letter from Sarah E. Gaunt, Plan Dir., NFL Player Benefits, to Robert P. Fitzsimmons, Counsel for Michael Webster (May 8, 2000) (on file with author) [hereinafter Letter to Robert P. Fitzsimmons] (regarding retired NFL player Michael Webster’s request for disability compensation); Letter from Sarah E. Gaunt, Plan Dir., NFL Player Benefits, to Confidential Recipient (Aug. 5, 1997) on file with author [hereinafter Letter to Confidential Recipient] (calculating payment for retired NFL player’s “total and permanent degenerative” benefit).

158. Jason M. Breslow, *NFL Reaches \$765 Million Settlement in Concussion Lawsuit*, FRONTLINE, (Aug. 29, 2013, 4:57 PM), <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/nfl-reaches-765-million-settlement-in-concussion-lawsuit/>.

159. Hanna, *supra* note 156, at 13.

160. 29 U.S.C. § 185 (2014) (regulating suits by and against labor organizations).

contains provisions for player medical care, player benefits, and, under all previous and existing CBAs, player safety.¹⁶² CBAs dating back to 1970 contain arbitration provisions for any grievances involving the compliance with, application, or interpretation of the terms of the CBA.¹⁶³

Most recently, the NFL is negotiating a settlement for a class action lawsuit brought by over forty-five hundred players and their families regarding concussion liability.¹⁶⁴ The suit was anticipated to be a landmark case for professional football, as it would have been the first suit to decide whether the NFL was liable for players' concussions.¹⁶⁵ The initial settlement proposal included \$675 million for retired players or the families of players who sustained cognitive injuries, \$75 million for baseline medical exams, and \$10 million for concussion research.¹⁶⁶ This initial settlement agreement for \$765 million has been rejected by Judge Anita Brody of the United States District Court for the Eastern District of Pennsylvania on the basis that the amount was likely insufficient to cover all future claimants—currently retired NFL players.¹⁶⁷ Additionally, the agreement was rejected because it barred retired players that have received compensation for cognitive impairment from suing the NCAA or other football organizations.¹⁶⁸ A finalized, approved settlement agreement will allow the NFL to avoid a lengthy discovery process that would have uncovered the medical histories of retired players from the 1940s to present.¹⁶⁹

This class action suit is largely based on a theory of negligence.¹⁷⁰ In alleging that the NFL owed a duty of care to plaintiffs, the retired NFL players alleged that the NFL breached its duty by failing to warn players of the unreasonable harm that results from repeated concussions.¹⁷¹ They also alleged that the NFL failed to disclose long-term implications of repeated concussions as well as knowledge of the cognitive decline from concussions.¹⁷² Finally, the players alleged that the NFL failed to implement a return-to-play policy that would minimize these long-term cognitive problems.¹⁷³

161. See Memorandum in Support of the Nat'l Football League's Motion to Dismiss the Amended Complaint, *supra* note 96, at 15 (citing 29 U.S.C. § 185) (arguing that the players' breach of duty claim is preempted by the LMRA and should be dismissed because such preempted claims must be first exhausted in arbitration procedures before filing a complaint in federal court). State law claims are preempted by the LMRA when such claims are "substantially dependent upon or inextricably intertwined with the terms of, or arise under, a collective bargaining agreement." *Id.* at 2.

162. *Id.* at 7–10.

163. *Id.* at 11–12.

164. Belson, *supra* note 3.

165. *Id.*

166. *Id.*

167. *In re Nat'l Football Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. 2014); see also Nathan Fenno, *Judge Denies Settlement Motion in NFL Concussion Lawsuit*, WASH. TIMES (Jan. 14, 2014), <http://www.washingtontimes.com/news/2014/jan/14/judge-denies-settlement-motion-nfl-concussion-laws/?page=all>.

168. *Id.*

169. Breslow, *supra* note 158.

170. Complaint, *supra* note 100 at 2.

171. Complaint, *supra*, note 100 at 15.

172. *Id.*

173. *Id.*

The NFL has not directly rebutted the aforementioned negligence claims.¹⁷⁴ The NFL's arguments have relied heavily upon the preemptive effect of the LMRA.¹⁷⁵ However, the courts have yet to determine whether the terms of the LMRA apply to the NFL CBA.¹⁷⁶ Without a determination on the applicability of the LMRA to the players' claims, the NFL has not yet had to argue on the individual elements of the negligence allegations.¹⁷⁷

Commentators have speculated that future lawsuits against the NFL are inevitable.¹⁷⁸ When the time comes, the NFL will directly argue against the failure to warn¹⁷⁹ and negligence claims.¹⁸⁰ With regard to duty, the NFL may argue a lack of an affirmative duty or that there is no special relationship between the players and the NFL, as the players are employees of their teams, not NFL employees.¹⁸¹ Regarding causation, the NFL may argue that their conduct was not the "but-for"¹⁸² cause of a player's cognitive decline, as that player may have sustained cognitive damage from other sources such as substance abuse or concussions unrelated to professional football.¹⁸³

The NFL may raise an affirmative defense to these future allegations.¹⁸⁴ In arguing against negligence, commentators have speculated that the NFL will also raise assumption of risk and contributory negligence as affirmative defenses.¹⁸⁵ The NFL

174. See Memorandum in Support of the Nat'l Football League's Motion to Dismiss the Amended Complaint, *supra* note 96, at 15–40 (outlining the NFL's arguments of preemption by the LMRA and failure to state non-negligence claims upon which relief can be granted).

175. *Id.* at 15–30 (providing an in-depth argument for preemption by the LMRA).

176. *Id.*

177. See *id.* at 15–40 (detailing the arguments that the NFL has put forth, none of which argue against the direct claims of negligence).

178. See Hanna, *supra* note 156, at 13 (describing how former NFL players will bring claims against the NFL because of how the NFL has left itself subject to liability for the claims of failure to warn and negligence); Hanna & Kain, *supra* note 115, at 10–12 (discussing how the NFL has left itself open to liability for the claims of failure to warn and negligence); see also Michael Hausfeld & Swathi Bojedla, *The NFLPA's Potential Legal Liability to Former Players for Traumatic Brain Injury*, SPORTS LITIG. ALERT, June 29, 2012, at 3–4 (arguing that claims brought against the NFL should join the NFL Players Association as a defendant for its own negligent conduct, including negligence in negotiating CBAs with inadequate concussion protection provisions for former players).

179. See Allan E. Korpela, Annotation, *Failure to Warn as Basis of Liability Under Doctrine of Strict Liability in Tort*, 53 A.L.R. 3d 239, § 2[a] (1973) (defining failure to warn as "strict" in a different sense than strict liability in that it requires the defendant to act in accordance with a reasonable standard of conduct).

180. Hanna, *supra* note 156, at 13.

181. *Id.*

182. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 26 (2010) (factual cause is established when the harm would not have occurred absent the tortious conduct); cf. *Summers v. Tice*, 199 P.2d 1, 3 (Cal. 1948) (citing RESTATEMENT (FIRST) OF TORTS § 432 (1934) (discussing the substantial factor theory as an alternate theory of liability to "but-for" liability, allowing a party to be liable if their negligent actions were sufficient to bring about harm to another but were not the only cause of the resulting harm)).

183. Hanna, *supra* note 156, at 14; see also *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) (discussing the role of foreseeability with regard to potential plaintiffs and the duty that is owed to them). With the NFL's knowledge of the risks associated with concussions and multiple TBIs, injuries that befall players as a result of concussions and TBIs will have been foreseeable by the NFL. Hanna, *supra* note 156, at 13.

184. Hanna, *supra* note 156, at 14–16.

185. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 496A cmt. c(1)–(2) (1965) (defining

may argue that concussions and other injuries are a known risk inherent to the dangerous game of football and that, by participating, the players assumed the risk of injury.¹⁸⁶ The NFL may also argue that the players contributed to their own injury.¹⁸⁷ This argument stems from the NFL's requirement for players to self-report their concussion symptoms and for players to be asymptomatic (without symptoms) before returning to play.¹⁸⁸ If the player returned to play prior to being asymptomatic or failed to report his concussion symptoms, the NFL would argue that he acted negligently and must assume liability for the damage to his health.¹⁸⁹

III. DISCUSSION

In the best interest of both the student-athletes and the NCAA, the NCAA should establish a concussion fund modeled after the asbestos trust funds and the Agent Orange Settlement Fund.¹⁹⁰ The NCAA was and is fully aware that its student-athletes are susceptible to concussions at any point during their intercollegiate athletic participation.¹⁹¹ Minimal efforts to protect against concussions coupled with a self-imposed duty of care to student-athletes have left the NCAA open to liability.¹⁹² Lack of concussion education at NCAA member institutions has created a potential claim of negligent failure to warn, similar to the failure to warn claims brought by former NFL players.¹⁹³ With arguably no protection from an affirmative defense, the NCAA has to look to deter future litigation as opposed to attempting to defeat it entirely.¹⁹⁴

Future claims against the NCAA are inevitable and will be unique, as they cannot be litigated like concussion suits involving professional athletes.¹⁹⁵ Unlike professional

“assumption of risk” as a situation where a plaintiff has given express consent, relieving the defendant of any obligation to protect the plaintiff, and has agreed to “take [his or her] chances as to injury from a known or possible risk,” or where a plaintiff has voluntarily entered into a relationship with defendant which involves an actual known risk and is regarded as having impliedly agreed to relieve the defendant of any responsibility). The Second Restatement of Torts also defines “contributory negligence” as a situation in which the plaintiff voluntarily undertakes a known risk that is unreasonable, and thus impliedly consented to accept the risk. *Id.* at cmt. c(4). In those instances, the plaintiff is also acting negligently and may be barred from recovering from the defendant. *Id.*

186. Hanna, *supra* note 156, at 14.

187. *Id.*

188. *Id.*

189. *Id.*

190. See *supra* Parts II.A.1 and II.B.2 for discussions of the asbestos trust funds and the Agent Orange Settlement Fund.

191. See NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 11–12 (NCAA bylaw for concussion management plans); *Concussion*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/health-and-safety/medical-conditions/concussion> (last visited Dec. 12, 2014) (acknowledging what concussions are and how they are sustained during athletically related activity).

192. See *supra* Part II.C.2 for a discussion of how the NCAA has treated concussion management and protection to date.

193. See Hanna, *supra* note 156, at 13 (stating that the NFL had knowledge of the exact dangers of concussions and intentionally kept that information from its players). See *supra* Part II.C.2 for a discussion of how the NCAA has treated concussion education and management with regard to its student-athletes.

194. See *infra* Part III.A.3 for a discussion of how affirmative defenses are unlikely to succeed against claims brought against NCAA. See *supra* Part II.A.2 for a discussion of how asbestos litigation led to bankruptcy for asbestos manufacturers and how trust funds deterred future litigation.

195. See *supra* Part II.C.3 for an overview of how professional football concussion suits are litigated.

players, student-athletes are not employees, so there is a less explicit duty of care, and are not afforded the protections of labor laws.¹⁹⁶ Further, there is no CBA to protect either the NCAA or the student-athletes with regard to player safety.¹⁹⁷ The courts have yet to decide on concussion suits brought by either student-athletes or former professional players.¹⁹⁸ Therefore, the NCAA is unable to foresee the amount of liability that will be imposed and the typical amount of recovery to which injured student-athletes will be entitled. The way to deter litigation while compensating eligible student-athletes is to establish a fund.¹⁹⁹ A concussion fund would protect the NCAA's overarching goal of protecting its athletes, allow for recovery by those injured by concussions during their intercollegiate athletic participation, reduce the amount of future settlements and litigation costs, and bide the NCAA time to limit its concussion liability.

To determine whether a concussion fund should be created, the NCAA's liability must first be examined.²⁰⁰ Though the injuries are identical in nature, it is critical to differentiate between intercollegiate athletics and the professional model, as described in Part III.A.4. The similarities between injuries that result from concussions, asbestos exposure, and Agent Orange exposure are detailed in Part III.B. This Section closes with a discussion of the need for a concussion fund that is specifically modeled after the Agent Orange Fund and the asbestos funds.²⁰¹

A. *The NCAA's Liability*

The case against the NCAA is strong, and it is possible the NCAA will be held liable for the concussion-related damage suffered by its student-athletes. At the very least, former student-athletes have the ability to make a prima facie claim for negligent conduct on the part of the NCAA.²⁰² Former student-athletes may also have a case against the NCAA for negligent failure to warn.²⁰³ As a defense, the NCAA will surely argue assumption of risk, contributory negligence, or both, yet neither argument will be successful.²⁰⁴

196. See NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 4 (describing the principles of amateurism as “participation . . . motivated primarily by education and by the physical, mental and social benefits”).

197. See Hanna, *supra* note 156, at 13 (noting that the NFL's collective bargaining agreement outlines the obligations of the NFL with regard to the issuance of warnings and the safety of players).

198. See *supra* notes 164–69 for a discussion of the latest settlement by the NFL, which, if accepted, will prevent a ruling on the merits of the negligence claims.

199. See *supra* Part II.A.1 for a discussion of asbestos litigation funds and the ways they have deterred litigation for asbestos manufacturers.

200. See *infra* Part III.A for an analysis of the NCAA's liability, the claims that are likely to be brought against the NCAA, the defenses the NCAA is likely to employ, and the likelihood of success of those claims and defenses.

201. See *infra* Part III.C for an analysis of why the NCAA should establish a concussion fund, why a concussion fund works, and what requirements the NCAA should incorporate from the Agent Orange and asbestos funds.

202. See *infra* Parts III.A.1–2 for a discussion of the negligent conduct by and resulting liability for the NCAA.

203. See Korpela, *supra* note 179, § 2[a] (providing the requirements for negligent failure to warn); *cf.* Hanna, *supra* note 156, at 13 (detailing the NFL players' failure to warn argument).

204. See *infra* Part III.A.3 for a discussion of why both affirmative defenses are unlikely to succeed

1. Negligence on the Part of the NCAA

The largest obstacle for student-athletes when making their case for negligent conduct on the part of the NCAA will be establishing a duty and showing causation.²⁰⁵ For a student-athlete that has suffered a sports-related concussion, it can be assumed that damages have already been sustained by the time the case reaches the trial court, regardless of the latency period or whether the action is brought as a class, an individual, or by a group of individuals.²⁰⁶ Due to the NCAA's lack of warning to student-athletes about the dangerous effects of concussions prior to 2010, a strong case for negligent failure to warn can also be made.²⁰⁷

a. The NCAA Has a Duty to Protect Its Student-athletes from Concussions

The basis for establishing the NCAA's duty to its student-athletes lies within the NCAA's founding principles. Since its adoption, the NCAA has sought to "protect young people from the dangerous and exploitative athletic practices of the time."²⁰⁸ In the present day, the NCAA has steadfastly stood by the reason for its creation and strives to protect its athletes both from dangerous athletic practices and, arguably, exploitative athletic practices that mirror the professional model.²⁰⁹

Although the NCAA does not employ its athletes, its duty of care is similar to that of an employer.²¹⁰ The NCAA does heavily regulate these students' activities, academic and otherwise, both on and off the playing field.²¹¹ Therefore, it can be argued that the NCAA's strict regulation of the lives of its student-athletes coupled with the NCAA's platform of student-athlete protection establishes a duty. The NCAA mandates medical treatment to be provided to athletes by athletic trainers and physicians.²¹² This undertaking in ensuring the health and well-being of student-athletes establishes an affirmative duty of care.²¹³ Foreseeability is a factor that can

against claims brought against NCAA.

205. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 26 (2010) (discussing what is required to show causation).

206. See *infra* Part III.B.2 for a discussion of asbestos, Agent Orange, and concussion-related injury and disease latency periods.

207. See *supra* Part II.C.2 for a discussion of how the NCAA has educated student-athletes on concussions to date.

208. Fenno, *supra* note 145.

209. See Mike Singer, *NCAA 'Denies Legal Duty' to Protect Student-Athletes, Court Filing Says*, CBSSPORTS.COM (Dec. 19, 2013, 10:03 AM), <http://www.cbssports.com/general/eye-on-sports/24380786/ncaa-denies-legal-duty-to-protect-student-athletes-court-filing-says> (stating that despite denying the existence of a legal duty to protect its student-athletes the NCAA admits it was "founded to protect young people from the dangerous and exploitative athletic practices of the time") (internal quotation marks omitted).

210. See Dobbs, *supra* note 142, at 50 (discussing an affirmative duty of care by way of an undertaking of treatment). See *supra* Part II.C.2 for a discussion of how the NCAA has treated concussed athletes and its undertakings of care.

211. See generally NCAA 2013–14 NCAA DIVISION I MANUAL, *supra* note 4 (laying out the NCAA's academic eligibility requirements and regulation of the time student-athletes spend on intercollegiate athletics).

212. See *id.* at 139 (detailing student-athlete medical safeguards and consent to treatment by institutional physicians and trainers).

213. See Dobbs, *supra* note 142, at 50 (discussing affirmative duties of care by undertakings).

easily be proved.²¹⁴ The NCAA cannot contest that it was and is fully aware that its student-athletes are susceptible to concussions at any point during their intercollegiate athletic participation. With such highly foreseeable injuries, the NCAA has a duty to minimize the risk of such injuries by, at the very least, educating its student-athletes.

b. The NCAA Breached Its Duty of Care to Student-athletes

There is a sufficient basis to conclude that the NCAA breached the duty of care owed to its student-athletes.²¹⁵ The breach can come in many forms and will largely be dependent on the circumstances surrounding each individual case. Given the circumstances surrounding sports-related concussions, the typical student-athlete case against the NCAA would involve at least one of three primary breaches of duty. The first breach of duty would come in the form of returning a concussed student-athlete to play before that athlete should have returned.²¹⁶ The second breach would come in the form of not removing a concussed student-athlete from play at the time the concussion was sustained.²¹⁷ The third breach would come in the form of not educating student-athletes on the risks associated with concussions.²¹⁸ One, all, or any combination of these instances would likely be enough to show that the NCAA breached its duty.

c. The NCAA's Breach Was the Cause of the Student-athlete's Injuries

The difficulty in showing but-for causation hinges upon the ease that concussions may be sustained.²¹⁹ Concussions are not confined to the limits of athletic activity and can be caused by any number of occurrences in everyday life.²²⁰ Outside of an extremely severe TBI sustained during athletic activity that can be pinpointed as the exact injury that caused the cognitive decline, diseases, or both, proving but-for causation may not be possible.²²¹ Each individual student-athlete would have to show that the only concussions or TBIs she had ever sustained were sustained during her intercollegiate career. Concussions and TBIs commonly go undetected and underreported.²²² Even if a student-athlete never played a sport outside of college and could prove through medical records that she never sustained a concussion in her life outside of intercollegiate participation, the NCAA would draw attention to the doubt that surrounds her assertion that her injuries were solely caused by her NCAA

214. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) (discussing the role of foreseeability with regard to causation and the duty owed to potential plaintiffs).

215. See *supra* Part II.C.2 for a discussion of the NCAA's treatment of concussed athletes and its lack of concussion education provided to student-athletes.

216. See *supra* Part II.C.2 for a discussion of the lack of concussion management plans throughout the NCAA and the lack of consequences and enforcement of the NCAA's concussion management plan bylaw.

217. See *supra* Part II.C.2 for a discussion of the policy to remove injured student-athletes from play after sustaining a concussion.

218. See *supra* Part II.C.2 for a discussion of concussion education mandated by the NCAA.

219. Hanna, *supra* note 156, at 14. See *supra* Part II.C.1 for a discussion of the nature of concussions and how concussions are sustained during athletically related activities.

220. See *supra* Part II.C for a discussion of TBIs and the nature of how concussions can be sustained.

221. See *supra* Part II.C for a discussion of determining the effects of a single concussion and a string of concussions.

222. See *supra* notes 135–36 and accompanying text for a discussion of the NCAA's requirement of self-reporting concussions.

participation.²²³ While medical records may not show any other head injuries, that does not discount that the student-athlete may have sustained one or multiple untreated or unreported concussions outside of athletics.²²⁴

Nevertheless, concussions sustained during athletic activity can be a substantial factor in causing a student-athlete's cognitive impairments.²²⁵ Causation would still exist provided the student-athlete could show that the injuries or diseases she is experiencing were caused, at least in substantial part, by the head trauma sustained as a student-athlete.²²⁶ The student-athlete would be able to prove this by showing that she had not sustained any obscure head trauma outside of intercollegiate athletics. The student-athlete would also have to show that her TBIs were either sustained or highly likely to have been sustained during intercollegiate athletic participation. The severity of concussions is well documented and widely known.²²⁷ For the average student-athlete, it is highly likely that she was on the receiving end of an athletically related TBI or a forceful hit at some point prior to her intercollegiate career, regardless of the sport she played.²²⁸ Yet it is likely to be sufficient under a substantial factor theory to show, for example, that the student-athlete had one concussion before college athletics but six concussions while playing an NCAA sport.²²⁹ The likelihood that the later cognitive injuries resulted from one of the six collegiate concussions is much higher than it being from the one precollege concussion.²³⁰

However, demonstrating a link between college athletics and a brain injury may be more difficult than it appears at first glance. For those student-athletes who have gone on to participate in professional or amateur sports, it may be impossible to prove their intercollegiate athletic participation was the cause of their injuries. Even for the average student-athlete who never goes on to participate in sports beyond the intercollegiate level, it can be presumed that most athletes played competitive sports prior to their intercollegiate participation. Therefore, there may be insufficient evidence to prove that a student-athlete's injuries were sustained while participating in intercollegiate athletics. Nevertheless, it is probable that properly educating student-athletes on the dangerous effects of concussions from the outset and implementing proper monitoring once a concussion is sustained would substantially reduce the

223. See *supra* notes 181–83 and accompanying text for a discussion of the NFL's argument against but-for causation with regard to other causes of concussions, including concussions unrelated to involvement in professional football.

224. See *supra* Parts II.C through II.C.2 for a discussion of the ease with which a concussion can be sustained, the NCAA's requirement of self-reporting concussions, and the NCAA's knowledge that student-athletes underreport concussions.

225. See *Summers v. Tice*, 199 P.2d 1, 3 (Cal. 1948) (discussing the substantial factor theory of liability).

226. *Id.*

227. See *supra* Part II.C for a discussion of concussion and CTE medical studies and the awareness of the dangers of concussions by both the NCAA and NFL.

228. See *Concussion*, *supra* note 191 (discussing the effort to study concussions involving more than thirty-seven thousand student-athletes).

229. See *Summers*, 199 P.2d at 3.

230. See Gavett et al., *supra* note 1, at 1 (explaining the connection between multiple athletically sustained head traumas and CTE); Omalu et al., *supra* note 1, at 131 (discussing the link between long-term impaired cognitive function and multiple head traumas).

damage done to student-athletes' brains in the future.²³¹

2. The NCAA's Negligent Failure to Warn Student-athletes of the Dangers Associated with Concussions

The NCAA was aware or should have been aware of the dangers associated with concussions prior to the addition of the concussion management bylaw to the NCAA manual in 2010.²³² This reasoning alone is arguably enough to support a claim for negligent failure to warn.²³³ The student-athletes would not be able to make the same failure to warn argument as NFL players.²³⁴ The NFL players' claim for failure to warn was more similar to a strict liability failure to warn.²³⁵ NFL players have the ability to present NFL-sanctioned concussion studies performed on NFL players to prove the NFL had actual knowledge of the dangers and failed to warn its players.²³⁶ Student-athletes will not be able to produce such NCAA-sanctioned concussion studies specific to student-athletes, as there are none available.²³⁷

However, this does not preclude the student-athletes from making a claim for negligent failure to warn.²³⁸ It is likely that the upper tiers of athletic administrations in all leagues have or should have some knowledge of the dangers associated with concussions.²³⁹ The student-athletes would be able to produce the NFL's concussion studies to show that the NCAA was at least on constructive notice of the dangers.²⁴⁰ Independent, distinguished CTE studies that occurred as early as 2005 would also aid in proving that the NCAA had constructive notice prior to the bylaw addition to the 2010 NCAA manual.²⁴¹ To show knowledge or constructive knowledge prior to the

231. See *supra* Part II.C.2 for a discussion of the lack of student-athlete concussion education, and the widespread underreporting by student-athletes of concussions.

232. NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 11–12. See *supra* Part II.C.1 for a discussion of the nationally recognized dangers associated with athletically related concussions by way of youth sport statutes and NFL player-safety provisions.

233. See Korpela, *supra* note 179, § 2[a] (defining failure to warn as a defendant's failure to act in accordance with a reasonable standard of conduct).

234. Cf. Complaint, *supra* note 100, at 2 (pleading the NFL players' failure to warn claim).

235. *Id.*

236. See generally, Gavett et al., *supra* note 1, at 2, 5–7 (discussing the results of an NFL-sanctioned study on the latency of athletically related concussions and head trauma relating to CTE, including diagnosis, risk, and protective factors).

237. While there are currently no existing NCAA athlete-specific concussion studies, the Ivy League Conference has joined with the Big Ten and Southeastern Conferences to establish a working group designed to study concussions on student-athletes. Solomon, *supra* note 98.

238. See Korpela, *supra* note 179, § 2[a] (discussing that failure to warn requires actions in accordance with a reasonable standard of conduct similar to that of negligence).

239. It can be inferred that NCAA administrators were aware of the specific dangers of concussions due to the groundbreaking, widely recognized independent study of CTE followed by the NFL-sanctioned CTE study. See generally Gavett et al., *supra* note 1 (an NFL-sanctioned CTE study); Omalu et al., *supra* note 1 (independent study revealing CTE in a deceased former NFL player). While groundbreaking, it is likely that student-athletes would not have had the same access to these studies or the journals in which those studies were published as the NCAA.

240. See Gavett et al., *supra* note 1, at 2, 5–7 (discussing the results of the NFL-sanctioned study on athletically related concussions and head trauma relating to CTE).

241. See Omalu et al., *supra* note 1, at 130–31 (groundbreaking independent study revealing CTE in the brain of a deceased former NFL player). See *supra* Part II.C.2 for a discussion of the NCAA concussion

2005 CTE studies, the student-athletes may be able to present general athletic concussion studies, state laws, and the concussion policies of other athletic leagues to lay the foundation for a negligent failure to warn claim.²⁴²

3. Affirmative Defenses: Why Assumption of Risk and Contributory Negligence Fail

To defend against any strong negligence claim regarding athletic injuries, the NCAA will undoubtedly employ the affirmative defenses of assumption of risk and contributory negligence.²⁴³ It is clear the NCAA's conduct and lack of concussion regulation support a claim for negligence.²⁴⁴ Yet the NCAA can defend these negligence claims by placing the fault on its student-athletes.²⁴⁵ Its defenses would be grounded in two arguments. The first argument is that sports, some more than others, are inherently dangerous and student-athletes voluntarily participated in collegiate athletics with knowledge of the associated risks.²⁴⁶ The second argument is that student-athletes are required to self-report their concussions, and any failure to do so was the student-athlete's fault.²⁴⁷

However, an assumption of risk defense based on the argument that sports are inherently dangerous fails. This defense fails primarily because the players must have had actual knowledge of the specific risk.²⁴⁸ For the assumption of risk defense to be successful, the NCAA would have had to provide all players with information detailing the cognitive damage that they would potentially be subject to later in life.²⁴⁹ As it stands today, the NCAA still does not have a strict, detailed bylaw with accompanying penalties that regulates concussed student-athletes, making it likely that not all institutions are compliant.²⁵⁰

Only since the enactment of the concussion management bylaw have member schools been required to annually educate their athletes on the symptoms and side effects of concussions.²⁵¹ Yet, the 2013–14 NCAA manual does not include the effect

management bylaw enacted in 2010.

242. See *supra* Part II.C.1 for a discussion of the nationally recognized dangers of athletically related concussions and head trauma.

243. See *supra* Part II.C.3 for a discussion of the defenses of assumption of risk and contributory negligence that have been raised in NFL concussion litigation.

244. See *supra* Part II.C.2 for a discussion of the lack of concussion management plans throughout the NCAA before the concussion management bylaw and for how the NCAA's concussion management bylaw acts as more of a guideline.

245. See *supra* Part II.C.3 for a discussion of the NFL's affirmative defenses.

246. See Bill McNabb, *Are Sports Torts Now Par for the Course? The Reckless Disregard Standard for Sport Participant Liability*, 19 T. MARSHALL L. REV. 723, 723–24 (1994) (noting that as athletic participation increases, the amount of athletically related injuries rapidly increases, and further inferring that there are sports that are inherently dangerous).

247. See *supra* notes 135–36 and accompanying text for a discussion the NCAA's requirement of self-reporting for concussions.

248. Hanna, *supra* note 156, at 14.

249. See *supra* Part II.C.2 for a discussion of the NCAA's lack of concussion education and enforcement.

250. Memorandum from Kathleen Brasfield, *supra* note 137, at 2.

251. NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 11–12; Memorandum from Kathleen Brasfield, *supra* note 137, at 2.

of a concussion management plan violation, making it difficult to interpret the NCAA's bylaw as a strictly enforced regulation as opposed to a mere guideline.²⁵² It can be inferred that a significant amount of student-athletes were not properly educated on the risks associated with concussions, as institutions were not required to provide a concussion management plan prior to 2010.²⁵³ This inference is based on the fact that fifty percent of schools did not require their concussed student-athletes to seek medical attention and allowed their reentry into the same game after suffering a concussion.²⁵⁴ With proper warning of the risks associated with concussions, it is highly likely that students would have sought immediate medical attention.²⁵⁵ Without knowing the extensive risks associated with concussions, a concussed player could not have knowingly assumed them by returning to play.²⁵⁶

It is plausible that the NCAA has an argument with regard to contributory negligence. By requiring student-athletes to self-report their concussion-like symptoms, the NCAA has placed the well-being of student-athletes into their own hands.²⁵⁷ The NCAA could argue that it was absolved from any liability once a student-athlete sustained a concussion and chose not to report it.²⁵⁸ Yet, by implementing a self-reporting system, the NCAA has forced student-athletes, including those fresh out of high school, to be responsible for their own well-being, even if they are unaware of their injury. It is likely that the argument for contributory negligence fails because of the inherent nature of concussions, as evidenced by the fact that concussion symptoms often go undetected.²⁵⁹ The NCAA would have to show that players were aware or should have been aware of their concussion-like symptoms and chose not to report their symptoms, which would be difficult to show on a case-by-case basis, especially where there is a lack of baseline testing.²⁶⁰

252. NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 11–12.

253. Memorandum from Kathleen Brasfield, *supra* note 137, at 2.

254. Fenno, *supra* note 138.

255. It can be inferred that if student-athletes were knowledgeable of the dangerous, long-term effects of concussions and TBIs and their immediate side effects, they would have higher rates of self-reporting. See *supra* notes 135–36 and accompanying text for the NCAA's requirement of self-reporting concussions.

256. While it may be widely known that concussions are generally dangerous, the specific dangers and long-term effects are likely not commonly known. Placing the responsibility on the student-athletes to independently search for concussion studies conducted within the medical field would be unreasonable and an undue burden on the student-athletes.

257. *Concussion Guidelines*, *supra* note 135.

258. See *supra* notes 135–36 and accompanying text for a discussion of the NCAA's self-reporting requirement and the rate at which concussions go unreported or underreported.

259. See Sander, *supra* note 131 (discussing how concussion symptoms can go undetected in female athletes).

260. If concussion symptoms are not detected by the athlete, the NCAA cannot expect them to report a concussion. Females are biologically more vulnerable to become concussed, but that does not make them biologically more likely to recognize that they are concussed and identify concussion symptoms. Sander, *supra* note 131. Baseline testing would provide a starting point to help monitor any damage done by concussions or TBIs throughout the playing season. Without baseline testing, proving that an athlete sustained a concussion or TBIs that specific season and failed to report it becomes increasingly difficult. See Fenno, *supra* note 138 (discussing the loose policy of concussion management plans from NCAA member schools).

4. Differentiating Between Intercollegiate Athletics and Professional Football

The existence of a CBA and the status as an employee is what separates athletes at the intercollegiate and professional level with regard to concussion litigation.²⁶¹ Student-athletes are amateur athletes that are not permitted to receive monetary compensation for their athletic endeavors.²⁶² NFL players are employees of their respective teams and are governed by the LMRA, their employment contracts, and the CBAs negotiated by their players' union, which the NFL has put forth to support its preemption defense.²⁶³

NFL players and their employers are bound by labor laws.²⁶⁴ The NFL has relied on the LMRA to argue that concussion-related lawsuits by former players are preempted.²⁶⁵ The LMRA works in conjunction with the NFL's CBAs.²⁶⁶ The LMRA preempts employment-related lawsuits that depend upon or are covered by a CBA.²⁶⁷ As such, the NFL's preemption defense is inapplicable to claims against the NCAA. Student-athletes' participation is voluntary. They are not employees. Therefore, student-athletes are not a class of individuals covered by the provisions of the LMRA.²⁶⁸

The ability to have their players' union negotiate a CBA is a benefit afforded to professionals that is unavailable to NCAA student-athletes.²⁶⁹ Having a CBA in place would allow for student-athletes to bargain for certain protections related to medical care and player safety.²⁷⁰ The nature of student-athletes' participation is voluntary, making them unable to unionize and collectively bargain for protections. Since student-athletes are not employed by the NCAA or their respective institutions, they are not eligible for any benefit plans, such as the NFL Player Benefits Plan, for the injuries they sustain during athletically related activity.²⁷¹

261. See *supra* Part II.C.3 for a discussion of the NFL's CBA and the relevant LMRA provisions.

262. See NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 59–63 (providing the NCAA's requirements for student-athletes to retain amateur status, including the provision against directly or indirectly receiving payment for athletic skill).

263. See *supra* Part II.C.3 for a discussion of the LMRA protections, the NFL's CBA, and the NFL's role as employer.

264. Hanna, *supra* note 156, at 13.

265. See Memorandum in Support of the Nat'l Football League's Motion to Dismiss the Amended Complaint, *supra* note 96, at 15–30 (providing an in-depth argument by the NFL for preemption by the LMRA).

266. *Id.*

267. See *id.* at 15 (citing 29 U.S.C. § 185(a)) (arguing preemption under the LMRA, which preempts claims that are "substantially dependent upon or inextricably intertwined with the terms of, or arise under, a collective bargaining agreement").

268. See 29 U.S.C. § 185(a) (providing that protections under the LMRA are afforded only to employees with regard to suits against employers for contractual violations).

269. See NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 57 (providing the NCAA's policy for only allowing amateur athletes, who cannot receive compensation for their athletic skills or participation, to participate in intercollegiate athletics).

270. Cf. Memorandum in Support of the Nat'l Football League's Motion to Dismiss the Amended Complaint, *supra* note 96, at 6–12 (discussing player safety as negotiated in the NFL's CBA).

271. See Letter to Robert P. Fitzsimmons, *supra* note 157 (regarding a retired NFL player's request for disability compensation); Letter to Confidential Recipient, *supra* note 157 (calculating payment for a retired NFL player's "total and permanent degenerative" benefit).

The courts have yet to decide upon concussion suits brought by either student-athletes or former professional players.²⁷² There are differences between the two plaintiff classes that will create large discrepancies between the ways the cases will be litigated. Provided the NFL's latest concussion-related settlement does not deter future concussion lawsuits, the courts will ultimately have to decide the weight afforded to CBAs and the LMRA.²⁷³ In the event the courts find the NFL strictly liable, provided the NFL litigation precedes NCAA litigation, it is probable that courts deciding on the NCAA's liability would take that into account.

B. Recognizing the Parallels Between the Injuries and Subsequent Claims that Result from Asbestos Exposure, Agent Orange Exposure, and Sports-Related Concussions

The parallel between the effects of asbestos-related and Agent Orange-related injuries and sports-related concussions can be drawn primarily along the lines of severity of the injuries and the length of the latency periods. The injuries in all cases are severe and many are life-threatening.²⁷⁴ The injuries associated with asbestos, Agent Orange, and concussions are all accompanied with latency periods that extend well beyond the point of initial injury or exposure, making the long-term injuries less predictable over a period of years.²⁷⁵

1. Severity

The injuries sustained in all instances of concussions, exposure to asbestos, and exposure to Agent Orange vary greatly but are highly dangerous to those who have sustained them.²⁷⁶ The possible injuries occur internally and are often difficult to detect before the injury or disease manifests.²⁷⁷ Although all are often difficult to detect, concussion-related diseases differ in that they cannot be as readily diagnosed or treated as diseases such as mesothelioma, diabetes, or lung cancer.²⁷⁸

Brain injuries are inherently severe and can be easily overlooked, as can be inferred by the lack of self-reporting done at all levels of athletic activity.²⁷⁹ The

272. Belson, *supra* note 3.

273. The NFL's arguments for preemption by the CBA and LMRA will require the courts to decide whether the players' claims are preempted in whole, in part, or not at all by either the CBA, LMRA, or both. Memorandum in Support of the Nat'l Football League's Motion to Dismiss the Amended Complaint, *supra* note 96, at 15–30.

274. See *supra* Parts II.A.1, II.B.1, and II.C.1 for discussions of the side effects of asbestos exposure, Agent Orange exposure, and concussions and TBIs, respectively.

275. See *supra* Parts II.A.1, II.B.1, and II.C.1 for discussions of the long-term effects of asbestos exposure, Agent Orange exposure, and concussions and TBIs, respectively, and how those effects may lie dormant in an individual for decades prior to manifestation.

276. See *supra* Parts II.A.1, II.B.1, and II.C.1 for discussions of the injuries and diseases that can result from asbestos exposure, Agent Orange exposure, and concussions and TBIs, respectively, including the varying parts of the body that are effected and the wide ranges of potential injuries.

277. See Parts II.A.1, II.B.1, and II.C.1 for discussions on the manifestation of the diseases that are caused by asbestos exposure, Agent Orange exposure, and concussions and TBIs, respectively.

278. See *Chronic Traumatic Encephalopathy*, *supra* note 118 (noting that CTE can only be diagnosed through a postmortem examination).

279. See Hanna, *supra* note 156, at 14 (citing how concussions are underreported at the professional

majority of states have enacted laws with regard to concussions in an effort to safeguard the brains of children who participate in athletics.²⁸⁰ Laws regulate asbestos exposure, Agent Orange exposure, and youth sport-related concussions, but fall short when it comes to concussions suffered at the intercollegiate and professional level.²⁸¹ It is as if the law presumes that concussions become a nonissue after a player reaches the age of majority. With the eyes of the world on the surge in CTE-spurred suicides by former NFL players, placing diseases such as CTE, Alzheimer's, and dementia on par with mesothelioma, diabetes, and ischemic heart disease is not unreasonable.

Further, there is a strong parallel between asbestos exposure, Agent Orange exposure, and concussions with regard to the uncertainty that surrounds the potential injuries. Sustaining one or even repeated TBIs does not guarantee that serious, irreversible neurological conditions will manifest later in life.²⁸² General exposure to asbestos or Agent Orange is also not a guarantee of the manifestation of related diseases later in life.²⁸³ However, major differences lie in the way those diseases are diagnosed and treated. When an individual exposed to asbestos or Agent Orange begins to show signs of any disease, the disease can be detected, diagnosed, and treated with proper medical attention.²⁸⁴ Conversely, with concussions, diseases such as CTE are impossible to diagnose prior to a postmortem examination of the brain for the buildup of tau.²⁸⁵ Partnered with the deterioration of the brain, the uncertainty of long-term concussion-related diseases elevates the severity of those diseases to that of the court- and government-recognized diseases associated with asbestos and Agent Orange exposure.²⁸⁶

2. Latency

Another trait shared by asbestos exposure, Agent Orange exposure, and concussions is the period of time that it takes for the long-term effects of the injury to manifest.²⁸⁷ These latency periods vary by individual and can only be estimated,

level); *Concussion Guidelines*, *supra* note 135 (citing how concussions are underreported at the intercollegiate level).

280. *Traumatic Brain Injury Legislation*, *supra* note 111.

281. See, e.g., H.R. 1521, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (detailing the Arizona state law regulating youth sport-related concussions); H.R. 1824, 61st Leg., Reg. Sess. (Wash. 2009) (detailing Washington's Zackery Lystedt Law); Occupational Safety & Health Admin., *Regulatory History*, U.S. DEP'T OF LABOR, https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=PREAMBLES&p_id=784 (last visited Dec. 12, 2014) (noting that OSHA first regulated asbestos in 1971).

282. Kelly & Rosenberg, *supra* note 95, at 579; see Gavett et al., *supra* note 1, at 5–6 (discussing the latency period of concussions and the possibility that side effects may manifest later in life).

283. See *supra* Parts II.A and II.B.1 for discussions of asbestos exposure and Agent Orange exposure.

284. See O'Reilly et al., *supra* note 11, 683, 684 tbl. 1 (describing treatment methods for different asbestos-related diseases); *Agent Orange Registry Health Exam for Veterans*, *supra* note 63 (providing veterans with information about health exams to detect problems related to Agent Orange exposure).

285. *Chronic Traumatic Encephalopathy*, *supra* note 118 (describing CTE as a disease that can only be diagnosed postmortem).

286. See CARROLL ET AL., 2002, *supra* note 12, at 1 (stating that asbestos manufacturers were strictly liable to exposed workers and that certain diseases were presumed to be caused by asbestos exposure); *Presumptions Available to Veterans with Agent Orange Exposure*, *supra* note 59, at 3 (2012) (providing the enumerated list of diseases and conditions presumed to have been caused by Agent Orange exposure).

287. CARROLL ET AL., 2005, *supra* note 13, at 24; INST. OF MED., *supra* note 89, at 15; *Chronic*

leaving many in a constant state of fear as to when their latency period will expire and their health will begin to deteriorate.²⁸⁸ The extensive latency periods support a unique parallel between these injuries, which makes litigation difficult.²⁸⁹

A negligence claim cannot be asserted without a showing of damages.²⁹⁰ With decades-long latency periods, litigation would not be able to commence until long after the initial exposure or sustained injury.²⁹¹ Currently, an individual only needs to show exposure to asbestos or Agent Orange in order to qualify for recovery from the established funds.²⁹² With no laws or funding programs in place for intercollegiate concussions, it is difficult for former athletes to prove their concussion-related injuries are the result of their prior participation in college sports.

For example, a man exposed to Agent Orange forty years prior is able to make a case and recover for his Parkinson's disease. Yet a man who sustained multiple TBIs during his formative collegiate years fifteen years prior is unable to make the case and recover for his Parkinson's disease—both with extensive latency periods and the same disease, yet have vastly differing and life-altering results.

C. *Why the NCAA Should Follow the Lead of the Asbestos Trust Funds and the Agent Orange Settlement Fund*

The establishment of specially designed funds to compensate those injured from exposure to harsh and hazardous chemicals has paved the way for future mass tort cases. The potential claimant pool in asbestos and Agent Orange exposure cases was exceedingly large and continues to grow as time goes on and diseases begin to manifest.²⁹³ The pool of potential claimants against the NCAA is vast and rapidly expanding, as student-athletes continue to graduate and are replaced by new student-athletes. It is possible that the courts could reach deep into the history of the NCAA to find a beginning date for negligence based upon past concussion research and the role the NCAA has played in managing players.²⁹⁴ Therefore, the NCAA should set up a fund similar to the asbestos trust funds and the Agent Orange Settlement Fund to deter future litigation that would be incredibly costly for the NCAA.

Traumatic Encephalopathy, *supra* note 118.

288. See Gavett et al., *supra* note 1, at 5–6 (discussing latency periods with concussions); CARROLL ET AL., 2005, *supra* note 13, at 23–25 (discussing latency periods with asbestos exposure); INST. OF MED. OF THE NAT'L ACADS., *supra* note 89, at 15 (discussing latency periods with Agent Orange exposure).

289. CARROLL ET AL., 2005, *supra* note 13, at 23–25.

290. Thomas Phillip Boggess, *Sports Injury—Participant's Recovery from Another Participant for Negligent or Reckless Act*, 111 AM. JUR. 3D *Proof of Facts* 129 § 10 (2009) (discussing the elements required for a prima facie case of negligence for general sports injuries).

291. *Cf. In re Johns-Manville Corp.*, 36 B.R. 743, 746 (Bankr. S.D.N.Y. 1984) (discussing the need to protect future claimants' interests from being discharged in bankruptcy).

292. See *supra* Part II.A.2 for a discussion of asbestos trust funds and Part II.B.3 for a discussion of the current requirements for receiving compensation through the Agent Orange Settlement Fund.

293. See *In re Johns-Manville Corp.*, 36 B.R. at 745–47 (discussing future claimants and how they may bring claims once their diseases begin to manifest); *Military Health History Pocket Card for Clinicians*, *supra* note 56 (noting that more than three million troops were deployed in Southeast Asia and were at risk of Agent Orange exposure between August 4, 1964 and January 27, 1973).

294. *Cf. Breslow*, *supra* note 158 (stating how settlement allowed the NFL to avoid extensive discovery into the medical histories of retired players dating back to the 1940s).

1. Requirements the NCAA Should Draw from the Asbestos Trust Funds and the Agent Orange Settlement Fund

The NCAA should take the approach of the asbestos manufacturers and recognize that concussion litigation and settlements will come at a steep cost.²⁹⁵ Asbestos manufacturers were strictly liable and shouldered the liability all the way into bankruptcy.²⁹⁶ While this in no way suggests the NCAA will go bankrupt as a result of concussion settlements, the NCAA may not have the option of dispersing liability among its member institutions or its various athletic conferences.²⁹⁷ The member institutions and various athletic conferences are governed by the NCAA as a whole.²⁹⁸ As the NCAA will likely have to shoulder the liability on its own, it should take the initiative and create a compensatory fund on its own accord.

Similar to the asbestos funds, the NCAA should appoint a third party to manage the fund.²⁹⁹ This prevents the NCAA from reallocating the funds or being accused of mismanaging the funds. As seen in the asbestos cases, paying settlements out of a fund incentivizes potential litigants to forego litigation in favor of an alternative that is less costly and time-consuming.³⁰⁰ It provides compensation to the injured at a lower overhead cost than would be incurred during litigation.³⁰¹ With the increasing and highly publicized concussion claims against the NFL, it is only a matter of time before student-athletes suffering the repercussions of concussions follow suit.³⁰² Having an established fund readily available, as the asbestos manufacturers do, allows for settlements to be made out of the public eye and will provide a system of compensation for student-athletes.

The NCAA should adopt the requirements of the Agent Orange Settlement Fund to determine which student-athletes are eligible for compensation. This first begins with a process that requires student-athletes to apply for compensation and submit medical evidence of their disability.³⁰³ As concussion injuries tend to be cognitively debilitating, the NCAA should set up a disability ranking system.³⁰⁴ With an exception

295. *Cf. Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 639 (2d Cir. 1988) (stating that the high number of lawsuits filed resulted in high litigation costs and judgments against the asbestos manufacturers, which ultimately led numerous manufacturers to file for bankruptcy).

296. CARROLL ET AL., 2002, *supra* note 12, at 2.

297. See *supra* Part III.A.1.a for an analysis of the NCAA's duty to protect student-athletes from concussions.

298. NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 1.

299. *Cf. In re Johns-Manville Corp.* 52 B.R. 940, 943 (Bankr. S.D.N.Y. 1985) (requiring outside representatives to represent those with interests in the trusts).

300. CARROLL ET AL., 2005, *supra* note 13, at xxiii (noting that many saw trusts "as a model for aggregating claims and capping corporate liability exposure even for those corporations that were not at the time facing bankruptcy themselves").

301. *Id.* at xxxii.

302. *Cf. Plaintiff's Amended Master Administrative Long-Form Complaint*, *supra* note 2 at 49–72 (detailing the claims brought against the NFL); Breslow, *supra* note 158 (providing an example of the publicity surrounding concussion claims against the NFL).

303. *Cf. Agent Orange Settlement Fund*, *supra* note 7 (detailing the requirements to receive compensation from the Agent Orange Settlement Fund, before the Fund was closed by the courts once its assets had been fully distributed).

304. See *id.* (explaining that the VA compensates veteran's by rating their service-connected disabilities based on the severity of the disability).

for any special circumstances, cognizable claims would range from 10% to 100% disabled and student-athletes would be compensated according to the disability percentage.³⁰⁵

However, unlike the VA's compensation system for Agent Orange-related diseases, the NCAA should not use factors such as a student-athlete's family or dependents in calculating compensation.³⁰⁶ Three differences underlie this assertion: (1) the NCAA has not been found strictly liable for student-athletes' concussion-related injuries; (2) there are no established presumptions for diseases or injuries as with Agent Orange-related diseases; and (3) there is no known, concrete evidence to support an assertion that the NCAA *intentionally* concealed the dangers of concussions to the detriment of its student-athletes.³⁰⁷ In order for a student-athlete to be considered for compensation, the athlete must be able to show that his or her disease or injury is the type that can be caused by TBIs or concussions.

2. Why Establishing a Fund Works in the Long Run

A hybrid of the asbestos trust funds and the Agent Orange Settlement Fund works in favor of the NCAA going forward because it deters litigation.³⁰⁸ Litigation could result in a series of large settlement claims.³⁰⁹ The publicity that would surround concussion litigation against the NCAA would likely attract more claimants, leading to more settlements. Without taking proactive steps to deter litigation, the NCAA could be facing a steep financial burden.³¹⁰

The proposed fund would target only those who have been severely injured. It is possible that those with minimal side effects would bring claims or attempt to include themselves in a class action suit. If the judgment were in favor of the class or the parties decided to settle, minimally injured individuals would be entitled to the same compensation as those that have been severely injured. Requiring an evaluation of each individual case and designating a disability percentage would ensure the minimally injured receive appropriate compensation.³¹¹

The NCAA must be proactive in its self-assumed duty of protecting its student-athletes. In the time that the fund delays any future litigation, the NCAA should take steps to reduce liability going forward. In doing so, the NCAA must alter the

305. See *Compensation: Veterans Compensation Benefits Rate Tables – Effective 12/1/13*, *supra* note 92 (noting the VA ranks veterans by percent disabled from 10% to 100% and compensates them accordingly).

306. *Contra id.* (noting the VA considers the spouse and number of dependents when determining the compensation for veterans).

307. See *supra* Part II.C.2 for a discussion of how the NCAA has treated concussion education and management with regard to its student-athletes. *Cf.* Hanna, *supra* note 156, at 13 (stating that the NFL had knowledge of the exact dangers of concussions and intentionally kept that information from its players).

308. See *supra* Part II.A.1 for a discussion of how trusts created in bankruptcy reduced the financial burden of litigation on asbestos manufacturers while still compensating claimants.

309. CARROLL ET AL., 2002, *supra* note 12, at 6–7 (noting that asbestos manufacturers were forced into bankruptcy because of litigation costs).

310. *Id.*

311. *Cf.* *Compensation: Veterans Exposed to Agent Orange*, *supra* note 95 (detailing the requirements to receive compensation from the Agent Orange Fund); *Compensation: Veterans Compensation Benefits Rate Tables – Effective 12/1/13*, *supra* note 92 (providing the rates at which exposed veterans and their dependents are compensated).

concussion management bylaw in the NCAA manual. The bylaw in its current form functions as a guideline.³¹² This bylaw must be amended into a strict regulation with accompanied sanctions for member institutions in violation. This would ensure that member schools are thoroughly educating their student-athletes. Definitive proof of concussion education would prevent the student-athletes from claiming the NCAA failed to warn of the dangers of concussions.³¹³

Finally, establishing a fund further acknowledges the severity of concussions in the NCAA. Enacting strict procedures for obtaining compensation from the fund could have a positive impact on concussion reporting. If student-athletes see the NCAA's heightened precautions for concussions and see that compensation is available but strictly regulated, they may be more cognizant to self-report. The NCAA also has the opportunity to promote self-reporting concussions through the fund. Eligibility for compensation could be made easier for those athletes who had a history of self-reporting their concussions or concussion-like symptoms than athletes who failed to report them.

At the end of the day, the NCAA is a nonprofit entity with a goal of protecting its amateur student-athletes from exploitative and dangerous athletic practices.³¹⁴ Establishing a fund protects the interests of the NCAA in deterring litigation, reducing settlement payments, and promoting self-reporting. The establishment of a fund also protects the interests of student-athletes by promoting self-reporting and providing compensation in the event of injury or disability.

IV. CONCLUSION

Recent concussion litigation against the NFL suggests that concussion litigation against the NCAA is on the horizon. Scholarship in recent years has revealed the severity of concussions both in the short and long term. The ease with which concussions are sustained coupled with life-altering and deadly side effects makes for serious, broad liability for the NCAA. Indeed, there is a nationwide lack of protection after an athlete has reached the age of majority. While professional athletes may receive protections from their CBAs and federal labor laws, the NCAA's student-athletes remain unprotected.

The severity and latency periods involved liken concussions to Agent Orange and asbestos exposure injuries. The NCAA should take proactive steps to deter concussion litigation by looking at how these similarly situated mass torts have been litigated in the past. The first step that must be taken in reducing liability is to amend the current concussion bylaw. Although it will not reduce liability, the establishment of a fund will deter future litigation against the NCAA. Providing an outlet for recovery external from the courts allows for the NCAA to deter litigation without conceding liability. To

312. NCAA 2013–14 DIVISION I MANUAL, *supra* note 4, at 11–12. See *supra* notes 141–44 and accompanying text for a discussion of the effect of the bylaw as a guideline and the lack of consequences for violating the provision.

313. *Cf.* Complaint, *supra* note 100, at 2–7 (describing the NFL players' action for failure to warn); Hanna, *supra* note 156, at 13 (discussing the claim for failure to warn against the NFL).

314. NAT'L COLLEGIATE ATHLETIC ASS'N <http://www.ncaa.org/health-and-safety> (last visited Dec. 12, 2014); *The NCAA Budget: Where the Money Goes*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/health-and-safety/ncaa-budget-where-money-goes> (last updated October 15, 2013).

operate within the NCAA's goal of protecting its athletes from dangerous and exploitative practices, and to protect itself from a whirlwind of costly and potentially crippling litigation, a fund modeled after the asbestos and Agent Orange funds must be established.