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Concussion suit looking for a class

Federal suit says NCAA failed to protect athletes

BY ROY STROM

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A lawsuit alleging the NCAA failed to protect athletes from concussions has entered the legal version of the red zone as lawyers filed a motion in Chicago's federal court to allow thousands of former players to join the suit as a class action.

If successful, the attempt to certify as a class any NCAA athlete in a "contact sport" who played after 2004 would become one of the more high-stakes head-trauma lawsuits.

It comes at a time when the impact of such suits has been visible from Chicago's high schools — which are considering a ban on hitting in football practices in the summer weeks next year — to a Pennsylvania federal court that is handling a 4,000-plaintiff lawsuit against the NFL.

The lawsuit against the NCAA, originally filed in September 2011 on behalf of former Eastern Illinois defensive back Adrian Arrington, currently lists four former athletes as plaintiffs. Two of the athletes played college football, one played women's soccer and another played men's hockey.

The class-action motion no doubt will be contested by the NCAA, but Joseph J. Siprut, who filed the original complaint and Friday's motion in the Dirksen Federal Courthouse, said if the lawsuit is to succeed in its goal to "change college sports," it is important to involve potentially hundreds of thousands of plaintiffs.

"If changes aren't made to shore up this problem, more and more parents will continue to not let their kids play sports," said Siprut, owner of Siprut P.C.

"If that happens, and the talent well dries up, that's how a sport dies."

NCAA spokeswoman Stacey Osburn said the NCAA does not believe the legal action is appropriate, adding that the organization has changed rules and equipment requirements to help prevent head injuries.

"Student-athlete safety is one of the NCAA's foundational principles," Osburn said. "The NCAA has been at the forefront of safety issues throughout its existence."

Seeking class certification represents a different, possibly more difficult tactic from the multidistrict litigation — or "mass action" — the NFL is now defending itself against in the U.S. District Court for the Eastern District of Pennsylvania.

In the mass action, personal-injury lawsuits alleging the league failed to protect its players from concussions have been consolidated in front of one judge to conduct

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proceedings such as discovery and mediation. Each case will ultimately be dealt with individually.

Whether or not the NCAA lawsuit will win its attempt to certify a class "is the critical question," said ESPN Legal Analyst Lester E. Munson Jr.

"That's going to be the Arrington lawyers' biggest challenge," Munson said.

That is in part because of the mass-action strategy employed by the lawyers suing the NFL, he said.

"When Arrington argues to the court here that a class action is the only way to handle this number of claims involving a substantial number of athletes, it's very easy for the NCAA to say, 'Wait a minute. (Look) to Philadelphia. There's 4,000 individual cases pending and these college players can do the same thing,'" Munson said.

The Arrington lawsuit seeks to certify as a class male and female NCAA athletes who from 2004 on played football, wrestling, basketball, field hockey, ice hockey, lacrosse or soccer.

Munson said the NCAA could argue that a class of athletes from such a multitude of sports should not be granted class certification. It could be argued they do not meet the "commonality" or "typicality" standard for a class to be certified.

"How do you have typicality if you have different sports?" Munson said.

Siprut acknowledged that winning a class certification is not an easy task, calling it "a very tough row to hoe in modern civil procedure."

But he said there is no reason to limit the case to football or any other sport.

"The overarching theme is the (NCAA's) failure to implement return-to-play guidelines and to deal with the concussion problem in a meaningful way," he said.

Friday's motion says NCAA athletes suffered roughly 30,000 concussions from 2005 to 2009, a time period in which the NCAA researched the amount of concussions in its sports but largely outsourced management protocol and treatment methods to its member schools.

Meanwhile, the suit says the NCAA knew schools were providing lax oversight.

Baseline testing was only conducted at 40 percent of schools; less than 50 percent required a concussed athlete to see a doctor; and half of NCAA member schools allowed a concussed athlete to return to play in the same game, the suit says.

By 2009, the NFL and many high schools had employed return-to-play guidelines. The NCAA had not and voted down a plan to bind its member institutions to one the next year.

The motion details an internal discussion between NCAA exec-



Joseph J. Siprut

utives deciding whether or not to implement a return-to-play policy.

It concludes with an assistant director of playing rules admin-

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istration, Teresa Smith, asking: "Are the refs more at risk if we don't provide the educational piece on concussions or if we do provide it? And, what about the NCAA? Would we be protecting/helping the organization by not providing the information?"

Siprut said he expects the NCAA to counter his motion, which at this time does not seek damages. A damages class would be certified later, he said.

"If we are successful with this class-certification phase, that wouldn't necessarily mean the NCAA has to start writing checks," Siprut said.

"If we get the class certified and we're successful on the merits, it would change college sports."

Meanwhile, concern over concussions has a chance to change Illinois high school football starting next year.

In May, the Illinois High School Association said its health and football committees supported adopting a rule for next year that would ban live tackling during the summer practice period.

That stance follows pressure from Rep. Carol Sente, D-Vernon Hills, who in February sponsored a bill that would limit tackling to one day a week.

The bill was defeated in late March.

The Associated Press contributed to this report.

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