

\$75M deal ends NCAA concussion litigation

By Roy Strom
LAW BULLETIN STAFF WRITER

The NCAA has agreed to pay a total of \$75 million and cover costs to diagnose concussion-related illnesses in a settlement with current and former athletes filed today in Chicago's federal court.

The collegiate body will also implement a new "return-to-play" policy for concussed athletes.

Pending a judge's approval, the settlement with athletes who sued the NCAA over concussion-related medical claims will create a \$70 million "medical monitoring fund."

The fund is intended to diagnose post-concussion syndrome or related problems, such as chronic traumatic encephalopathy (CTE), but it does not cover the cost of treating any head injuries that are discovered. Athletes could later sue the NCAA for personal-injury claims.

The fund will provide "comprehensive, diagnostic relief" for past and present NCAA athletes, regardless of what sport they played or for how long, the settlement says.

The NCAA will also donate \$5 million to "research the prevention, treatment and/or effects of concussions."

Among other provisions, the return-to-play policy includes baseline testing of all athletes before each season and prohibiting athletes diagnosed with a concussion from returning to competition or practice on the same day — and later only after a physician's clearance.

The settlement would end a lawsuit filed in Chicago's federal court in 2011 that accused the NCAA of breaching its duty to protect its players by not adopting a formal policy to spot and treat concussions.

Former Eastern Illinois University football player Adrian Arrington was the first plaintiff to file a suit. Current and former athletes who played hockey, soccer and football at universities across the country later joined him.

"This really is an historic, ground-breaking settlement. It's going to change college sports forever," said Joseph J. Siprut, owner of Siprut P.C. and co-lead counsel for the plaintiff class.

"We're basically confronting this issue in a way that's just leaps and bounds better than anything that has been attempted previously."

Brian Hainline, the NCAA's chief medical officer, said the organization has always been committed to athlete safety, calling it a "bedrock principle."

"This agreement's proactive measures will ensure student-athletes have access to high-quality medical care by physicians with experience in the diagnosis, treatment and management of concussions," Hainline said in a statement.

The case draws some parallels but is also distinct from a concussion lawsuit that the NFL remains in the process of settling for a potentially unlimited amount of cash payments.

While both lawsuits address concussions, the NCAA and NFL plaintiffs took different legal avenues.

More than 4,000 former NFL players filed individual lawsuits that were consolidated into a "mass action" claim that is being settled to fund treatment of concussion-related health problems.

The NCAA plaintiffs, meanwhile, used a class-action strategy, initially seeking to provide relief for all male and female NCAA athletes who from 2004 to the present played football, wrestling, basketball, field hockey, ice hockey, lacrosse or soccer.

Shortly after the plaintiffs sought to certify that class in July 2013, they entered mediation discussions with the NCAA. Those meetings took place from November to May and were mostly brokered by retired federal judge Layn Phillips, who was the mediator for the NFL's concussion lawsuit.

The settlement comes at a time when the NCAA faces antitrust claims, unionization efforts and the possibility of legislation from Congress — all of which could bend or shatter its amateurism model.

"They're happy to settle the concussion case, but for example, they will fight any possibility of payment to the athletes in the form of salary or anything else," said Lester E. Munson Jr., a senior writer and legal analyst for ESPN.

"They've drawn the line there."

Under terms of the NCAA agreement, athletes will have access to up to two medical evaluations over a 50-year period for post-concussion syndrome or related problems so long as their symptoms are deemed serious enough after a self-reporting process.

The settlement lays out a "medical monitoring program" that consists of two phases. The first is "designed to assess self-reported symptoms and cognitive, mood, behavioral, and motor problems that may be associated with persistent post-concussion syndrome and/or mid-to late-life onset problems," such as CTE and related disorders.

The second phase provides in-person medical evaluations for those who are eligible as a result of the self-reported responses. A committee of medical professionals will be created to judge the seriousness of self-reported symptoms.

The in-person evaluations could include neurological examinations, neuropsychological examinations, an evaluation of mood, behavior and movement or other testing as determined by a neurologist. A physician will then evaluate the results.

Athletes diagnosed with an illness such as CTE will be free to file personal-injury claims, according to the settlement.

Those may be difficult cases to bring, however, because of the cost involved in proving the severity of brain trauma or its direct cause, said Timothy L. Epstein, chair of the sports law practice group at SmithAmundsen LLC.

"Because of the nature of concussions, unless you have a prove-up of (brain trauma that is) severe, then it's going to be difficult to get plaintiff's counsel interested in taking on individual cases because the cost of discovery can be significant," Epstein said.

"The difficult thing for damage recovery on a personal-injury suit for these cases is ... proof."

That difficulty may be further complicated by the fact that concussions were not routinely tracked by the NCAA, according to the settlement.

The medical committee will include Dr. Robert Cantu, an expert on concussions from Boston University School of Medicine, whose advice was vital in creating the return-to-play policy.

That policy includes a concussion tracking element, which is not currently mandated by the NCAA, according to the settlement. In giving his opinion on that in the settlement agreement, Cantu said "without complete data, injury prevention initiatives have not gone far enough and have not had sufficient support within the NCAA as an organization."

The NCAA will also provide concussion education to athletes, coaches and trainers before each season. And medical personnel will be present at each "contact sport," including football, lacrosse, wrestling, ice hockey, field hockey, soccer and basketball.

The \$70 million figure could include as much as \$15 million in attorney fees and up to \$750,000 in out-of-pocket expenses. NCAA insurers are expected to pay at least part of the settlement, NCAA Chief Legal Officer Donald Remy said on the association's website.

Other attorneys listed in the settlement as counsel for the plaintiff class are Seattle-based Steve W. Berman of Hagens, Berman, Sobol, Shapiro LLP; Richard S. Lewis, a Hausfeld LLP partner in Washington, D.C.; Charles S. Zimmerman, a Minneapolis partner at Zimmerman, Reed; James R. Dugan II, a New Orleans attorney at The Dugan Law Firm LLC; and Mark Zamora of The Orlando Law Firm P.C. in Decatur, Ga.

In addition, Philip Harnett Corboy Jr. and William T. Gibbs of Corboy & Demetrio represent several class representatives.

If the fund runs dry before the 50-year period ends, the plaintiffs may pursue individual claims for medical monitoring, or their lawyers can request the NCAA replenish the fund. If the NCAA chooses not to add any money, "the statute of limitations will begin to run on tolled claims," the settlement says.

The settlement was filed in the courtroom of U.S. District Judge John Z. Lee.

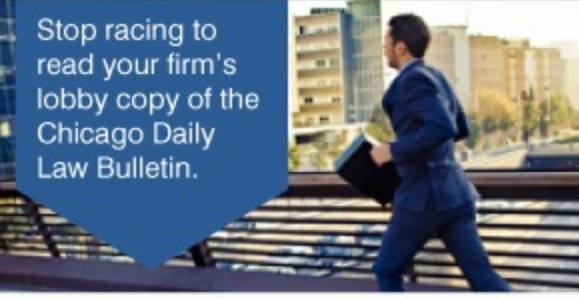


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