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## The NCAA's Special Relationship with Student-Athletes as a Theory of Liability for Concussion-Related Injuries

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## NOTE

### THE NCAA'S SPECIAL RELATIONSHIP WITH STUDENT-ATHLETES AS A THEORY OF LIABILITY FOR CONCUSSION-RELATED INJURIES

Tezira Abe\*

*The National Collegiate Athletic Association (NCAA) is the primary governing body of college athletics. Although the NCAA proclaims to protect student-athletes, an examination of its practices suggests that the organization has a troubling history of ignoring the harmful effects of concussions. Over one hundred years after the NCAA was established, and seventy years after the NCAA itself knew of the potential effects of concussions, the organization has done little to reduce the occurrence of concussions or to alleviate the potential effects that stem from repeated hits to the head. This Note argues for recognizing a special relationship between the NCAA and student-athletes that would allow these athletes to hold the NCAA liable for concussion-related injuries.*

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#### INTRODUCTION

The National Collegiate Athletic Association (NCAA) recently settled a negligence suit brought by the widow of former University of Texas football player Gregory Ploetz, who was posthumously diagnosed with Chronic Traumatic Encephalopathy (CTE).<sup>1</sup> Mr. Ploetz was a student-athlete at the University of Texas, where he played football from 1968 to 1971.<sup>2</sup> Throughout his collegiate career, Mr. Ploetz suffered numerous concussions and

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1. Daniel Siegal, *NCAA Settles Suit over Football Player's CTE Death Mid-Trial*, LAW360 (June 15, 2018, 3:31 PM), <https://www.law360.com/articles/1054387/ncaa-settles-suit-over-football-player-s-cte-death-mid-trial> (on file with the *Michigan Law Review*) (noting that Ms. Hardin-Ploetz's negligence suit against the NCAA was a big step forward for plaintiffs, as it was the "first-ever trial about the NCAA's responsibility for a football player's CTE"); see also *In re NCAA*, 543 S.W.3d 487 (Tex. App. 2018). After the NCAA settled with Ms. Hardin-Ploetz, more than 200 former college football players filed lawsuits alleging that "the NCAA was negligent in failing to take steps to protect college football players from the long-term brain damage caused by hits to the head while playing football." Zachary Zaggar, *NCAA Will Likely Face over 200 New Concussion Suits*, LAW360 (Jan. 25, 2019, 10:18 PM), <https://www.law360.com/sports/articles/1122373/ncaa-will-likely-face-over-200-new-concussion-suits> [<https://perma.cc/6LZG-GPG5>]; see also Ralph D. Russo, *Wave of Concussion Lawsuits to Test NCAA's Liability*, AP (Feb. 7, 2019), <https://www.apnews.com/4a4ed68e4c3a426abc4e34606ae4a399> [<https://perma.cc/QH6S-JFXA>]. The cases were subsequently pulled into an MDL. *MDL 2492*, U.S. DISTRICT CT. N. DISTRICT ILL., <https://www.ilnd.uscourts.gov/mdl-details.aspx> [<https://perma.cc/ZZF5-87W6>]. CTE is a degenerative brain disease commonly found in people who have a history of repetitive brain trauma. *Frequently Asked Questions about CTE*, BU RES.: CTE CTR., <http://www.bu.edu/cte/about/frequently-asked-questions/> [<https://perma.cc/P4WF-8HZU>]. Known symptoms of CTE include "memory loss, confusion, impaired judgement, impulse control problems, aggression, depression, suicidality, parkinsonism, and eventually progressive dementia." *Id.*

2. Plaintiff's First Amended Petition at 4–5, *Ploetz v. NCAA*, No. DC-17-00676, 2017 WL 10604058 (Tex. Dist. Ct. Dall. Cty. Dec. 29, 2017).

blows to the head in practice and games.<sup>3</sup> Instead of pursuing a career in football, he earned a Master of Fine Arts in 1975 and worked as an art teacher for almost forty years.<sup>4</sup> Decades after his time as a football player ended, however, Mr. Ploetz began experiencing depression, memory loss, and confusion so severe that he could not remember how to send an email.<sup>5</sup> In 2009, he was forced to stop teaching, and his condition continued to deteriorate until he passed in 2015.<sup>6</sup>

The suit, brought by Mr. Ploetz's widow, exemplifies a growing trend of litigation against the NCAA. In these cases, the plaintiffs have alleged that the NCAA faces negligence liability when student-athletes suffer from the effects of concussion-related injuries.<sup>7</sup> Many believed that the Ploetz trial would be a landmark moment, potentially turning the tide of a decade-long series of court battles between the NCAA and its former athletes. Instead, the parties settled under undisclosed terms, leaving the NCAA's critics to wonder if the college sports juggernaut would ever be held accountable.<sup>8</sup> CTE research has advanced significantly<sup>9</sup> since Mr. Ploetz's time on the field in the late 1960s, and a medical consensus has crystallized, connecting the disease to the high-impact brain trauma of football and other contact sports.<sup>10</sup> Accordingly, modern research on CTE and other degenerative brain diseases could create a path for current and former student-athletes to hold the NCAA accountable in court. For example, the widow of former NCAA football player Jeff Staggs recently sued the NCAA.<sup>11</sup> She alleged that the association "knew of the harmful effects of [traumatic brain injuries] on athletes for

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3. *Id.*

4. *Id.* at 5.

5. *Id.*; Patrick Hruby, *The NCAA Is Running Out of Excuses on Brain Injuries*, DEADSPIN (May 24, 2018, 10:31 AM), <https://deadspin.com/the-ncaa-is-running-out-of-excuses-on-brain-injuries-1819854361> [<https://perma.cc/U68H-ANY4>].

6. Plaintiff's First Amended Petition, *supra* note 2, at 5.

7. *See, e.g., In re NCAA Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 590 (N.D. Ill. 2016) (showing that class of student-athletes alleged "negligence and fraudulent concealment" against the NCAA); Y. Peter Kang, *NCAA, Others to Pay \$1.2M for Player's Fatal Head Injury*, LAW360 (Aug. 8, 2016, 8:19 PM), <https://www.law360.com/articles/826254/ncaa-others-to-pay-1-2m-for-player-s-fatal-head-injury> [<https://perma.cc/TLQ5-TFWE>].

8. The NCAA has since reached other settlements, *see, e.g., Perry Cooper, NCAA Concussion Class Settlement Worth \$75 Million Finalized*, BLOOMBERG L. (Aug. 13, 2019, 11:48 AM), <https://news.bloomberglaw.com/class-action/ncaa-concussion-class-settlement-worth-75-million-finalized> [<https://perma.cc/9GG6-JCYV>], which may indicate some level of *financial* accountability. But this is still not the same as being held *legally* accountable through a court judgment on the merits.

9. *See infra* note 149.

10. PAUL MCCRORY ET AL., CONSENSUS STATEMENT ON CONCUSSION IN SPORT—THE 4TH INTERNATIONAL CONFERENCE ON CONCUSSION IN SPORT HELD IN ZURICH 255, 261 (2012); *see also infra* note 149 and accompanying text.

11. *See Staggs v. NCAA*, No. 18-cv-19810-L-WVG, 2018 WL 4092104 (S.D. Cal. Aug. 28, 2018) (order dismissing complaint with leave to amend to allege subject matter jurisdiction).

decades,” ignored the facts, “and failed to institute any meaningful methods of warning and/or protecting the athletes.”<sup>12</sup> Regardless of the outcome of the Staggs case, negligence lawsuits against the NCAA for concussion-related injuries are certain to continue multiplying in the coming years.

Of the concussion cases that the NCAA has recently settled, none of the plaintiffs have argued that a special relationship with the NCAA exists.<sup>13</sup> Instead, they have made their case under a traditional negligence theory.<sup>14</sup> This is a missed opportunity. Litigants should consider arguing that a special relationship exists between student-athletes and the NCAA. A special relationship would impose a higher duty of care on the NCAA—an affirmative duty to provide protection—and would ease the burden on litigants who seek to recover against the organization in the future.<sup>15</sup> In order to take advantage of more exacting judicial scrutiny, the next plaintiffs who bring concussion litigation against the NCAA should argue that a special relationship between the NCAA and injured student-athletes exists.

Because of contemporary research and increasing public pressure, now is an opportune time to hold the NCAA accountable for its mishandling of concussion protocol and student-athlete safety. Although the NCAA has known about the harmful effects of concussions for decades,<sup>16</sup> CTE did not enter the public consciousness until 2002, when Dr. Bennet Omalu examined former professional football player Mike Webster’s brain and discovered that Webster had been living with the disease.<sup>17</sup> Even after this discovery, another decade passed before enough pressure mounted to force action by prominent sports organizations.<sup>18</sup> With science continuing to confirm the dangers of football and the public growing increasingly concerned,<sup>19</sup> student-athletes finally have a chance to hold the NCAA accountable.

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12. Complaint at 16, *Staggs v. NCAA*, No. 18-cv-01981-L-WVG, 2018 WL 4092104 (S.D. Cal. Aug. 27, 2018).

13. See *infra* Section III.A.

14. See *id.*

15. See *infra* Section II.B.

16. See Travis Waldron, *The NCAA’s History with Concussions: A Timeline*, THINKPROGRESS (July 23, 2013, 1:17 PM), <https://thinkprogress.org/the-ncaas-history-with-concussions-a-timeline-530a8c5af0df/> [<https://perma.cc/5EYG-9VAA>].

17. Jason M. Breslow, *The Autopsy that Changed Football*, FRONTLINE (Oct. 6, 2013), <https://www.pbs.org/wgbh/frontline/article/the-autopsy-that-changed-football/> [<https://perma.cc/QU3G-7S4F>].

18. Lauren Ezell, *Timeline: The NFL’s Concussion Crisis*, FRONTLINE (Oct. 8, 2013, 9:57 PM), <https://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/> [<https://perma.cc/BXM9-PK5Y>] (documenting how the National Football League (NFL) resisted research and denied the long-term impact of concussions on football players, and how tenacious scientists applied pressure on the NFL and NCAA by publishing studies, holding press conferences, and briefing Congress).

19. See, e.g., Jacob Bogue, *CTE Researchers Discover Possible Step Toward Diagnostic Test for Living Patients*, WASH. POST (Apr. 10, 2019), <https://www.washingtonpost.com/sports/2019/04/10/cte-researchers-discover-possible-step-toward-diagnostic-test-living-patients/> [<https://perma.cc/7ZS7-SVY7>].

This Note argues that, by virtue of an existing but currently unrecognized special relationship between the NCAA and student-athletes, the NCAA must be held liable for student-athletes' concussion-related injuries. Part I sets the groundwork for finding a special relationship between the NCAA and student-athletes by differentiating the NCAA, where athletes are not paid and do not benefit from the ability to organize (therefore lacking power to effect change in a meaningful way), from the National Football League (NFL). Part II contends that due to this special relationship, the NCAA must be held liable for concussion-related injuries of student-athletes who compete under its purview. Part III analyzes the potential effects of a special relationship and suggests that litigants explore the possibility that football should be governed by the doctrine of strict liability.

I. KICKOFF: THE INSTITUTIONAL INCENTIVES OF THE PROFESSIONALS VS. THE AMATEURS

Many view the NCAA as an extension of the major professional leagues.<sup>20</sup> Proponents of compensation for student-athletes suggest that student-athletes are essentially professionals, because of factors including their status on campus, the importance placed on winning championships, and the large amounts of money that they generate for their schools. But this comparison fails in one very significant way: when it comes to bargaining power and health-and-safety regulations, student-athletes do not have the same nonlegal options as professional athletes. Therefore, they are far from equal to the athletes competing in their sports at the next level. This Part illustrates how the NCAA differs from the NFL by identifying three primary differences in organizational structure: profit-driven purpose, professional player status, and players' ability to unionize. Because of these differences, the NCAA's incentive to settle student-athletes' claims is lower than that of the NFL.

A. *The Pros: National Football League*

The NFL's primary focus is maximizing profits for team owners.<sup>21</sup> The continuous buying and selling of teams, combined with the many sponsor-

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20. See, e.g., Rick Burton, *NCAA Athletes Are Already Paid and Paid Handsomely*, BUS. INSIDER (Apr. 13, 2012, 9:05 AM), <https://www.businessinsider.com/ncaa-athletes-are-already-paid-2012-4> [<https://perma.cc/BCD8-QV7V>]; Jeffrey Dorfman, *Pay College Athletes? They're Already Paid up to \$125,000 per Year*, FORBES (Apr. 29, 2013, 8:00 AM), <https://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/> [<https://perma.cc/V37N-4HY5>].

21. This Note focuses on differentiating the NCAA from the NFL. Though other professional sports organizations, including the National Hockey League (NHL), have faced the prospect of concussion liability, the NFL is most closely tied to concussion-based negligence litigation. The NHL initially decided to fight its concussion-related negligence suit, but after more than five years in court, the league agreed to settle with the more than 300 former players who brought the suit. Zachary Zaggar, *NHL Ends Concussion MDL with \$19M Tentative Set-*

ship and marketing opportunities that were created throughout the history of the NFL, exemplifies the profit-maximization purpose of the league.<sup>22</sup> Before the NFL was founded, professional football was in a state of disarray. Professional teams, lacking any institutional governing structure, engaged in bidding wars for top players, who frequently jumped from one team to the next in pursuit of the highest offer.<sup>23</sup> Without any eligibility rules governing the game, some teams plucked college students—still enrolled in school—to join their squads.<sup>24</sup> Realizing that this chaotic disorganization was unsustainable, representatives from the major teams came together in 1920 to form the American Professional Football Association, what is now the NFL.<sup>25</sup> After a rocky start involving frequent buying and selling of teams, the NFL grew from fourteen teams in 1920 to its current size of thirty-two teams in 2002.<sup>26</sup> Now, the teams are owned and operated almost exclusively by individuals for profit.<sup>27</sup>

The NFL, unlike the NCAA, employs paid professional athletes. Accordingly, NFL players enjoy various opportunities, resources, and protections—unavailable to the student-athletes of the NCAA—that allow them to collectively bargain and maximize their marketability and profitability.<sup>28</sup> NFL players are supported by the National Football League Players Association (NFLPA), their labor union, which ensures that players' interests are properly represented.<sup>29</sup> The NFLPA functions as the players' voice. It represents

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tlement, LAW360 (Nov. 13, 2018, 11:13 PM), <https://www.law360.com/sports/articles/1100924/nhl-ends-concussion-mdl-with-19m-tentative-settlement> [https://perma.cc/T54K-JQ6Z].

22. See generally *Football History*, PRO FOOTBALL HALL FAME, <http://www.profootballhof.com/football-history/history-of-football/> [https://perma.cc/LM6M-G2N2] (showing the different times various NFL franchises were bought and sold as well as the negotiation of new marketing agreements).

23. *1920 - American Professional Football Conference Is Formed*, PRO FOOTBALL HALL FAME, <https://www.profootballhof.com/football-history/history-of-football/1869-1939/1920-american-professional-football-conference-is-formed/> [https://perma.cc/BW8Q-E5S6].

24. *Id.*

25. See *id.* (illustrating that the American Professional Football Association changed its name to the National Football League on June 24, 1922).

26. *National Football League Franchise Histories*, PRO FOOTBALL HALL FAME, <http://www.profootballhof.com/football-history/national-football-league-franchise-histories/> [https://perma.cc/2EAU-EPGG].

27. See *2018 - The NFL Announced a Joint Player and Ownership Committee Focused on Social Justice*, PRO FOOTBALL HALL FAME, <https://www.profootballhof.com/football-history/history-of-football/2010-present/2018-the-nfl-announced-a-joint-player-and-ownership-committee-focused-on-social-justice/> [https://perma.cc/NCD5-2KYM]. This profit maximization goal was illustrated when Jerry Jones, the owner of the Dallas Cowboys, opted out of a shared revenue agreement in which teams divvy up the money from television and merchandise deals and split it evenly. See Paul Sullivan, *How to Bid for the N.F.L.'s Biggest Prize: Team Ownership*, N.Y. TIMES (Feb. 2, 2018), <https://www.nytimes.com/2018/02/02/your-money/buy-nfl-team.html> [https://perma.cc/98WV-NVPD].

28. See *infra* notes 29–34 and accompanying text.

29. *About the NFLPA*, NFLPA, <https://www.nflpa.com/about> [https://perma.cc/4KXM-KWBG]. For a historical view on how NFL players gained some of their bargaining power, see

them in negotiations with NFL ownership over the league's collective bargaining agreement (CBA), which governs salary and workplace-related issues.<sup>30</sup> For example, the NFLPA recently helped players negotiate "tangible contract-related benefits" in health and safety.<sup>31</sup> One such benefit is the NFL's establishment of a health committee in 2013, two years after the current CBA went into effect.<sup>32</sup> But the NFLPA's work also extends off the field: with the current CBA set to expire after the 2020 season, the union intends to demand more generous pensions and robust health coverage for retired players.<sup>33</sup> The NFLPA, then, functions as an institutional advocate for the rights and dignity of players, publicly pressuring the league to take seriously the threat of CTE.<sup>34</sup> No such organizational equivalent exists in the NCAA.

Finally, the NFL has settled a concussion-related class action with retired players.<sup>35</sup> This settlement class includes retired NFL players, authorized representatives of deceased or legally incapacitated retired NFL players, and close family members of retired NFL players.<sup>36</sup> The settlement creates three sources of benefits for the settlement class: (1) a \$75 million program that offers retired players baseline neurological and neuropsychological evaluations to determine the extent of any cognitive defects, (2) an unlimited sixty-

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Scott E. Backman, Note, *NFL Players Fight for Their Freedom: The History of Free Agency in the NFL*, 9 SPORTS LAW. J. 1 (2002).

30. See, e.g., Maury Brown, *As NFLPA Turns 60, Their Importance Never Greater*, FORBES (Nov. 1, 2016, 4:09 PM), <https://www.forbes.com/sites/maurybrown/2016/11/01/as-nflpa-turns-60-their-importance-never-greater/> [<https://perma.cc/Z952-EYC8>] (noting that since its inception, the NFLPA has sought "fair wages, safe working conditions, a pension and basic employee benefits" for players in the league); Tim Daniels, *NFLPA's DeMaurice Smith: 18-Game Schedule Not in 'Best Interest of Our Players'*, BLEACHER REP. (July 13, 2019), <https://bleacherreport.com/articles/2845437-nflpas-demaurence-smith-18-game-schedule-not-in-best-interest-of-our-players> [<https://perma.cc/PV7C-UC9M>] (sharing the NFLPA's concerns about a proposed 18-game NFL season); Mark Maske, *NFL Puts National Anthem Policy on Hold Under Agreement with NFLPA*, WASH. POST (July 19, 2018), <https://www.washingtonpost.com/news/sports/wp/2018/07/19/nfl-puts-national-anthem-policy-on-hold-under-agreement-with-nflpa/> [<https://perma.cc/H4WC-TAWD>] (reporting that after the NFLPA challenged the NFL's anthem policy, the organization chose to halt the policy's implementation).

31. *History*, NFLPA, <https://www.nflpa.com/about/history> [<https://perma.cc/JE5A-WZ4V>].

32. *Health Committees Plan Help to Guide NFL's Safety Plans*, NFL (Aug. 2, 2013, 1:46 AM) (updated Apr. 23, 2015, 5:41 PM), <http://www.nfl.com/news/story/0ap1000000224875/article/health-committees-plan-help-to-guide-nfls-safety-plans> [<https://perma.cc/3A9J-HF6K>].

33. Ken Belson & Kevin Draper, *NFL Players Union Says Retiree Benefits Are a Priority*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/2019/01/31/sports/nflpa-demaurence-smith.html> [<https://perma.cc/2AQK-7WUX>].

34. Chuck Johnson, *NFLPA Letting Medical Science Point the Direction in Fight to Protect Players' Health and Safety*, NFLPA (Mar. 3, 2016), <https://www.nflpa.com/medical-science-health-and-safety> [<https://perma.cc/3TF7-CQWM>].

35. *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191 (E.D. Pa. 2014).

36. *Id.* at 195–96.



five-year fund that awards cash to all retired players who have or will receive a qualifying diagnosis, and (3) a \$10 million fund for “education programs promoting safety and injury prevention.”<sup>37</sup>

While the NFL has not admitted liability, the settlement is an example of how the NFL—despite years of claiming ignorance—is finally being held accountable in the form of a settlement that has seen \$660 million in approved payouts.<sup>38</sup> But because NFL players have bargaining power through the NFLPA, current and future NFL players can negotiate benefits, like rule changes and pay, that offset the harmful effects of a career in the NFL.<sup>39</sup> Unlike NFL players, student-athletes cannot negotiate for monetary compensation or safety provisions. Student-athletes do not have an organization like the NFLPA to protect their interests. Instead, student-athlete plaintiffs should invoke the tort special-relationship doctrine to fill that role.

#### B. *The Amateurs: The National Collegiate Athletic Association*

The NCAA is a nonprofit organization that regulates college athletic contests within its three divisions.<sup>40</sup> The NCAA was established in the early 1900s to keep college athletes safe in the midst of a crisis that involved President Theodore Roosevelt. Before the formation of the NCAA, collegiate athletics was a messy system, initially run by students without a regulatory regime to ensure fairness and safety.<sup>41</sup> But even the introduction of faculty oversight was insufficient to ensure the safety of student-athletes.<sup>42</sup> After the deaths of eighteen collegiate football players and serious injuries to one hundred more in the 1905 season alone, President Roosevelt felt obligated to step in.<sup>43</sup> The president invited educators and officials to the White House to craft comprehensive reforms.<sup>44</sup> This meeting led to the formation of the In-

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37. *Id.* at 196–97.

38. Dom Cosentino, *Tuesday Is a Big Day for the NFL’s Concussion Settlement*, DEADSPIN (May 6, 2019, 2:41 PM), <https://deadspin.com/tuesday-is-a-big-day-for-the-nfls-concussion-settlement-1834551274> [<https://perma.cc/H8AH-AAHM>].

39. For years, NFL players have been refusing to play for various reasons, including feeling undercompensated and the effects football has on their bodies. See Michael Shapiro, *Who Is the Last Player to Sit Out an Entire Year After a Contract Dispute?*, YAHOO! SPORTS (Nov. 9, 2018, 9:24 AM), <https://sports.yahoo.com/last-player-sit-entire-contract-142428978.html> [<https://perma.cc/9PNP-M4HY>].

40. *Our Three Divisions*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions> [<https://perma.cc/D8VD-7NCE>].

41. See Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 11–12 (2000) (explaining that institutions moved athletic teams from student to faculty control in order to alleviate unsportsmanlike conduct).

42. *Id.* at 12.

43. *Id.*

44. *Id.*

tercollegiate Athletic Association, which was quickly renamed the National Collegiate Athletic Association in 1910.<sup>45</sup>

The NCAA now governs 1,117 colleges and universities and almost 500,000 student-athletes throughout its three divisions.<sup>46</sup> It is a membership-led organization, meaning that regulatory and policy decisions are made by various committees that promulgate the rules and policies that govern college athletics.<sup>47</sup> Committee members work for the various NCAA member institutions or conferences, meaning that a disconcerting conflict of interest exists.<sup>48</sup> At the end of the day, student-athletes would benefit if member institutions had more oversight from independent actors.

Though its profit margins fall short of the moneymaking behemoth that is the NFL, the NCAA still generates considerable revenue. In 2017, the organization generated over \$1 billion in revenue,<sup>49</sup> with much of it coming through marketing fees and ticket sales.<sup>50</sup> But unlike professional athletes,<sup>51</sup> student-athletes are not paid for their talents. Though the NCAA's defenders argue that receiving a scholarship is analogous to the payment earned by professional athletes,<sup>52</sup> many student-athletes do not even receive discounted tuition, let alone a full ride.<sup>53</sup> Lastly, as the NCAA has made abundantly clear, student-athletes are not employees.<sup>54</sup> This has hindered their ability to

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45. *Id.*

46. *What Is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [<https://perma.cc/XY4C-36KV>]; see also *The Student-Athlete Experience*, NCAA, <http://www.ncaa.org/student-athletes/current> [<https://perma.cc/UL4B-LZVV>].

47. *NCAA Committees*, NCAA, <http://www.ncaa.org/governance/committees> [<https://perma.cc/D23W-PTS7>].

48. It is quite troubling that the people who oversee NCAA rulemaking process are the very people who, by virtue of their positions at universities and conferences, have a heightened interest in how those rules are enforced. See *Committee Vacancies*, NCAA (updated Jan. 27, 2020), <http://www.ncaa.org/governance/committees/committee-vacancies> [<https://perma.cc/YP3Y-XFVK>].

49. Alex Kirshner, *Here's How the NCAA Generated a Billion Dollars in 2017*, SBNATION (Mar. 8, 2018, 7:00 AM), <https://www.sbnation.com/2018/3/8/17092300/ncaa-revenues-financial-statement-2017> [<https://perma.cc/ZKF5-BNFX>].

50. *Id.*

51. See *Where Does the Money Go?*, NCAA, <http://www.ncaa.org/about/where-does-money-go> [<https://perma.cc/UBE8-4XVP>] (showing that most money made by the NCAA goes to Division I conferences and student-athletes, leaving many Division II and III athletes and programs to fend for themselves). Whether student-athletes should be paid is outside the scope of this Note.

52. See Burton, *supra* note 20; Dorfman, *supra* note 20.

53. *NCAA Recruiting Facts*, NCAA (Mar. 2018), <https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf> [<https://perma.cc/8S9M-LEH5>] (showing that 59% and 62% of student-athletes at the Division I and Division II levels, respectively, receive some level of athletics aid, and stating that 80% of Division III student-athletes "receive some form of academic grant or need-based scholarship").

54. See Press Release, Donald Remy, NCAA Chief Legal Officer, NCAA Responds to Union Proposal, <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal> [<https://perma.cc/9XAD-6NHJ>] ("Student-athletes are not employ-

unionize or form any other meaningful source of bargaining power or leverage that would allow them to make requests for safer, more player-friendly conditions.<sup>55</sup> Because student-athletes lack bargaining power, the NCAA must be held liable for concussion-related injuries.

Like the NFL, the NCAA is under pressure from current and former student-athletes who claim that they are suffering from concussion-related injuries due to the organization's negligence. The NCAA has been the target of negligence suits from several former student-athletes and their families.<sup>56</sup> The most high-profile concussion case was brought by former Eastern Illinois University (EIU) football player Adrian Arrington, who alleged that the concussions he suffered while playing football at EIU have left him unable to lead a normal life.<sup>57</sup> Mr. Arrington's case was quickly followed by over a dozen similar cases, and they were soon consolidated into a multidistrict litigation.<sup>58</sup> Mr. Arrington, the lead plaintiff in the class action, has been vocal about his dissatisfaction with the proposed settlement.<sup>59</sup> Despite these objections, a district court judge approved a proposed settlement in 2016 between the NCAA and the putative class that includes "[a]ll persons who played an NCAA-sanctioned sport at an NCAA member institution on or prior to the Preliminary Approval Date."<sup>60</sup>

Despite the fact that it was approved by a judge, the NCAA's settlement does not go far enough. Under the settlement, the NCAA agreed to (1) create a Medical Monitoring Fund worth \$70 million to be used to pay for expenses such as medical evaluations and administrative costs for fifty years; (2) implement changes, consistent with best practices, to its concussion management and return-to-play policies; and (3) create a \$5 million concussion

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ees, and their participation in college sports is voluntary."); see also Joe Nocera & Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be*, SPORTS ILLUSTRATED (Feb. 24, 2016), <https://www.si.com/college-football/2016/02/24/northwestern-union-case-book-indentured> [<https://perma.cc/M3SU-GZZU>] (showing that the National Labor Relations Board refused "to exert the board's jurisdiction over whether Northwestern's football players were university employees").

55. See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 80-81 (2006) (stating that "employee-athletes" would be able to collectively bargain, earn a negotiated wage, and have a federally protected right to strike).

56. See *supra* notes 7, 11.

57. Consolidated Class Action Complaint at 5, *Arrington v. NCAA*, No. 11-cv-06356 (N.D. Ill. Nov. 18, 2011), ECF No. 24.

58. *In re NCAA Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 583 (N.D. Ill. 2016).

59. Ralph D. Russo, *Wave of Concussion Lawsuits to Test NCAA's Liability*, SEATTLE TIMES (Feb. 7, 2019, 11:20 AM), <https://www.seattletimes.com/sports/college/wave-of-concussion-lawsuits-to-test-ncaas-liability/> [<https://perma.cc/RN6Z-MVJK>].

60. *In re NCAA Student-Athlete Concussion Injury Litig.*, 314 F.R.D. at 584. The preliminary approval date that set the cutoff for student-athletes is July 15, 2016.

research fund.<sup>61</sup> This settlement is similar to the one reached in the NFL concussion litigation.<sup>62</sup> But it falls short in three areas. First, unlike the NFL settlement, which compensates former NFL players who are given a qualifying diagnosis,<sup>63</sup> the NCAA settlement does nothing for student-athletes once they are diagnosed with a concussion-related illness.<sup>64</sup> In fact, the NCAA settlement provides *no compensation* whatsoever to former student-athletes who are diagnosed with concussion-related illnesses.<sup>65</sup> Second, the settlement class—meaning those who are eligible for medical monitoring—only consists of those student-athletes who competed before July 15, 2016.<sup>66</sup> Finally, the number of former student-athletes who decided to opt out of the settlement and pursue personal injury lawsuits has already exceeded the number of NFL players who chose to do the same.<sup>67</sup> The differences between the NCAA and NFL, namely that student-athletes do not have experience competing at a high level as adults and are not afforded the benefit of players' unions, not only permit different treatment, but demand it.

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61. *Id.* at 586; *Judge Approves Settlement in Concussion Lawsuit Against NCAA*, USA TODAY (Aug. 12, 2019, 9:24 PM), <https://www.usatoday.com/story/sports/ncaaf/2019/08/12/judge-approves-settlement-in-concussion-lawsuit-against-ncaa/39947739/> [<https://perma.cc/LFW4-AAEP>].

62. *See supra* notes 35–37.

63. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191, 196–97 (E.D. Pa. 2014).

64. *See In re NCAA Student-Athlete Concussion Injury Litig.*, 314 F.R.D at 585–86 (noting that the Medical Monitoring Fund “will be used to pay the expenses associated with . . . Screening Questionnaires; Medical Evaluations; Notice and Administrative Costs; Medical Science Committee Costs; approved Attorneys' Fees and Costs; and Class Representatives' Service Awards”).

65. *Id.*

66. *Student-Athlete Concussion Injury Litigation*, NCAA, <http://www.ncaa.org/sport-science-institute/topics/student-athlete-concussion-injury-litigation> [<https://perma.cc/L2M8-CL3J>].

67. *See Russo, supra* note 59 (noting that hundreds of former college football players are now bringing personal injury claims against the NCAA and member institutions); Steven M. Sellers, *NCAA, Colleges Hit with New Deluge of Concussion Lawsuits (1)*, BLOOMBERG L. (Jan. 28, 2019, 10:50 AM), <https://news.bloomberglaw.com/product-liability-and-toxics-law/ncaa-colleges-hit-with-new-deluge-of-concussion-lawsuits-1> [<https://perma.cc/93ND-XDVP>] (stating that dozens of lawsuits were filed in January 2019, and “[m]ore than 200 additional cases are on the way”). Alternatively, only ninety-four NFL players opted out of the NFL settlement. Sheilla Dingus, *Most NFL Litigation Opt-Out Claims Have Now Settled*, ADVOC. FOR FAIRNESS SPORTS (Apr. 18, 2019), <http://advocacyforfairnessinsports.org/nfl-concussion-settlement/most-nfl-litigation-opt-out-claims-have-now-settled/> [<https://perma.cc/UDB9-PYM4>].

## II. PERSONAL FOUL: THE NCAA SHOULD BE HELD LIABLE FOR THE CONCUSSION-RELATED INJURIES OF STUDENT-ATHLETES

The NCAA has consistently denied responsibility for concussion-related injuries and their effects, including as recently as the *Ploetz* case.<sup>68</sup> Former student-athletes have brought negligence claims against the NCAA, but the majority have settled, while others are still unresolved.<sup>69</sup> In order to successfully bring a negligence cause of action, a plaintiff must show that (1) the defendant owed him a legal duty, (2) the defendant breached that duty, (3) the plaintiff suffered an injury, and (4) the plaintiff's injury was caused by the defendant's breach of duty.<sup>70</sup> Negligent conduct may consist of an act or an omission to act.<sup>71</sup> When a special relationship is recognized, a heightened duty of care is imposed on the actor "to take affirmative precautions for the aid or protection of the other."<sup>72</sup> This Part argues that a special relationship exists between the NCAA and student-athletes, and by virtue of that special relationship, the NCAA breached the duty of care it owes to student-athletes. Section II.A argues that the NCAA is the correct actor for student-athletes to hold accountable. Section II.B explores state court cases that lay the groundwork for establishing a special relationship between student-athletes and the NCAA. Section II.C argues that the NCAA breached the duty of care it owes to student-athletes by failing to act reasonably.

### A. Targeting: The NCAA Is the Correct Defendant for Player-Litigants

The NCAA is the correct defendant for student-athletes with concussion-related injuries to sue for damages. Though advocates for student-athlete safety may face their share of procedural hurdles, litigation against the NCAA avoids certain traps that litigation against other parties may fall

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68. See Mark Schlabach, *NCAA, Wife of Former Texas DT Greg Ploetz Settle CTE Lawsuit*, ESPN (June 15, 2018), [https://www.espn.com/college-football/story/\\_/id/23806167/ncaa-wife-ex-texas-longhorns-dt-greg-ploetz-settle-cte-lawsuit](https://www.espn.com/college-football/story/_/id/23806167/ncaa-wife-ex-texas-longhorns-dt-greg-ploetz-settle-cte-lawsuit) [https://perma.cc/RKU8-MJRD].

69. Despite being granted discovery in *In re NCAA*, 543 S.W.3d 487 (Tex. App. 2018), Debra Ploetz settled with the NCAA three days into trial. Rick Maese, *NCAA Concussion Case Settles Three Days into Trial*, WASH. POST (June 15, 2018), <https://www.washingtonpost.com/news/sports/wp/2018/06/15/ncaa-concussion-case-settles-three-days-into-trial/> [https://perma.cc/WE8H-HHTS]. As the highest-profile concussion litigation against the organization, *In re NCAA Student-Athlete Concussion Injury Litigation*, 314 F.R.D. 580, has garnered the most attention of all the claims against the NCAA. In *Bradley v. NCAA*, 249 F. Supp. 3d 149 (D.D.C. 2017), plaintiff Jennifer Bradley recently survived a motion to dismiss on her negligence claim against the NCAA, but it is unclear where the case stands at the moment.

70. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984).

71. RESTATEMENT (SECOND) OF TORTS § 282 (AM. LAW INST. 1965). Additionally, this Note assumes that a student-athlete bringing a negligence claim against the NCAA both has a tangible injury and can show that the injury was both actually and proximately caused in the course of NCAA-sanctioned competition. So, the questions explored in this Note are whether the NCAA owes student-athletes a duty of care and whether the NCAA breached that duty.

72. *Id.* § 314 cmt. a.

into. The doctrine of sovereign immunity, despite being a significant legal obstacle for student-athletes who wish to sue public universities, does not protect the NCAA from liability. But clearing the sovereign immunity hurdle does not clear the way for litigants. Some states will have more favorable tort law than others, so litigants will have to be thoughtful when deciding where to file claims.

The doctrine of sovereign immunity generally shields government officials or actors from negligence liability for actions they take while fulfilling their duty as a state actor.<sup>73</sup> But because state sovereign immunity can be waived, government actors like universities will have immunity for negligence in some states but not in others.<sup>74</sup> For example, Texas and Florida, two central locations in college athletics, have reached opposite conclusions on this issue. In *Plancher v. University of Central Florida Athletics Ass'n*, the Florida Supreme Court held that the University of Central Florida (UCF) was immune from suits that allege negligence by state actors.<sup>75</sup> The plaintiffs in *Plancher* brought a negligence action against UCF after their son “collapsed and died during football practice after participating in a series of conditioning drills.”<sup>76</sup> The court held that UCF was “primarily acting as an instrumentality of the state,” and therefore was entitled to sovereign immunity.<sup>77</sup>

The Supreme Court of Texas, however, declined to hold a public university immune in a similar negligence case.<sup>78</sup> In *Lowe v. Texas Tech University*, a varsity football player at Texas Tech University alleged that he was injured due to negligence by the coaching staff, management, and trainers.<sup>79</sup> The plaintiff relied on the Texas Tort Claims Act, which “provided for waiver of governmental immunity”<sup>80</sup> for personal injuries when caused by the negligence of any officer or employee acting within the scope of his employment.<sup>81</sup> The court decided that the plaintiff’s allegations of negligent failure to furnish proper protective items put the case within the “statutory waiver of immunity,” and therefore the university and its employees were not immune from suit.<sup>82</sup>

Where no such waiver of sovereign immunity is recognized, though—like in Florida—identifying a special relationship with the NCAA is vital for

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73. See KEETON ET AL., *supra* note 70, § 131 (explaining that, historically, governmental immunity has protected the government and its actors from suit or liability).

74. See *id.*

75. 175 So. 3d 724 (Fla. 2015).

76. UCF Athletics Ass’n v. Plancher, 121 So. 3d 1097, 1099 (Fla. Dist. Ct. App. 2013), *rev’d in part*, 175 So. 3d 724.

77. *Plancher*, 175 So. 3d at 729.

78. See *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297 (Tex. 1976).

79. *Id.* at 297.

80. *Id.* at 298.

81. *Id.* at 298–99.

82. *Id.* at 300.

plaintiffs. The doctrine of sovereign immunity prevents other parties that could potentially be held liable for concussion-related injuries, such as public universities and their staff, from being sued.<sup>83</sup> This immunity is a problem because nearly half of all NCAA institutions are public universities.<sup>84</sup>

Another hurdle student-athletes will face in arguing for a “special relationship” is the variability of negligence standards from state to state.<sup>85</sup> Because a special relationship between student-athletes and the NCAA has not been recognized, the already-recognized special relationship between student-athletes and their universities can provide guidance. For example, though a Pennsylvania court recognized a special relationship between a student-athlete and his university,<sup>86</sup> a federal court in Utah in *Orr v. Brigham Young University* did not.<sup>87</sup> In the latter case, a former college football player filed a negligence claim against his university.<sup>88</sup> Orr argued that a special relationship existed between him and the university, but the Tenth Circuit instead concluded that “[t]he rule Orr contends for would result in a broad, nearly unprecedented expansion of duty . . . for Utah’s colleges and universities.”<sup>89</sup> This demonstrates that litigants should be wary of the scope of state tort law duties even when they prefer to sue in federal court.<sup>90</sup>

The inconsistency between states presents a strategic challenge for plaintiffs, who should adapt by arguing that there is a special relationship between the NCAA and student-athletes. Because the NCAA has known about concussion-related injuries for many years and research continues to illustrate the harmful effects of hits to the head,<sup>91</sup> courts may be more likely to arrive at a plaintiff-friendly ruling now.

#### B. *Unnecessary Roughness: Why the NCAA Owes Student-Athletes a Heightened Duty of Care*

The NCAA has a duty to protect the student-athletes who compete under its purview. Though negligence law disclaims any general affirmative du-

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83. See Steven Pachman & Adria Lamba, *Legal Aspects of Concussion: The Ever-Evolving Standard of Care*, J. ATHLETIC TRAINING, Mar. 2017, at 186, 190 (explaining that some entities that may be responsible for establishing concussion policies might have immunity).

84. See *NCAA Member Schools*, NCAA, <http://www.ncaa.org/about/resources/research/ncaa-member-schools> (on file with the *Michigan Law Review*).

85. See *infra* notes 99–114 and accompanying text.

86. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993); see *infra* notes 97–106.

87. 960 F. Supp. 1522 (D. Utah 1994), *aff'd*, 108 F.3d 1388 (10th Cir. 1997) (unpublished table decision).

88. *Orr*, 960 F. Supp. 1522.

89. *Orr v. Brigham Young Univ.*, No. 96-4015, 1997 WL 143600, at \*2 (10th Cir. Mar. 31, 1997) (footnote omitted).

90. See *id.*

91. See *infra* notes 166–167 and accompanying text.

ty of care,<sup>92</sup> the Restatement (Second) of Torts provides that affirmative duties may arise out of special relations between parties.<sup>93</sup> The Restatement further notes that the duty to protect “against unreasonable risk of harm extends to risks arising out of the actor’s own conduct.”<sup>94</sup> When analyzing potential special relationships, courts consider the parties’ mutual dependence as well as “public sentiment and views of social policy.”<sup>95</sup> Courts recognize that in special relationships, the plaintiff is “particularly vulnerable and dependant [sic] upon the defendant who, correspondingly, holds considerable power over the plaintiff’s welfare.”<sup>96</sup> Accordingly, the relationship between the NCAA and student-athletes could be a “special” relationship. Indeed, courts have signaled willingness to recognize similar theories.

Courts have already recognized a special relationship between student-athletes and their universities by virtue of their mutual dependence on one another.<sup>97</sup> In 1993, the Third Circuit decided *Kleinknecht v. Gettysburg College*,<sup>98</sup> the first case to address the heightened level of care owed to student-athletes by their universities.<sup>99</sup> In *Kleinknecht*, the parents of Drew Kleinknecht brought a negligence action against Gettysburg College after their son died during a university-sponsored lacrosse practice.<sup>100</sup> The trial court held that the college had no legal duty to implement preventative measures that would have protected Drew in the event of cardiac arrest.<sup>101</sup> The Third Circuit, however, reversed, recognizing that “a special relationship existed between the College and Drew” as an intercollegiate athlete.<sup>102</sup> In finding a special relationship, the court focused on three factors (“the *Kleinknecht* fac-

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92. See RESTATEMENT (SECOND) OF TORTS § 314 (AM. LAW. INST. 1965) (explaining that “[t]he fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action”).

93. *Id.* § 314A cmt. b.

94. *Id.* § 314A cmt. d. The special relationships illustrated in section 314 of the Restatement include an innkeeper to his guests, a common carrier to its passengers, and a landowner to a lessee. *Id.* § 314A. While none of these examples can be directly analogized to the student-athlete and NCAA relationship, the Restatement states that the above list is not exhaustive.

95. *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 926–27 (N.C. Ct. App. 2001) (quoting *KEETON ET AL.*, *supra* note 70, § 56).

96. *Id.* (quoting *KEETON ET AL.*, *supra* note 70, § 56).

97. Andrew Rhim, Comment, *The Special Relationship Between Student-Athletes and Colleges: An Analysis of a Heightened Duty of Care for the Injuries of Student-Athletes*, 7 MARQ. SPORTS L.J. 329, 342–48 (1996).

98. 989 F.2d 1360 (3d Cir. 1993).

99. Rhim, *supra* note 97, at 342.

100. *Kleinknecht*, 989 F.2d at 1363.

101. See *Kleinknecht v. Gettysburg Coll.*, 786 F. Supp. 449, 453 (M.D. Pa. 1992).

102. *Kleinknecht*, 989 F.2d at 1367.



tors”).<sup>103</sup> First, Drew was actively recruited by the head trainer to play lacrosse for Gettysburg College.<sup>104</sup> Second, Drew’s participation on the team benefited the school by generating “favorable attention” to the college.<sup>105</sup> Finally, Drew was participating in a scheduled practice for a Gettysburg College-sponsored team when he suffered the injury that caused his death.<sup>106</sup>

The *Kleinknecht* factors provide guidance for extending the special-relationship doctrine to the student-athlete and NCAA relationship.<sup>107</sup> First, although the NCAA does not actively recruit student-athletes itself, the organization structures and regulates the system under which the recruitment of student-athletes occurs.<sup>108</sup> The NCAA is just as invested in the highest talent playing under its umbrella as each of its member schools, because if schools do not recruit engaging athletes who can compete at the highest levels, much of the NCAA’s revenue stream disappears.<sup>109</sup> Without the NCAA or an equivalent organization, it is unlikely that the high level of competition between diverse universities would be possible at a large scale.<sup>110</sup> Second, student-athletes play for the benefit of the NCAA, which, despite its non-profit status, is a business that generates over \$1 billion in revenue.<sup>111</sup> To protect that revenue, the NCAA’s organizational structure must stay intact.<sup>112</sup> Finally, student-athletes who bring claims against the NCAA are injured either competing in NCAA-sanctioned events or in practices

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103. See *id.* at 1367–69 (explaining that Gettysburg College recruited Drew “for its own benefit” and had he been acting in his capacity as a private student, there would likely be no heightened duty).

104. *Id.* at 1367.

105. *Id.* at 1368.

106. *Id.* at 1367–68.

107. Many courts analyzing the existence of a special relationship have relied upon the *Kleinknecht* factors. See, e.g., *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1229 (D. Or. 2016) (noting that courts find special relationships “when the incident giving rise to the negligence claim occurred during a supervised school practice or other event”); *Nguyen v. Mass. Inst. of Tech.*, 96 N.E.3d 128, 140 (Mass. 2018) (observing that universities “sponsor and have special relationships with their students regarding athletics and other potentially dangerous activities” (citing *Kleinknecht*, 989 F.2d at 1370)); *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1214–16 (Pa. Super. Ct. 2017) (analyzing whether the defendant’s failure to have qualified personnel at practice constituted gross negligence “through the lens” of *Kleinknecht*).

108. See *supra* Section I.B.

109. See, e.g., Adam Wells, *LeBron James Says ‘The NCAA Is Corrupt, We Know That,’* BLEACHER REP. (Feb. 27, 2018), <https://bleacherreport.com/articles/2761757-lebron-james-says-the-ncaa-is-corrupt-we-know-that> [<https://perma.cc/U3CA-D7SL>].

110. See Michael Felder, *What Would Happen if Member Schools Left the NCAA?*, BLEACHER REP. (Feb. 19, 2013), <https://bleacherreport.com/articles/1535038-what-would-happen-if-member-schools-left-the-ncaa> [<https://perma.cc/F2LD-VB8E>] (suggesting that if NCAA member institutions left the NCAA the big schools could, for example, “start their own major basketball tournament,” putting the strongest brands in the “‘haves’ category”).

111. Kirshner, *supra* note 49.

112. See Felder, *supra* note 110 (explaining that if member schools left the NCAA “the impact would be wholly crippling”).

sponsored by programs the NCAA regulates.<sup>113</sup> Thus, all three *Kleinknecht* factors lean toward finding a special relationship in negligence cases, and the *Kleinknecht* case itself recognizes a special relationship between student-athletes and the NCAA.<sup>114</sup>

*Davidson v. University of North Carolina at Chapel Hill* further illustrates how courts have analyzed special relationships.<sup>115</sup> Robin Davidson, a junior varsity cheerleader, sued the University of North Carolina (UNC) after being injured during a warm-up prior to a women's basketball game.<sup>116</sup> Davidson argued that UNC owed her an affirmative duty of care by virtue of her status as "a member of a school-sponsored, intercollegiate team."<sup>117</sup> In finding that a special relationship existed between Davidson and UNC, the North Carolina Court of Appeals applied its own two-factor test.<sup>118</sup> First, the court noted that special relationships form because of the existence of "mutual dependence" and stated that UNC benefited from the cheerleading program.<sup>119</sup> Second, the court found it persuasive that "UNC exerted a considerable degree of control over its cheerleaders."<sup>120</sup> The court noted that "UNC cheerleaders had to abide by certain standards of conduct," like maintaining their GPA and avoiding public intoxication, which it believed caused the students to "have higher expectations with regard to the protection they [would] receive from the school."<sup>121</sup>

Like the *Kleinknecht* factors, the *Davidson* factors can be applied to the relationship between student-athletes and the NCAA. "[T]he factual circumstances and policy considerations" of the NCAA's CTE crisis warrant a conclusion that a special relationship exists.<sup>122</sup> First, there is mutual dependence between student-athletes and the NCAA: student-athletes depend on the NCAA for the opportunity to compete and afford an education, while the NCAA and its member institutions depend on student-athletes to maximize their revenue.<sup>123</sup> Second, the NCAA exerts "control over" student-athletes.<sup>124</sup>

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113. See *supra* Part I (discussing NCAA concussion litigation).

114. See KEETON ET AL., *supra* note 70, § 54 ("[I]t should be recognized that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.").

115. 543 S.E.2d 920 (N.C. Ct. App. 2001).

116. *Davidson*, 543 S.E.2d at 922.

117. *Id.* at 926.

118. *Id.* at 927.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Cf. id.*

123. See *Where Does the Money Go?*, *supra* note 51 (showing that \$216.6 million of NCAA revenue is "[d]istributed to Division I schools to help fund NCAA sports and provide scholarships for college athletes").

124. *Davidson*, 543 S.E.2d at 927. A well-known lawsuit challenging the NCAA's restrictions against student-athletes is *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015). In *O'Bannon*, student-athletes brought an antitrust challenge to the NCAA's amateurism rules,

Beyond the concerns surrounding the NCAA's restrictive eligibility rules—which are highlighted by the organization's harshly limiting definition of amateurism—the NCAA imposes academic requirements on student-athletes, going so far as to require not only that student-athletes maintain a minimum GPA but also that they are “enrolled in at least a minimum full-time program of studies, [are] in good academic standing and [are] maintain[ing] progress toward a baccalaureate or equivalent degree.”<sup>125</sup> Additionally, the NCAA considers student-athletes to be ineligible if they do any of the following: take payment or the promise of payment for competing in their NCAA sport; after college enrollment, accept any pay for promoting a commercial product or service; allow their name or picture to be used for promoting a commercial product; or receive financial aid outside of the aid distributed by their university.<sup>126</sup> Considering the lack of protection they are receiving now, it is reasonable that student-athletes “have higher expectations with regard to the protection they [would] receive” from the NCAA.<sup>127</sup>

Beyond the factors cited in *Kleinknecht* and *Davidson*, NCAA officials' statements and conduct suggest that the NCAA owes student-athletes a heightened duty of care. First, and most importantly, the NCAA has all but assumed responsibility for the well-being of student-athletes.<sup>128</sup> The NCAA advertises its mission as being “dedicated to safeguarding the well-being of student-athletes.”<sup>129</sup> The NCAA should not be allowed to claim to safeguard the well-being of those it supports while at the same time denying liability for injuries sustained by those very people.

Moreover, the NCAA essentially fills the role that a professional players association does because, unlike professionals in the NFL or other leagues, student-athletes are not assisted by a group of advocates helping them bargain for safer conditions.<sup>130</sup> Professional players enjoy the representation of their agents and players associations, which offer leverage to negotiate contract-related benefits in health and safety. No such protection exists for college athletes. Unlike in the NFL, there is no countervailing force to the

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which prohibited schools from compensating student-athletes for the use of their name, image, and likeness. *Id.* at 1052–53. For examples of other antitrust challenges brought against the NCAA, see *infra* note 164.

125. NCAA, 2018-19 NCAA DIVISION I MANUAL 159, 161 (2018) [hereinafter DIVISION I MANUAL], <http://www.ncaapublications.com/productdownloads/D119.pdf> [https://perma.cc/RR4C-8QWF].

126. Memorandum from NCAA to Student-Athletes, Summary of NCAA Eligibility Regulations—NCAA Division I (2019), [https://ncaaorg.s3.amazonaws.com/compliance/d1/2019-20D1Comp\\_SummaryofNCAARegulations.pdf](https://ncaaorg.s3.amazonaws.com/compliance/d1/2019-20D1Comp_SummaryofNCAARegulations.pdf) [https://perma.cc/294H-9ZHL].

127. *Cf. Davidson*, 543 S.E.2d at 927.

128. See Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS L. REV. 287, 298 (2016) (showing an excerpt from an NCAA Division I Manual where the NCAA specifically illustrates its commitment to student-athlete well-being).

129. *Who We Are*, NCAA, <http://www.ncaa.org/about/who-we-are> [https://perma.cc/5VXZ-2EQM].

130. See *supra* notes 28–34, 53–54 and accompanying text.

directives and whims of the league front office. The NCAA itself ostensibly protects the interests of its athletes. But to expect the organization to elevate student-athletes' health and well-being over its own profitability is unrealistic. After evaluating the NCAA's historical purpose and the way the organization interacts with student-athletes through the analytical framework of the *Davidson* and *Kleinknecht* factors, a court should conclude that a special relationship is present.

C. *Unsportsmanlike Conduct: The NCAA Breached Its Duty of Care*

When determining breach of duty, courts ask whether the defendant acted with the legally appropriate level of care. To establish that the NCAA breached its duty of care, a student-athlete plaintiff must show that the NCAA could have done something to prevent the injury.<sup>131</sup> This Note contends that a reasonable organization in the NCAA's position would have accepted well-documented science and implemented proactive measures in line with industry suggestion.<sup>132</sup> The NCAA should have taken any number of simple steps to mitigate or eliminate the effects of concussion-related injuries in student-athletes.<sup>133</sup> This Section outlines three main categories of preventative actions that were available to the NCAA: educating student-athletes and their families, prohibiting dangerous hits and drills, and penalizing noncompliant member institutions.

The NCAA should have informed student-athletes and their families about the inherent dangers of playing football.<sup>134</sup> The NCAA has known about the negative effects of concussions since at least 1933,<sup>135</sup> yet in the eighty-seven years since that discovery, the organization has done little to ensure that players also understand these risks.<sup>136</sup> For example, the NCAA

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131. Whether a duty has been breached is a question of fact to be decided by the jury. RESTATEMENT (SECOND) OF TORTS § 328C (AM. LAW INST. 1965).

132. The NCAA has a documented history of not requiring its member institutions to follow widely adopted best practices. For example, "[b]etween 2002 and 2010, the NCAA consistently failed to update its concussion policies to reflect the consensus best practice standards for concussion management." K. Adam Pretty, Note, *Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 NOTRE DAME L. REV. 2359, 2380 (2014). During that time, the NCAA refused to adhere to both the "Vienna Protocol" and the "Prague Protocol," both of which would have required increased action and engagement of athletic staff and universities. *Id.* at 2380–81.

133. While some of the solutions mentioned in this Section are solutions the NCAA currently asks of its member institutions, they are not obligations the NCAA has always imposed, nor are they properly enforced.

134. Henry Davison, *Former MSU Player: NCAA Must Establish Concussion Protocol, Protect Players*, CLARION LEDGER (Jan. 5, 2018, 10:07 AM), <https://www.clarionledger.com/story/opinion/columnists/2018/01/05/former-msu-player-ncaa-must-establish-concussion-protocol-protect-players/1007141001/> [<https://perma.cc/4T5C-BGP4>].

135. See Waldron, *supra* note 16.

136. See *id.* (showing that even after acknowledging the harmful effects of concussions, the NCAA chose to promulgate nonbinding concussion guidelines—even now, the guidelines are mandatory but there is no enforcement mechanism to hold universities accountable).

could require universities to establish specific educational procedures to satisfy the education requirement of the Concussion Safety Protocol Program, which is the NCAA's attempt to ensure that universities are adequately following concussion safety measures.<sup>137</sup>

The NCAA could respond to calls for a heightened duty of care in two ways. First, it may argue that student-athletes assumed the risk of competing at the college level.<sup>138</sup> Second, it may argue that student-athletes are legally adults and therefore should have known that the contracts they signed were with their respective universities, not the organization.

Assumption of risk is not a sufficient basis for the NCAA to avoid liability for student-athletes' foreseeable injuries. The NCAA has represented itself as an organization meant to protect student-athletes. Importantly, while testifying in front of the Senate in 2014, NCAA President Mark Emmert said that he would "unequivocally state that [the NCAA has] a clear moral obligation to make sure we do everything we can to protect and support student-athletes."<sup>139</sup> Mr. Emmert's comments suggest that those who run the NCAA do not believe that student-athletes are informed enough to be cognizant of all the risks associated with football, and therefore the assumption of risk defense should not apply. Additionally, student-athletes have signed contracts with universities that are governed by an organization that has promised to take care of them.<sup>140</sup> Many student-athletes choose to attend certain schools because of that university's prestige within the NCAA.<sup>141</sup> And the formalities of signing a contract that they must sign in order to live their dream or re-

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137. See DIVISION I MANUAL, *supra* note 125, at 12. For an example of how the NCAA could better educate student-athletes, see Pretty, *supra* note 132, at 2389–90 (suggesting that student-athletes be "educated about the potential long-term effects of concussions or the dangers of continuing to play after sustaining one"). Mr. Pretty's proposal was introduced in 2014, before the settlement in *In re NCAA Student-Athlete Concussion Injury Litigation*, 314 F.R.D. 580 (N.D. Ill. 2016). The current version of the NCAA's Concussion Safety Protocol, which is a subsection of the Concussion Management Plan, merely requires that universities establish "[p]rocedures for education about concussion" but does not elaborate on what procedures are sufficient to satisfy the requirement. DIVISION I MANUAL, *supra* note 125, at 12.

138. See Pretty, *supra* note 132, at 2383–84 (suggesting that because the NCAA "pass[ed] its concussion management plan requirement and publish[ed] it in its Sports Medicine Handbook . . . [and] through the media coverage devoted to the issue, college football players have been notified of the risks associated with concussions," and therefore the NCAA would likely argue that football players assumed the risk of playing the sport).

139. Jon Solomon, *NCAA: Market Emmert Is Wrong Witness in Wrongful Death Lawsuit*, CBS SPORTS (July 16, 2014, 2:05 PM), <https://www.cbssports.com/college-football/news/ncaa-mark-emmert-is-wrong-witness-in-wrongful-death-lawsuit/> [<https://perma.cc/ZEK8-499X>].

140. See Epstein & Anderson, *supra* note 128, at 298.

141. See, e.g., Stewart Mandel, *College Football Program Pecking Order 3.0: Dividing All 66 BCS Teams into Four-Tier Hierarchy*, FOX SPORTS (May 27, 2017, 9:22 AM), <https://www.foxsports.com/college-football/story/college-football-program-pecking-order-3-0-dividing-all-66-bcs-teams-into-four-tier-hierarchy-052517> [<https://perma.cc/88PU-683W>] ("Prestige arguably shows itself most directly in the annual recruiting rankings, where we usually see the same group of programs finish in roughly the same range year-in, year-out, regardless of annual ebbs and flows in their win-loss columns.").

ceive their education should not matter. Although the NCAA is not a party to the contracts between student-athletes and their universities, it does not merely act as the governing body once student-athletes begin their careers: student-athletes must be deemed eligible by the NCAA before institutions will allow them to sign letters of intent for scholarships.<sup>142</sup> Student-athletes should not be penalized for using their talent to earn a quality education by losing access to a mechanism that allows them to hold regulators accountable.<sup>143</sup> This is particularly true for those student-athletes who might not be able to afford a college education if it were not for the NCAA and the scholarship they were offered by their college or university.<sup>144</sup> Unlike public universities that are shielded by sovereign immunity, there is a defendant student-athletes can hold accountable: the NCAA.

A recent Pennsylvania state court decision helpfully illuminates why the assumption of risk defense should not shield the NCAA from liability. In *Feleccia v. Lackawanna College*, the court found that although two college football players were “aware of the general risks inherent in the sport,” they were unaware of their school’s “failure to take reasonable measures to assure their safety.”<sup>145</sup> This case is analogous to the student-athlete and NCAA relationship because student-athletes, most of whom have competed from a young age, are sufficiently experienced and therefore “underst[and] the dangers of the sport.”<sup>146</sup> Yet, just as it is reasonable that the plaintiffs were unaware of their school’s inadequate safety measures, it is reasonable that student-athletes were unaware of the NCAA’s similar failure to protect athletes.<sup>147</sup>

Second, the NCAA should have prohibited objectively dangerous hits and drills. Take, for instance, the infamous Oklahoma Drill, which requires

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142. See *NLI Binding Agreement FAQs*, NAT’L LETTER INTENT, <http://www.nationalletter.org/frequentlyAskedQuestions/bindingAgreement.html> [https://perma.cc/4V2E-CELT].

143. For a discussion on how parents in some lower socioeconomic communities encourage their kids to play football as a way to help them develop, learn valuable life skills, and stay out of serious trouble, see Alana Semuels, *The White Flight from Football*, ATLANTIC (Feb. 1, 2019), <https://www.theatlantic.com/health/archive/2019/02/football-white-flight-racial-divide/581623/> [https://perma.cc/KH2P-SKW9].

144. See RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT’L COLL. PLAYERS ASS’N, *THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT* 4 (2011), <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf> [https://perma.cc/PG7K-M84G] (showing that “[t]he compensation [Football Bowl Subdivision] athletes who are on ‘full scholarship’ receive for living expenses . . . situates the vast majority at or below the poverty level”). And though scholarships are not offered by the NCAA, student-athletes are required to register with the NCAA Eligibility Center before they are able to sign a National Letter of Intent. See *Signing the NLI FAQs*, NAT’L LETTER INTENT, <http://www.nationalletter.org/frequentlyAskedQuestions/signingTheNli.html> [https://perma.cc/DJX3-Y9PY] (explaining that when prospective student-athletes sign their letters of intent, they “agree to submit the necessary information and documents to the Eligibility Center”).

145. 156 A.3d 1200, 1219 (Pa. Super. Ct. 2017).

146. *Feleccia*, 156 A.3d at 1218.

147. See *id.* at 1219.

players to tackle one another at full force.<sup>148</sup> Though the drill is rarely used, researchers have stated that reducing the number of hits players take significantly reduces the likelihood of suffering from concussion-related injuries.<sup>149</sup> For example, the NFL has banned historically popular high-impact practice drills.<sup>150</sup> Because the NFLPA empowers NFL players to bargain for health and safety improvements, the NFL has taken steps to reduce football's impact on players' bodies. By contrast, it appears that the NCAA does not have the same ability to quickly revise dangerous policies.<sup>151</sup>

Although the NCAA has been sluggish in updating its concussion protocol, the organization's treatment of the concussion issue is not entirely inadequate. In 2008, the NCAA instituted a controversial rule prohibiting "targeting," which is defined as "forcible contact to the head or neck area of a defenseless opponent," like a receiver about to catch a pass.<sup>152</sup> The NFL followed suit and modeled its own targeting rule after the NCAA's.<sup>153</sup> The NFL, through its referees, also briefly attempted to penalize the more serious hits

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148. For an example of the drill, see *Gamecocks Do Oklahoma Drills*, CBS SPORTS, <https://www.cbssports.com/college-football/video/gamecocks-do-oklahoma-drills/>. For a variation of the drill, see Alex Kirshner, *Why the Georgia Bulldogs Have a Drill Called 'Millennial Oklahoma'*, SBATION (July 10, 2017, 9:06 AM), <https://www.sbnation.com/college-football/2017/7/8/15942824/oklahoma-drill-kirby-smart-uga> [<https://perma.cc/C82P-VEPC>].

149. Chad A. Tagge et al., *Concussion, Microvascular Injury, and Early Tauopathy in Young Athletes After Impact Head Injury and an Impact Concussion Mouse Model*, 141 BRAIN 422, 423 (2018) (citing Ann C. McKee et al., *The Neuropathology of Sport*, 127 ACTA NEUROPATHOLOGICA 29 (2014)) (explaining that "closed-head impact injuries, independent of concussive signs, can induce traumatic brain injury"); see also Claire Maldarelli, *Football Helmets Don't Prevent Concussions. What Can?*, POPULAR SCI. (Feb. 3, 2018), <https://www.popsci.com/helmets-concussions-football> [<https://perma.cc/3EXD-5UL3>].

150. Steven Ruiz, *NFL Bans 3 Drills Because Some Coaches Were Too Dumb to Stop Using Them*, USA TODAY SPORTS: FORTHEWIN (May 22, 2019, 4:16 PM), <https://ftw.usatoday.com/2019/05/nfl-oklahoma-drill-ban> [<https://perma.cc/HJR8-CCHS>] (describing how the NFL banned three high impact drills that "had been leading to an increase in concussions early during training camp").

151. For an example of the NFLPA's ability to negotiate quick change for NFL players, see the NFL's quick revision of concussion protocol less than a month after Houston Texans quarterback Tom Savage returned to play in the December 10, 2017 game against the San Francisco 49ers despite suffering a concussion. *NFL-NFLPA Joint Statement on Concussion Protocol*, NFLPA (Dec. 29, 2017), <https://www.nflpa.com/news/joint-statement-tom-savage-concussion-protocol> [<https://perma.cc/2E4U-J4A3>].

152. 2019 NCAA FOOTBALL RULES AND INTERPRETATIONS 88 (2019), <https://www.ncaapublications.com/productdownloads/FR19.pdf> [<https://perma.cc/L8J9-273M>].

153. See Austin Knoblauch, *NFL Expands Helmet-Hit Rule, Working on Targeting Rule*, NFL (Mar. 27, 2018, 4:54 PM), <http://www.nfl.com/news/story/0ap3000000923435/article/nfl-expands-helmet-hit-rule-working-on-targeting-rule> [<https://perma.cc/MJ5V-VH27>]; Ralph D. Russo, *Targeting: College Football's Most Hated Rule Here to Stay*, USA TODAY (Aug. 12, 2017, 2:42 AM), <https://www.usatoday.com/story/sports/ncaaf/2017/08/12/targeting-college-football-most-hated-rule-here-to-stay/104521566/> [<https://perma.cc/KQE2-7Q5X>].

that occur in games.<sup>154</sup> Though this attempt appears to have failed,<sup>155</sup> it still seems clear that the proper structures for holding the NCAA accountable are not in place.<sup>156</sup>

Finally, the NCAA should penalize universities that fail to adhere to its current concussion policy.<sup>157</sup> In 2010, the NCAA announced new concussion guidelines,<sup>158</sup> which require each member institution to develop a concussion management plan (CMP). At minimum, these plans required:

- (a) An annual process that ensures student-athletes are educated about the signs and symptoms of concussions . . .
- (b) A process that ensures a student-athlete who exhibits signs . . . consistent with a concussion is removed from athletics activities . . . and evaluated by a medical staff member . . .
- (c) A policy that precludes a student-athlete diagnosed with a concussion from returning to athletic activity . . . at least the remainder of that calendar day; and
- (d) A policy that requires medical clearance for a student-athlete diagnosed with a concussion to return to athletics activity . . . as determined by a physician . . . or the physician's designee.<sup>159</sup>

But guidelines alone are insufficient to compel compliance. Indeed, a 2017 study, analyzing adherence to the NCAA's concussion policy among schools in its major conferences, found disturbing shortcomings in schools' efforts to reduce head trauma and assist students' return to the classroom post-concussion.<sup>160</sup> These failures fell "outside the core competencies of the medical staff," meaning that responsibility lay with staff members like coaches and administration officials who typically see student-athletes outside of the doctor's office and compound the issues that come with the already-lacking medical requirements.<sup>161</sup> Yet it appears that institutions are

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154. Bill Pennington, *Helmet-to-Helmet Hits in N.F.L. Haven't Diminished, but Penalty Flags Have*, N.Y. TIMES (Oct. 14, 2018), <https://www.nytimes.com/2018/10/14/sports/football/nfl-helmet-to-helmet-hits.html> [<https://perma.cc/G6DH-5P5F>].

155. *See id.*

156. *See* Jon Solomon, *NCAA Chief Medical Officer: NFL Can Afford Less Hitting in Practice than Colleges*, AL.COM (June 5, 2013, 1:00 PM) (updated Mar. 6, 2019, 1:30 PM), [https://www.al.com/sports/index.ssf/2013/06/ncaa\\_chief\\_medical\\_officer\\_nfl.html](https://www.al.com/sports/index.ssf/2013/06/ncaa_chief_medical_officer_nfl.html) [<https://perma.cc/D934-EEQ9>].

157. The NCAA does not penalize universities that fail to adhere to its concussion policy. Additionally, violations are only reported to the NCAA if the universities themselves report the violation. *See infra* note 163 and accompanying text.

158. Christine M. Baugh et al., *Concussion Management in United States College Sports*, AM. J. SPORTS MED., Oct. 2014, at 47, 47.

159. NAT'L COLLEGIATE ATHLETIC ASS'N, 2013–14 NCAA SPORTS MEDICINE HANDBOOK 64 (24th ed. 2013). The guidelines have been modestly updated since their implementation, most recently in 2016 to add a requirement for baseline testing, more detailed education procedures, and a requirement of concussion management consistent with best known practices. Thomas A. Buckley et al., *Concussion Management Plan Compliance: A Study of NCAA Power 5 Conference Schools*, ORTHOPAEDIC J. SPORTS MED., Apr. 2017, at 1, 1–2.

160. Buckley et al., *supra* note 159, at 1.

161. *Id.*



not penalized for the negligent actions of their staff.<sup>162</sup> There have been reports of universities that have violated the NCAA's concussion protocol, but there is no evidence of any penalties or sanctions imposed.<sup>163</sup>

The lack of evidence of penalties for violating the NCAA's concussion protocol is disturbing considering that the NCAA has not penalized behavior that damages student-athletes' health but does regularly sanction behavior that implicates its monetary interests.<sup>164</sup> The NCAA regulates amateurism to an alarming degree by imposing seemingly arbitrary restrictions on student-athletes. For example, after competing in the Olympics, swimmers can be paid exorbitant amounts of money by their home countries and still be eligible, but a promising basketball recruit could run into big problems if the wrong person buys him a lunch.<sup>165</sup>

The NCAA should be liable for the concussion-related injuries of student-athletes that compete within its purview. It is clear that the NCAA should have done many things differently in the past that would have made diagnosing or treating concussions more effective, but the organization failed to take on its most basic responsibilities. If a court were to recognize the special relationship that exists between student-athletes and the NCAA, student-athletes would be one step closer to holding the organization that spends much of its time and energy on meticulously regulating amateurism accountable for not taking their health and safety as seriously.

### III. END AROUND: THE CONSEQUENCES OF HOLDING THE NCAA LIABLE

The NCAA has openly acknowledged the prevalence of concussions in college football and college athletics generally since at least 2010.<sup>166</sup> With the recent influx of litigation against the NCAA regarding concussion liability, dramatic reform to the NCAA's concussion protocol, whether self-imposed

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162. See vol freak, *2018 Tennessee vs Missouri*, YOUTUBE (Nov. 19, 2018), <https://youtu.be/XQSFwSaI8Iw?t=593>; The Sports Source, *11 18 18 Sports Source Segment 2*, YOUTUBE (Nov. 18, 2018), <https://youtu.be/b05D74MWNE8> (discussing University of Tennessee's response to quarterback Jarrett Guarantano's brain injury).

163. Dan Diamond, *Arizona Just Broke the NCAA's Concussion Policy. Will It Matter?*, FORBES (Oct. 27, 2012, 9:27 PM), <https://www.forbes.com/sites/dandiamond/2012/10/27/arizona-just-broke-the-ncaas-concussion-policy-will-it-matter/> [<https://perma.cc/B3AX-DTL4>].

164. See Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551, 564 (2011) (discussing the fact that "NCAA sanction powers extend only to member institutions, not to individual coaches, players . . . or involved individuals who are not direct members of the NCAA"); see also Smith, *supra* note 41, at 19–20 (discussing how the NCAA made it a point to regulate televised football games, but was challenged by member institutions who prevailed when the Supreme Court, in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), held that the NCAA's restrictions violated antitrust laws).

165. Dennis Dodd, *NCAA's Hypocrisy Toward Revenue-Generating Sports Is More Apparent than Ever*, CBS SPORTS (Mar. 29, 2018, 10:06 PM), <https://www.cbssports.com/college-basketball/news/ncaas-hypocrisy-toward-revenue-generating-sports-is-more-apparent-than-ever/> [<https://perma.cc/5W88-PPL3>].

166. See Buckley et al., *supra* note 159, at 1 (stating that the NCAA enacted its concussion policy on April 29, 2010).

or ordered via injunctive relief or settlement agreements, seems likely. Public concern regarding football's risks has continued to increase in the last decade, but the NCAA has not meaningfully responded.<sup>167</sup> Section III.A contends that the special relationship argument would be an effective litigation strategy. Section III.B analyzes the implications of a special relationship, as defined by tort principles, between the NCAA and student-athletes. And finally, Section III.C explores whether it may be time for the doctrine of strict liability to govern high-impact sports like football.

#### A. *Victory Formation: Special Relationship as a Litigation Strategy*

Pleading that a special relationship exists could be a winning strategy. The next plaintiffs who bring a concussion-related negligence action against the NCAA should, like the *Kleinknecht* plaintiffs, argue that a special relationship between the NCAA and injured student-athletes exists, heightening the duty of care owed. So far, none of the plaintiffs in the concussion cases that the NCAA recently settled have made such an argument.<sup>168</sup> There are several similarities to the special relationship argument in the claims that have been brought against the NCAA, but their pleadings have not gone far enough. The complaints in *In re NCAA Concussion Litigation*, *Ploetz*, and *Staggs* all assert that the NCAA had a duty to act because the injuries at issue were foreseeable results of the NCAA's conduct, specifically the organization's willingness to take on the role of college football regulator. For example, the plaintiffs in *In re Concussion Litigation* argued that the NCAA failed to educate players about concussion symptoms and failed to disclose the "special risks of long-term complications from repeated concussions."<sup>169</sup> In *Ploetz*, damages were sought for injuries sustained as a "result of the tortious conduct of the NCAA in connection with its failure to . . . take effective action to protect Gregory Ploetz."<sup>170</sup> And in *Staggs*, the plaintiff contended, *inter alia*, that the NCAA failed to implement procedures to "monitor the health of student football players after they sustained (or were suspected of sustaining) concussive . . . injuries."<sup>171</sup> But the default negligence standard does not recognize an affirmative duty to act, and none of the complaints asserted a circumstance that would give rise to an affirmative duty.

#### B. *Win Probability: Implications of a Special Relationship*

If courts recognize a special relationship between the NCAA and student-athletes, the NCAA will need to do much more than maintain its bare-

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167. See *id.*; see also *supra* notes 132–137 and accompanying text.

168. See First Amended Class Action Complaint, *Staggs v. NCAA*, No. 3:18-cv-01981-L-WVG (S.D. Cal. Sept. 19, 2018), ECF No. 4; Consolidated Class Action Complaint, *supra* note 57; Plaintiff's First Amended Petition, *supra* note 2.

169. Consolidated Class Action Complaint, *supra* note 57, at 34.

170. Plaintiff's First Amended Petition, *supra* note 2, at 2.

171. First Amended Class Action Complaint, *supra* note 168, at 26–27.

bones concussion policy.<sup>172</sup> The NCAA would have to, at a minimum, implement those policies that are reasonably necessary to prevent the concussion-related injuries that so often affect student-athletes.<sup>173</sup> Some of the most obvious fixes, such as creating an enforcement mechanism for the concussion protocol<sup>174</sup> and requiring independent team physicians, have already been suggested by scholars and professionals.<sup>175</sup> But courts finding a special relationship would increase pressure on the NCAA in the form of legal liability.

The NCAA has the capital to face liability for concussion-related issues.<sup>176</sup> The NCAA is primarily funded through television-marketing-rights fees and championship revenues.<sup>177</sup> Much of the association's revenue is distributed to the programs, and the existence of the organization allows programs to compete at a high level, creating more opportunity to earn revenue.<sup>178</sup> Some of this revenue can fund a scheme where the NCAA goes beyond its recent settlement by redirecting revenue to funds that would directly compensate student-athletes who suffer from concussion-related injuries and by providing actual treatment as opposed to mere medical monitoring.<sup>179</sup> And because much of the NCAA's revenue is distributed back to its member institutions, a special relationship between student-athletes and the NCAA would pressure universities to act more responsibly.

Beyond the NCAA's ability to pay, the organization's governance structure also presents an opportunity for injured plaintiffs to hold responsible parties to account. The legislative bodies and committees that govern each division are made up of volunteers from member schools.<sup>180</sup> This organiza-

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172. See *supra* notes 157–161 and accompanying text.

173. See *supra* notes 157–161 and accompanying text.

174. See *Pretty, supra* note 132, at 2386–87 (suggesting that one way to reform the NCAA's concussion protocol would be to add an enforcement mechanism); see also *Waldron, supra* note 16.

175. See *Pretty, supra* note 132, at 2387 (proposing a requirement that independent team physicians be hired in order to “eliminate the conflict of interest inherent for team doctors who are also university employees”).

176. See Mark Schlabach, *NCAA: Where Does the Money Go?*, ESPN (July 12, 2011), [http://www.espn.com/college-sports/story/\\_/id/6756472/following-ncaa-money](http://www.espn.com/college-sports/story/_/id/6756472/following-ncaa-money) [<https://perma.cc/6NG9-ULMX>]; see also *Where Does the Money Go?*, *supra* note 51.

177. See *Where Does the Money Go?*, *supra* note 51.

178. See Mark Yost, *Who Pays the College Coach*, WALL STREET J. (Dec. 6, 2008, 11:59 PM), <https://www.wsj.com/articles/SB122853304793584959> [<https://perma.cc/TPX3-VRNG>] (noting that “[o]ne of the benefits to come out of the rampant commercialism of college athletics is that media conglomerates and sneaker companies are willing to pay huge sums for the broadcast and apparel rights”); *Where Does the Money Go?*, *supra* note 51.

179. See *supra* notes 62–65 and accompanying text.

180. *Governance*, NCAA, <http://www.ncaa.org/governance> [<https://perma.cc/W47J-9YWJ>]. In a recent move, representatives from member institutions voted to add five independent voting members to the NCAA's Board of Governors. Amy Wimmer Schwarb, *NCAA to Add Independent Members to Top Board*, NCAA (Jan. 24, 2019, 7:04 PM), <http://www.ncaa>

tional structure creates a conflict of interest because the NCAA officials who promulgate the competition rules are the same officials who have an interest in the success of the regime, which would assuredly be less profitable if the NCAA and its member schools were forced to comply with a multitude of regulations.<sup>181</sup> But this organizational structure also provides an opportunity because imposing liability on the NCAA would necessarily mean imposing liability on its member institutions—something that student-athletes have had trouble doing for many years—since those institutions will feel the impact of reduced revenue.<sup>182</sup> A higher duty of care needs to be enforced because of the NCAA's relationship with member institutions and their role in approving and enforcing the rules and regulations promulgated by the organization.<sup>183</sup>

Though a special relationship would ease the road to damages for student-athletes, the newly recognized relationship would also help student-athletes pursue equitable remedies such as injunctive relief. Student-athletes should also seek injunctive relief to require the NCAA to allocate some of its more than \$1 billion annual revenue<sup>184</sup> to bolster health and safety programs for student-athletes. There are countless ways such resources could be put to good use; the NFL's approach may provide some guidance. In stark contrast with the NCAA, retired NFL players have access to the NFL Player Care Foundation (PCF) fund, which is "dedicated to helping retired players improve their quality of life."<sup>185</sup> The foundation "addresses all aspects of life by providing programs and assistance with medical, emotional, financial, social and community issues."<sup>186</sup> Although the PCF is independent of the NFL, it is a collective venture created by the NFL Owners, NFLPA, Pro Football Hall of Fame, and the NFL Alumni Association.<sup>187</sup> A fund that does similar work for former NCAA student-athletes could be established by reallocating funds or creating an entirely new fund and reducing revenues poured back into member institutions.

After the recognition of a special relationship, the NCAA should establish and enforce uniform concussion risk-assessment standards to be utilized by all NCAA member institutions. Under current policy, schools establish their own standards for the number of hits or concussions necessary to rule

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.org/about/resources/media-center/news/ncaa-add-independent-members-top-board [https://perma.cc/6KH2-4H28].

181. See *Governance*, *supra* note 180.

182. See Section I.B; see also *supra* notes 86–90 and accompanying text.

183. See Section I.B.

184. *Where Does the Money Go?*, *supra* note 51.

185. Overview, NFL PLAYER CARE FOUND., <http://www.nflplayercare.com> [https://perma.cc/ED45-4AZY].

186. *Id.*

187. *Id.*

student-athletes ineligible for further competitions.<sup>188</sup> This has led to the bizarre and disturbing phenomenon in which student-athletes who are ruled medically ineligible to compete at one university simply transfer and play for another.<sup>189</sup> And because the NCAA does not adequately regulate athletes' ability to play, the problem is exacerbated. Moreover, the NCAA Chief Medical Officer has admitted that in his personal capacity as a neurologist "he has recommended that athletes stop playing, only to have them seek second or third opinions from doctors who disagree."<sup>190</sup> Student athletes, perhaps motivated by their own competitive nature and pressure from coaches and teammates, may think that competing is worth the risk of exacerbating their injury. But that is all the more reason to defer to the neutral, objective judgment of medical professionals; a decision to declare a student-athlete medically ineligible should be taken seriously.<sup>191</sup> The foregoing issues and arguments make it even more important that a special relationship be found to provide consistency with respect to how student-athletes are treated.

### C. *Hail Mary: Strict Liability*

The NCAA has consistently argued that it does not owe student-athletes a heightened duty of care. If the NCAA is correct, however, its arguments still feed into a theory of strict liability.<sup>192</sup> If one accepts the questionable premise that the NCAA has observed and exhausted all reasonable methods of care, it follows that football, and potentially other dangerous sports such as hockey, may be activities that are too inherently dangerous to be governed by traditional negligence principles. This Section suggests that sports like football may need to be judged under strict liability principles, explores potential defenses the NCAA may have to a strict liability argument, and examines a potential implication of recognizing football as a strict liability sport.

Student-athletes who wish to hold the NCAA accountable could argue that contact sports like football or hockey are abnormally dangerous activities and therefore should be governed by strict liability. Under general tort principles, "[a]n actor who carries on an abnormally dangerous activity is

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188. David Armstrong, *Watch: Disqualified After Concussions, College Football Players Recruited Back onto the Field*, STAT (Jan. 8, 2016), <https://www.statnews.com/2016/01/08/concussions-college-football-players/> [<https://perma.cc/T6H3-FB6M>].

189. See *id.* (explaining that "colleges . . . decide on their own when, or if, players should be medically disqualified").

190. *Id.*

191. See Pretty, *supra* note 132, at 2372 (explaining that college football players have a great interest in returning to play after injury because they "are never more than a single major injury away from losing their scholarship"). For a discussion on the conflict of interest that exists between university athletic staff and the pressure on programs to win, see *id.* at 2371–73, discussing the "direct conflict of interest" some team physicians and athletic trainers may feel when put in the position to diagnose and manage head injuries, especially when the athlete in question is "crucial to the team's success."

192. The analysis with respect to the merits of strict liability are beyond the scope of this Note. This Section is merely meant to acknowledge the existence of the argument.

subject to strict liability for physical harm resulting from the activity.”<sup>193</sup> Activities are considered abnormally dangerous if “the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and . . . the activity is not one of common usage.”<sup>194</sup> One hurdle with respect to the strict liability argument is that football could be considered an activity of “common usage.” The importance of the common usage element has been interpreted differently between each drafting of the Restatement.<sup>195</sup> And even if the concept is not redefined, as fewer and fewer people compete, football itself could become an activity that is not of common usage.<sup>196</sup>

Despite the common usage hurdle, the argument that football is abnormally dangerous is only getting stronger. Contact sports involve high numbers of hits that players sustain while competing. These repeated hits are what some leading health-and-safety experts claim cause brain damage.<sup>197</sup> A recent CTE study suggests that roughly 20 percent of brains showed the occurrence of CTE even though the subjects had not been diagnosed with a concussion during their lifetime.<sup>198</sup> This is also the argument made by the plaintiffs in *Mehr v. Fédération Internationale de Football Association*.<sup>199</sup> There, the plaintiffs alleged that “heading a soccer ball can result in problems of memory and attention, as well as structural and metabolic differences visible on advanced brain imaging, even in the absence of a symptomatic concussion.”<sup>200</sup> However, it is still clear that more protection is necessary in football, because hits to the head cannot be as easily or effectively eliminated as they can in soccer, where removing headers significantly lowers the risk of playing the sport.

The NCAA would likely argue that strict liability rules “are designed largely to protect innocent third parties or innocent bystanders,” and not those “who voluntarily come[] into contact with or approach[] the defend-

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193. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 20 (AM. LAW INST. 2010).

194. *Id.*

195. *See id.* § 20 cmt. j, Reporters’ Note (noting that under the First Restatement, if an activity was in common usage, it prevented the application of strict liability, but under the Second Restatement, whether an activity was in common usage was just a factor “among many to consider in determining whether an activity is abnormally dangerous”).

196. *See* Semuels, *supra* note 143 (sharing that football’s popularity is “declining in majority-white states”).

197. Tom Goldman, *Repeated Head Hits, Not Just Concussions, May Lead to a Type of Chronic Brain Damage*, NPR (Jan. 18, 2018, 10:01 AM), <https://www.npr.org/sections/health-shots/2018/01/18/578355877/repeated-head-hits-not-concussions-may-be-behind-a-type-of-chronic-brain-damage> [<https://perma.cc/PRA2-DVJM>].

198. Thor D. Stein et al., *Concussion in Chronic Traumatic Encephalopathy*, CURRENT PAIN & HEADACHE REP., Oct. 2015, at 47.

199. Class Action Complaint, *Mehr v. Fédération Internationale de Football Ass’n*, No. 14-cv-3879, 2014 WL 4214853 (N.D. Cal. Aug. 27, 2014).

200. *Id.* at 2–3.

ant's . . . activity in order to secure some benefit that contact or proximity to the . . . activity provides."<sup>201</sup> But the strength of this argument is not dispositive. On one hand, in an action against an opposing team's head coach, a New York state court found that a college football player assumed the risk of competing in a football competition.<sup>202</sup> Alternatively, as noted above, a Pennsylvania court found that because plaintiffs were "unaware of [their college's] failure to take reasonable measures to assure their safety by providing qualified trainers during [a] drill," they did not assume the risk of playing football for their school.<sup>203</sup>

Additionally, the NCAA benefits from football's resilient popularity. While the strict liability argument may seem appealing upon first blush, it is important to note that strict liability could mean the end of college football. Regulating football would become too costly under a theory of strict liability.<sup>204</sup> If football became a strict liability activity, the NCAA would likely choose the highest level of care in order to avoid liability, since it would be liable for all injuries incurred in the course of play.<sup>205</sup> Strict liability would also likely limit the number or intensity of hits made by players, which may alienate players and fans interested in that intensity.<sup>206</sup> Though many families have voiced concern about allowing their children to participate in the sport, football is still the number one spectator sport in America.<sup>207</sup> The sport's enduring popularity is likely the largest of many hurdles that proponents of this strict liability argument will face. Yet, if plaintiffs successfully jump these hurdles and continue on armed with the proof that the NCAA has not acted reasonably, they might have a strong case for strict liability.

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201. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 24 cmt. a (AM. LAW INST. 2010).

202. See *Butchello v. Herberger*, 145 A.D.3d 1586, 1587 (N.Y. App. Div. 2016).

203. *Feleccia v. Lackawanna Coll.*, 156 A.3d 1200, 1219 (Pa. Super. Ct. 2017).

204. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 873 (1981) ("Strict liability is costly to administer because . . . every accident that occurs gives rise to a legal claim for compensation and thus a possible lawsuit.").

205. See *id.*

206. See *Clay Matthews Says NFL 'Getting Soft' as League Defends Latest Roughing Flag*, ESPN (Sept. 23, 2018), [http://www.espn.com/nfl/story/\\_id/24773771/clay-matthews-says-nfl-getting-soft-league-defends-latest-roughing-passer-flag](http://www.espn.com/nfl/story/_id/24773771/clay-matthews-says-nfl-getting-soft-league-defends-latest-roughing-passer-flag) [https://perma.cc/HRH5-S8FH] (showing how professional football players like Clay Matthews think that some hits are just "football play"); see also Travis Brody, *What Is the Appeal of American Football?*, GROWTH GAME (Nov. 3, 2014), <https://www.growthofagame.com/2014/11/appeal-american-football/> [https://perma.cc/YQ5R-QXEK] (expressing the idea that football is, in the words of Vince Lombardi, "a collision sport," which is appealing because of its intensity and the "incredible amount of focus and mental toughness required, as the risk of injury is very real").

207. See Jim Norman, *Football Still Americans' Favorite Sport to Watch*, GALLUP (Jan. 4, 2018), <https://news.gallup.com/poll/224864/football-americans-favorite-sport-watch.aspx> [https://perma.cc/LU3R-YA3J] (discussing a Gallup poll that found that 37% of adults in the United States chose football "as their favorite sport to watch").

## CONCLUSION

A special relationship exists between the NCAA and student-athletes who compete at its member institutions. Despite the NCAA's self-proclaimed role as the protector of student-athletes, progressive health-and-safety reforms have been slow to follow the discovery of links between dangerous practices and serious injury. The NCAA refuses to accept responsibility for injuries happening under its scope of influence and has failed to exercise the due care its student-athletes deserve. Further, public perception of contact sports—such as football, hockey, and even soccer—where athletes are taking hits to the head will continue to worsen as we learn more about the impact of concussions and their long-term effects.

The NCAA has shown its unwillingness to act swiftly unless it is compelled by a court-ordered settlement, and even then, there is no real guarantee that the organization will be held liable for preventable injuries that occur under its purview. There is room in the law to find a special relationship between the NCAA and student-athletes. If the NCAA refuses to concede on this point, it may be time to go one step further and seek strict liability governance of contact sports.



