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Concussion management should be 'no brainer' for NCAA

Alexander "Trey" Robertson IV is a trial attorney and senior partner of Robertson & Associates LLP, in Westlake Village. He is also a certified Emergency Medical Technician (EMT) and president of Ventura County Event Medical Standby LLC, which provides EMT's for youth and high school football games. He is the father of a current high school varsity football player and a youth football player in Ventura County.



On Monday, Brian Baucham, a former cornerback at USC, filed a lawsuit in Los Angeles County Superior Court against the school and its former head football coach, Lane Kiffin, alleging that they forced Baucham to play a game in 2012 over his objection against the California Golden Bears (Cal) while he was still suffering the combined effects of a previous concussion and "influenza-like illness, viral pharyngitis and dehydration." Baucham collapsed on the field during the

fourth quarter and was subsequently hospitalized and placed on a ventilator for days thereafter, according to the lawsuit.

This is not the first such lawsuit. In July of this year, a settlement worth approximately \$75 million was announced resolving two class actions brought by student-athletes against the NCAA for alleged concussion-related injuries. Of the settlement amount, \$70 million will be used to fund medical monitoring for student-athletes and \$5 million will be dedicated to research into sports-related head injuries. The settlement excludes any student-athletes who have sustained an actual injury. *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, MDL No. 2492 (N.D. Ill.).

Baucham's Suit

In his suit, Baucham claims he was left with "cardiopulmonary damage and compromise as well as brain injury with neurocognitive deficits." According to the lawsuit, USC has a "USC Athletics Head Injury Program & Concussion Management Plan," which assures that the health and welfare of the student-athlete is a priority when determining when it is safe to return to play any contact sport, including football. The suit alleges that USC and Kiffin were negligent by "increasing the risk that plaintiff would be injured ... by forcing him to play in the Cal game, despite his history of a concussion approximately two months earlier and his two days of illness."

These allegations highlight the serious ethical dilemmas, and potential conflicts of interest, which are unique to the field of sports medicine and collegiate contact sports. Baucham alleges that he suffered a concussion two months before the game in question. Additionally, two days before the Cal game, he alleges he had "a high fever, chills and abdominal distress." The next morning, he went to the USC Health Clinic, where he reportedly "presented with a fever of 103 degrees, chills and body aches, fatigue, nausea, vomiting, and abdominal pain." He claims he was given medications and four liters of intravenous fluids, and told by the school's medical staff that he was in no condition to practice or play.

Baucham claims he reported these facts to the coaching staff, but was told to report to practice, where he watched but did not participate. The lawsuit alleges that Kiffin instructed Baucham to report to the team hotel the night before the game, and that Baucham was given his own room because he was sick. The following morning, Baucham alleges he told his coaches he was still too sick to play, but was told to dress out and be prepared to play. Baucham played both the first and second quarters, but was taken to the locker room before half-time, where additional intravenous fluids were administered to him.

Baucham claims he has no recollection of leaving the locker room or going out onto the field for the second half, yet the coaching staff continued to play Baucham into the

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Friday, September 26, 2014

Litigation

Judge grants S&P's discovery motion, but warns it might not like what it finds

A judge granted in part the company's motion to compel discovery in the government's case targeting S&P's ratings activity in advance of the financial crisis, but cautioned that it might not like what it finds in the unredacted files.

Judges and Judiciary

Judges' censures draw criticism as too lenient

The decision by judicial watchdogs not to seek the removal of two judges who had sex in their chambers, one with a clerk and the other with former law students, is drawing criticism from jurists who say the punishment is too light.

Perspective

Review: A flawed case against the Supreme Court

Erwin Chemerinsky undertakes an ambitious review of the Supreme Court's history in his new book. He conveys his criticism in strong, clear language. But that criticism is mostly a restatement of conventional liberal ideology. By **David A. DeGroot**

Corporate

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Rick Climan and Keith Flaum of Weil, Gotshal & Manges LLP debate and discuss employee-related walk rights in the M&A context.

Litigation

Drones fly into Hollywood

Partial federal approval to use drones for shooting films and TV has clear benefits to the entertainment industry, legal experts say.

San Diego settles sexual misconduct case for \$5.9 million

The city of San Diego has approved a \$5.9 million settlement of the civil rights case brought by one of more than a dozen women who claimed they were victims of sexual misconduct by veteran San Diego police officer Anthony Arevalos.

Intellectual Property

Newegg questions conduct in fee shifting fight

Making a second bid for attorney fees after warding off patent infringement claims, Newegg.com Inc. alleged that a subsidiary of Newport Beach-based patent holding company

fourth quarter, where he collapsed on the field and was carted back into the locker room, where an additional five liters of intravenous fluids were administered to him. The suit claims that Baucham then began coughing up "copious amounts of fluid and blood ... had a 10/10 headache and blurred vision." He was transported to USC Keck Medical Center, where he was placed on a ventilator for a number of days. The suit also claims that a CT scan revealed Baucham had sustained a brain injury and bleeding into the brain.

Student Athletes and Team Physicians

Unlike their professional counterparts, college football players who receive scholarships are often at the mercy of their school, coaches and team physicians when it comes to return-to-play decisions. Baucham claims that after his career-ending injury, USC tried to cancel his scholarship. Most people do not realize that college scholarships are annually renewable contracts, which must be approved by the head coach each year. If a player gets injured, they can lose their scholarship, get stuck with unpaid medical bills, an inability to pay for tuition, and no recourse for loss of earnings after a career-ending injury.

Because college players are deemed "student-athletes," they do not qualify for workers compensation benefits and have little negotiating power over whether their scholarship will be renewed after an injury. This inequity has prompted some to argue that, "Grant-in-aid athletes in revenue-generating sports at NCAA Division I institutions are employees under the common law." McCormick & McCormick, "The Myth of the Student-Athlete: The College Athlete as Employee," 81 Wash. L. Rev. 71, 97 (2006). And just this year, the National Labor Relations Board in Chicago agreed and ruled that football players at Northwestern University can unionize.

Nowhere does the conflict between the health and safety of the player and the pecuniary interests of the team come into sharper focus than with the team physician. In his book, "You're OK, It's Just a Bruise," Dr. Rob Huizenga, former team physician for the Los Angeles Raiders and past president of the NFL Physicians Society wrote, "I thought I could be a team doctor and rise above the potential game-day pressures and conflicts of interest ... I was wrong." Health care professional often identify return-to-play decisions as one of the main ethical conflicts in sports medicine - and "the decision should not be dominated by the desire to affect the outcome of the competition or by the coaches." See "Sports Medicine and Ethics," American Journal of Bioethics (2014).

The team physician's decision-making process is governed by a combination of a professional code of ethics and the common law standard of care. For instance, American Medical Association Code of Medical Ethics Section 3.06 requires that physicians assist players in making "informed decisions about their participation in amateur and professional contact sports which entail the risk of bodily injury." The code further states that the physician's *only* consideration should be the medical care of the participant.

Team physicians, like any doctor, face potential tort liability for medical malpractice. As one commentator stated, "Team physicians should perform with the level of knowledge, skill, and care that is expected of a reasonably competent medical practitioner under similar circumstances, taking into account reasonable limits that have been placed on the scope of the physician's undertaking." Joseph H. King Jr., "The Duty and Standard of Care for Team Physicians," 18 Houst. L. Rev., 657, 692 (1981). One of the first successful medical malpractice suits by a football player against a team physician was won by former San Francisco 49er Charlie Krueger, who sued the team physician for fraudulently concealing the extent of his injuries and giving him repeated treatments to return him to play. A jury awarded Krueger \$2.3 million as compensation for his injuries.

Of course, Baucham will have to prove a causal link between his alleged injuries and the decisions of the coaching staff and team physician, but his story is not unique. Potential solutions to this problem include (1) eliminating the team physician entirely and have the NCAA or player's union employ team doctors to remove the team physician's inherent conflict of interest to make medical decisions that could be adverse to the player's best interests; (2) require mandatory conflict-of-interest disclosure by the team physician to the student-athlete so that player can obtain a second opinion from an independent sports medicine doctor before being forced to return to play; and as a last resort, (3) litigation against the team physician and his or her employer (the university) to provide economic incentives to put the student player's long-term health and safety first above the team's short-term goals of winning games.

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Litigation

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Discipline

Disciplinary Actions

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