

April 2016

Class Certification Issues: In Re: National Football League Concussion Injury Litigation

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Jessica L. Hawley, *Class Certification Issues: In Re: National Football League Concussion Injury Litigation*, 6 Pace. Intell. Prop. Sports & Ent. L.F. 184 (2016).

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Class Certification Issues: In Re: National Football League Concussion Injury Litigation

Abstract

This paper will discuss whether the prerequisites of the Federal Rules of Civil Procedure, Rule 23, were properly applied in the certification of the class in the NFL Concussion Injury Litigation, with an emphasis on typicality. Discussion will begin with the general rule of class actions and drafter's intent when the rule was enacted. It will then discuss the major amendment to the rule and the purpose of the amendment with a focus on typicality, and clarify the standard for the typicality requirement with a discussion of the United States Supreme Court decision in *Amchem v. Georgine*. The discussion then narrows the application of typicality with the Third Circuit's *Baby Neal* test. It discusses the Eastern District Court of Pennsylvania's misapplication of typicality with an analysis of where the court erred. A brief comparison between the class action of *Amchem* and the NFL Concussion Injury Litigation is also discussed.

In closing, the paper concludes with a summation of the writer's analysis of the District Court's holding.

Keywords

NFL, concussions, class actions, concussion injury lawsuits, football

PACE INTELLECTUAL PROPERTY, SPORTS & ENTERTAINMENT LAW FORUM

VOLUME 6

SPRING 2016

NUMBER 1

CLASS CERTIFICATION ISSUES: IN RE: NATIONAL FOOTBALL LEAGUE CONCUSSION INJURY LITIGATION[‡]

Jessica Leigh Hawley^{*}

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[‡] At the time this Article was written, the Third Circuit Court of Appeals had not yet ruled on the matter.

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INTRODUCTION

Football is viewed as a violent personal contact sport because of the player to player hits, some of which involve contacts to the head. While players have traditionally worn helmets in part for protection, the design of the helmets for protective purposes has varied over time. Notwithstanding the protection afforded by the helmet, former players of the National Football League (hereinafter “NFL”) have alleged that their consistent blows to the head are attributable to playing football in the NFL and that the NFL knew or should have known about the potential for these head injuries.

As a result professional football players have alleged that these contacts caused neurocognitive impairments. Retired NFL players have filed various lawsuits seeking concussion injury relief. However, just because the injuries appear to be similar to each other does not mean that the injuries alleged by plaintiffs in the lawsuits against the NFL are representative of the interests and incentives of all former football players. The neurocognitive impairments span a multitude of material factual variations of injury causation of injury and misrepresentation. Furthermore, there is considerable doubt as to whether or not one nationwide class action lawsuit is proper to address the claims of all retired football players.

This paper will discuss whether the prerequisites of the Federal Rules of Civil Procedure, Rule 23, were properly applied in the certification of the class in the NFL Concussion Injury Litigation, with an emphasis on typicality. Discussion will begin with the general rule of class actions and drafter’s intent when the rule was enacted. It will then discuss the major amendment to the rule and the purpose of the amendment with a focus on typicality, and clarify the standard for the typicality requirement with a discussion of the United States Supreme Court decision in *Amchem v. Georgine*.¹

The discussion then narrows the application of typicality with the Third Circuit’s *Baby Neal* test. It discusses the Eastern District Court of Pennsylvania’s misapplication of typicality with an analysis of where the court erred. A brief comparison between the class action of *Amchem* and the NFL Concussion Injury Litigation is also discussed.

In closing, the paper concludes with a summation of the writer’s analysis of the District Court’s holding.

I. PROCEDURAL RULE ON CLASS ACTIONS

1. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

This section will explain the historical development of the rule controlling certification of a civil action as a class action. Next, it will set out the specific rule as enacted by Congress in 1937. Then, it will discuss the major amendment to the rule's typicality requirement in 1966. Further, it will discuss the Supreme Court's interpretation of the typicality requirement under the current version of the Federal Rules of Civil Procedure Rule 23.

A. Historical Development of the Class Action Rule: Particular Focus on the Typicality Requirement

Traditionally, the Chancellor² would decide if acts of a defendant that were complained of was a common injury to all the complainants; there was such a common interest in the subject of the suit as to authorize them to join in one bill; despite each injury being separate and distinct; and the relief sought was the same to all the complainants.³ However, a plaintiff who had a separate and distinct claim to relief could not join in suit for separate relief from each claimant.⁴ The decisions would require a common interest of some sort, in the situation known as a class action.⁵ Thus the representative must possess such an interest that the representative would have joined with the other members in the filing of the suit; and the court was to take special care to ensure there is fair representation.⁶

The United States Supreme Court created a committee to study and draft rules of procedures for federal district courts to initiate civil actions. As to an action identified as a "class action," the committee proposed a special rule.

Rule 38 originally provided:

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.⁷

2. During the time of English law, a judge who sat in a court of equity and ordered something to be done other than paying money damages.

3. William Wirt Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 MICH. L. REV. 878, 879 (1931).

4. *Id.* at 883.

5. Hiram H. Lesar, *Class Suits and the Federal Rules*, 22 MINN. L. REV. 34, 36 (1937).

6. Lesar, *supra.* at 37.

7. *Id.* at 36.

Justice Story, most known for his American jurisprudence commentary, is quoted noting:

The most usual cases arranging themselves under this head of exceptions are; (1) where the question is one of common or general interest, and one or more sue, or defend for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes, and those, who sue, or defend, may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous, and though they have, or may have, separate and distinct interests; yet it is impracticable to bring them all before the Court.”⁸

As revised from former Equity Rule 38, the 1937 Federal Rule of Civil Procedure Rule 23(a) provided:

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.⁹

The original rule attempted to define what constituted a common or general interest.¹⁰ Chief draftsman James Wm. Moore¹¹ proposed the following as a tentative draft to the rule:

(a) *When Action May be Brought.* In the following situations, if persons are so numerous as to make it impracticable to bring them all before the court, such a number of them as will fairly insure the

8. Blume, *supra* at 879.

9. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 414 (1967).

10. Daniel C. Hopkinson, *The New Federal Rules of Procedure as Compared with the Former Federal Equity Rules and the Wisconsin Code*, 23 MARQ. L. REV. 159, 170 (1939).

11. John K. Rabiej, *The Making of Class Action Rule 23 – What Were We Thinking?*, 24 MISS. C. L. REV. 323 (2005).

adequate representation of all may, on behalf of all, join as plaintiffs or be joined as defendants, when the character or rights sought to be enforced for or against the class is

- (1) joint, or common, or derivative in the sense that the owner of a primary right neglects or refuses to enforce such right and the class thereby obtains a right to enforce the primary right;
- (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action;
- (3) several, and there is a question of law or fact common to the several rights.¹²

The purpose of the categorical distribution was so that an intervener to a class action, whose only interest in the action other than that of the class, who shared a common question of law or fact, must be distinguished from an intervention which is additional to the main action; an intervention in the class action itself; or an intervention to a claim for a share of property or fund in an action.¹³ The second preliminary draft read: [S]uch a number of them, *one or more*, as will fairly insure the adequate representation of all may, on behalf of all, join as plaintiffs.¹⁴

This modification was suggested so that one could not be a representative of a group unless he represented the common interests of all and could honestly and fairly try the rights between himself, all other persons interested, and the opponents.¹⁵ The goal was to ensure that in order for a party to represent a class adequately, his interests must not be antagonistic to those whom he would represent.¹⁶ The representative must then have a coextensive interest and is wholly compatible with the interests of those whom he would represent.¹⁷ The proposed rule attempted to restate the better practice of the decided cases of Equity Rule 38, which dealt with the subject of class actions, in the light of the history and long tradition of the equity courts.¹⁸ Accordingly, at the time Congress enacted Rule 23, typicality was meant to ensure the named representative adequately represented the members of the class.

12. James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems raised by the Preliminary Draft*, 25 GEO. L. J. 551, 571 (1937).

13. *Id.* at 575.

14. James Wm. Moore & Marcus Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, (1937) (*emphasis added*).

15. James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 308 (1937).

16. *Id.* at 312.

17. *Id.*

18. *Id.* at 325.

B. *The Major Amendment to Rule 23*

The Advisory Committee to the Federal Rules of Civil Procedure amended¹⁹ subsections (a) – (d)²⁰ of Rule 23 in 1966.²¹ The Committee recommended amendments for adoption because the provisions on class actions relied on the terms such as “joint” and “common,” to define its categories.²² These terms were found increasingly unsatisfactory.²³ It became a concern for courts to classify or limit representative actions by reference to the abstract nature of the rights or duties involved.²⁴

The purposes of the revisions were to create a more practical set of definitions.²⁵ The revisions paid closer attention to the procedural fairness and included the procedural direction to the questions that arose about notice to the class.²⁶ The rule was then revised to specifically state the requisites of any class action, which included the requirement that the representative parties will fairly and adequately protect the interest of the class.²⁷ The amendment to Rule 23(a) also added in clause (3)²⁸ to emphasize that the representatives out to be squarely aligned in interest with the represented group.²⁹ Typicality is designed to implement the due process mandate that the interests of absent class members are protected and it ensures that the representatives’ interests are substantially aligned with the interests of the class members’ interests by demanding that the

19. However, this paper will only address the amendments to subdivision (a) as it relates to typicality.

20. FED. R. CIV. P. 23(a) advisory comm. nn. (1966 Amendment, Subdivision (a)).

21. Rule 23 was Amended in 1987 but only 23(c), 1998 but only 23(c)(1) and 23(f), 2003, but only 23(c), (g), and (h) 2007 but only 23(d) and (f) stylistic changes only, and 2009 but only the time set in the former rule at 10 days revised to 14 days relating to Rule 6.

22. *Statement on Behalf of the Advisory Committee on Civil Rules* (Jun. 10, 1965), [hereinafter *Advisory Committee*], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV08-1965.pdf>.

23. *Id.*

24. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 376 (1967).

25. *Advisory Committee*, *supra* note 22; *see also* Kaplan, *supra* note 23, at 387 (discussing The Committee’s proposition that a class action is based on a “class so numerous as to make individual joinder impracticable, questions of law or fact exist and are common to the class, and the representative parties are proper” of the class it seeks to represent).

26. *Id.*

27. *Id.* *see also* FED. R. CIV. P., *supra* note 21.

28. The typicality prong.

29. Kaplan, *supra* note 24, at 387 n.120.

respective legal and factual positions are reasonably similar.³⁰ It is important to distinguish typicality and adequacy of representation although the two criteria derive from a single provision in the former Rule 23.³¹

Typicality requires the same legal theory (question of law or fact) and a degree of factual similarity, although varying facts may not always preclude a finding of typicality.³² It ensures that fairness and adequate representation of the class is achieved, by minimizing the risk that the representative party does not differ from that of the absent members of the class and that the outcome achieved would not differ absent individual adjudication of liability.³³

Typicality also mandates inquiry into material factual variations among the parties, and must rely on probabilities rather than certainties.³⁴ A common test for typicality is if the plaintiff's claim arose from the same course of conduct or events of which are the same claims asserted by members of the class.³⁵ For example, contested practices in collective bargaining agreements are well defined and applied in an identical fashion from one defendant to another. Therefore, the requirement of typicality may be satisfied.³⁶

C. *Current Version of the Prerequisites for Certifying a Class*

Rule 23 of the Federal Rules of Civil Procedure authorizes the court to hear a claim on behalf of absent class members.³⁷ The absent class members are then bound by the decision of the court and the outcome of the representative's litigation.³⁸ Ordinarily a representative in a litigation of this

30. Samuel M. Shafner, Note, *The Juridical Links Exception to the Typicality Requirement in Multiple Defendant Class Actions: The Relationship Between Standing and Typicality*, 58 B.U. L. REV. 492, 495 (1978).

31. FED. R. CIV. P., *supra* note 20 (distinguishing adequacy of representation from typicality).

32. Shafner, *supra* note 30, at 495-496 n. 22; see Gregory S. Meece, Comment, *Class Actions, Typicality, and Rule 10B-5: Will the Typical Representative Please Stand Up?*, 36 EMORY L.J. 649, 653 n.16 (describing typicality as whether a relationship exists between the plaintiff's claims and the claims alleged on behalf of the class); see also WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* §3:31 (5th ed. 2015) [hereinafter *Newberg on Class Actions*].

33. *Id.* at 507; see Meece, *supra* note 30, at 655 (explaining the function of typicality is to ensure the no interest of a class members claim will go unrepresented by the representative of the class); see also *Newberg on Class Actions*, *supra* note 32, at §3:32.

34. *Id.* at 510.

35. Meece, *supra* note 33, at 656.

36. Shafner, *supra* note 30, at 511.

37. *Newberg on Class Actions*, *supra* note 32, at §1:1.

38. *Id.*

form would violate due process because an absent party to litigation cannot be bound by a judgment in personam if the absent party has not been made a party by process of service.³⁹ However, Rule 23 serves as an exception and protects the rights of an absent party so long as the procedural rules of Rule 23 “afford the absent class members protection.”⁴⁰ Rule 23 is a procedural device that identifies situations where litigation is appropriate and ensures to protect the rights of absent class members in conformity with the United States Constitution.⁴¹

Rule 23(a) of the Federal Rules of Civil Procedure is the vehicle that allows the court put into operation the process of identifying situations where class litigation is appropriate while protecting the rights of absent class members.⁴² Rule 23(a) provides:

- (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
 - (1) the class is so numerous that joinder of all members is impracticable;
 - (2) there are questions of law or fact common to the class;
 - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
 - (4) the representative parties will fairly and adequately protect the interests of the class.⁴³

The first two requisites “numerosity” and “commonality” set out the criteria for the represented or absent class members to the litigation.⁴⁴ The last two requisites “typicality” and “adequacy of representation” set out the criteria for the representative to the class.⁴⁵ Adequacy of representation directly addresses the question of whether the representative of the class will be a sufficient plaintiff in the absence of class members.⁴⁶ Typicality indirectly examines the representative of the class by “insisting on a class representative with typical claims.”⁴⁷ Thus the class representative acting on his own behalf will also pursue the interests of the class at the same time.⁴⁸ In sum, typicality means the named plaintiffs must share interests, claims,

39. *Newberg on Class Actions*, *supra* note 32, at §1:1.

40. *Id.*

41. *Id.*

42. *Id.* at § 1:2

43. FED. R. CIV. P. 23(a).

44. *Newberg on Class Actions*, *supra* note 32, at § 1:2.

45. *Id.*

46. *Id.* at § 3:28.

47. *Id.*

48. *Id.*

and possess no conflict with members of the class, and absentee members of the class.

D. Amchem Clarifies the Scope and Meaning of Rule 23's Typicality Provision

In the case *Amchem v. Georgine*, the Supreme Court clarified the scope and meaning of Rule 23's typicality provision. Typicality – as its own prong – must be satisfied as well as the other prongs of numerosity, commonality, and adequate representation as required in 23(a), in addition to a subsection of 23(b), even when taking into account a settlement.⁴⁹ The District Court for the Eastern District of Pennsylvania certified an asbestos class for settlement in *Georgine v. Amchem Products, Inc.*⁵⁰ and found typicality was satisfied.⁵¹ However the court's analysis was flawed because it failed to apply the test for typicality to the facts.

On appeal, the settling parties⁵² argued that, “in contrast to the 23(a) factors, which protect absent class members' rights, the 23(b)(3) factors promote the ‘fair and efficient resolution of justice’” and the settlement “goes to the heart” of the Rule 23(b)(3) and “must be considered.”⁵³ The Appeals Court disagreed with this stating the requirements of 23(b)(3) “protect the same interests in fairness and efficiency as the 23(a) requirements.”⁵⁴ Further the Appeals Court stated the lower court erred because the application of Rule 23 requirements are not lower for settlement classes.⁵⁵ Moreover, the lower court relied on “the presence of the settlement” to satisfy the prerequisite requirements of 23(a)⁵⁶ and opined the “typicality requirement is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of absentees.”⁵⁷

The purpose of the typicality inquiry is to assess whether the representative plaintiff of the class has “incentives that align with those of

49. *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 245, 316 (E.D. Pa. 1994).

50. *Id.* at 337.

51. *Id.* at 316.

52. A settlement agreement was reached for a fund that included a distribution with an administrative mechanism and schedule of payments that would compensate the class members who met the defined exposures to asbestos and other medical questions. *See Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 267 (E.D. Pa 1994).

53. *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 625 (3d Cir. 1996).

54. *Id.* at 625.

55. *Id.* at 626.

56. *Id.*

57. *Georgine*, 83 F.3d. at 631 (citing *Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994)).

absent members”⁵⁸ and to ensure the absentee members’ interests are fairly represented.⁵⁹ The Appeals Court in *Amchem* relied on criteria set out in *General Tel. Co. of Southwest v. Falcon*⁶⁰ noting, “[Commonality and typicality]⁶¹ . . . seek to assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented.”⁶² Commonality evaluates the sufficiency of the class and parties to the class itself, whereas typicality evaluates the sufficiency of the representatives or the named plaintiff, making them distinct requirements.⁶³ The Appeals Court disagreed with the lower court’s decision that typicality was met, stating that the “factually and legally different plaintiffs”⁶⁴ create a “problematic conflict[] of interest among different members of the class.”⁶⁵ The Court went on to say, “no set of

58. *Georgine*, 83 F.3d. at 631 (citing *Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994)).

59. *Id.*

60. *Gen. Tel Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

General Telephone Company launched a recruitment and training program for minorities and after the defendant was denied a promotion that had been granted to several Caucasian employees with less seniority, he sued the employer seeking class certification. *Id.* at 149. He claimed, “a policy, practice, custom, or usage of: (a) discriminating against [Mexican-Americans] because of national origin and with respect to compensation, terms, conditions, and privileges of employment, and (b) subjecting [Mexican-Americans] to continuous employment discrimination.” *Id.* at 150. Typicality was not met where class certification on behalf of “all Mexican American’s who have applied, would have applied, have been employed, are employed, or apply in the future.” *Id.* at 151. The Court stated, “if one allegation were sufficient to support an across the board attack, every Title VII action would be a companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation.” *Id.* at 159. *Cf.* *East Texas Motor v. Rodriguez*, 431 U.S. 395 (1977). A plaintiff’s description of a claim is critical to securing or establishing the typicality requirement of claims for similarly situated persons. *Id.* at 399. City drivers at East Texas Motor Freight System filed suit on the basis of denial of equal employment opportunities “because of their race or national origin.” *Id.* Moreover, the rule requires that a class representative “must be a part of the class and possess the same interest and suffer the same injury as the class members.” *Id.* at 403. The Supreme Court found because the class representatives were not current line drivers, they could not represent those who were line drivers. *Id.*

61. Commonality and Typicality.

62. *Georgine v. Amchem Prods.*, 83 F.3d 610, 632 (3d Cir. 1996).

63. *Id.* (see also, *Hassine v. Jeffes*, 846 F.2d 169, 176 n.4 (3d Cir. 1988)).

64. The Appeals Court noted the factual differences (such as different medical expenses in medical monitoring and individual medical histories) would turn into legal differences because of the “differences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff.” *Georgine v. Amchem Prods.*, 83 F.3d 610, 627 (3d Cir. 1996).

65. *Id.* at 632.

representatives can be ‘typical’ of this class”⁶⁶ and that, “it is impossible to say that legal theories of named plaintiffs are not in conflict with those of the absentees, or that the named plaintiffs have incentives that align with those of the absent class.”⁶⁷ Ultimately, the Appeals Court entered an order that the district court’s certification be vacated and remanded with instructions to decertify the class.⁶⁸

The Supreme Court granted certiorari of *Amchem* to review “the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class action certification sought to achieve global settlement of current and future asbestos-related claims.”⁶⁹ The Court specifically granted review to determine the proper method of class certification in a settlement action under Rule 23.⁷⁰ The Supreme Court agreed with the appellate court stating, “[t]he Court of Appeals’ opinion amply demonstrates why – with or without a settlement on the table – the sprawling class the District Court certified does not satisfy Rule 23’s requirement.”⁷¹ Moreover, the court acknowledged that an inquiry that relies on the “legal or factual questions that qualify each member’s case is a genuine controversy.”⁷² The Court also noted, “[t]he words ‘claims or defenses’ in this context . . . manifestly refer to the kinds of claims or defenses that can be raised in courts of law as a part of an actual or impending law suit.”⁷³ Thus a conflicting interest by the representative parties negates typicality and those parties to the class as discussed in *Hansberry v. Lee*.⁷⁴

II. ANALYSIS

66. Class consisted of claims of “(1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy,” represented by nine lead plaintiffs for the class and all persons who had been “exposed – occupationally or through the occupational exposure of a spouse or household member,” or all persons, “whose spouse or family member had been so exposed,” *Georgine v. Amchem Prods*, 83 F.3d 610, 620 (3d Cir. 1996).

67. *Id.*

68. *Id.* at 635.

69. *Amchem Prods v. Windsor*, 521 U.S. 591, 597 (1997).

70. *Id.* at 619.

71. *Id.* at 622.

72. *Id.* at 623.

73. *Id.* at 623 n.18 *Diamond v. Charles*, 476 U.S. 54 (U.S. 1986).

74. *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). (holding, “because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say solely because they are parties to it that any two of them are of the same class.”).

Prior to 2012, a number of former NFL players complained about symptoms of depression, forgetfulness, and even suicide. In particular, one former NFL player, Junior Seau requested after his death, his brain should be used to conduct scientific experiments as to whether the symptoms he suffered were attributable to concussions or other blows to the head during his football career. This and other evidence eventually lead to law suits filed by and on behalf of former NFL players against the National Football League.

A. *Application of “Typicality” in the Third Circuit*

The Third Circuit relies on *Amchem* and *Baby Neal* to evaluate typicality.⁷⁵ While *Amchem* post-dates *Baby Neal*, it remains good law.⁷⁶ The *Baby Neal* case is the controlling case that sets out and explains typicality in the Third Circuit. The requirements of Rule 23(a) are meant to assure both that class action treatment is necessary and efficient and that it is fair to the named plaintiffs and absentees under the particular circumstances. The concepts of commonality and typicality are broadly defined and tend to merge.⁷⁷ Both criteria seek to assure that the action can be practically and efficiently maintained and that the interests of the named plaintiffs and absentees will be fairly and adequately represented⁷⁸. Despite their similarity, however, commonality and typicality are distinct requirements⁷⁹ under Rule 23.⁸⁰

The test for typicality asks the court to consider a conjunctive four-part test. First, typicality requires an evaluation of the “sufficiency of the named plaintiff,”⁸¹ but does not require that all the “putative class members share identical claims.”⁸² Moreover, “[f]actual differences will not render a

75. *Beck v. Maximus, Inc.*, 457 F.3d 291, 295, 296 (3rd Cir. 2006). (noting, “the typicality and adequacy inquiries often ‘tend[] to merge’ because both look to potential conflicts and to ‘whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.’” (quoting, *Amchem*, 521 U.S. at 626 n.20 (citation omitted))).

76. *Id.* (“[W]hether the named plaintiffs’ claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class.” *Neal v. Casey*, 43 F.3d 48, 55 (3rd Cir. 1994).

77. 7A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1764, at 247 (1986).

78. *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982).

79. *See Hassine v. Jeffes*, 846 F.2d 169, 177 n. 4 (3d Cir.1988) (“‘[C]ommonality’ like ‘numerosity’ evaluates the sufficiency of the class itself, and ‘typicality’ like ‘adequacy of representation’ evaluates the sufficiency of the named plaintiff....”).

80. *Neal v. Casey*, 43 F.3d 48, 56 (3rd Cir. 1994).

81. *Id.*

82. *Id.*

claim atypical if the claim arises from the same even or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.”⁸³ To determine sufficiency of the named plaintiff the district court must “assess whether the class representatives themselves present those common issues of law and fact that justify class treatment, thereby tending to assure that the absent class members will be adequately represented.”⁸⁴ The plaintiff must make the required presentation demonstrating that he/she satisfied the requirements of that rule.⁸⁵

Second, it requires an assessment of “whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of the absent class so as to assure that the absentees’ interests will be fairly represented.”⁸⁶ The named plaintiff does not have to “endure[] precisely the same injuries that have been sustained by the class members, only that the harm complained of to be common to the class, and that the named plaintiff demonstrate a personal interest or ‘threat of injury . . . [that] is “real and immediate,” not conjectural or hypothetical.”⁸⁷ The named plaintiff may have incentives “plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed.”⁸⁸ However, the determination of whether the absentees’ interests will be fairly represented “generally involve considerations that are ‘enmeshed in factual and legal issues comprising the plaintiff’s cause of action.”⁸⁹

Third, because typicality “is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict” with absentee members of the class, it requires that the “common claims are comparably central to claims of the named plaintiffs as to claims

83. *Id.* at 58 (citations omitted).

84. *Hoxworth v. Blinder, Robinson, & Co., Inc.*, 980 F.2d 912, 923 (3d Cir. 1992).

85. *Weiss v. York Hospital*, 745 F.2d 786, 810-11 (3d Cir. 1984) (noting defendant’s argument that “dichotomy between those who have applied and been rejected and those who are afraid to apply” was found to not be “enough to carry the day, for, in essence, there is only one class advanced in this case—the osteopathic physicians in the York MSA who are the intended victims of York’s discriminatory admissions policy”). *See also*, *Hoxer v. Blinder, Robinson, and Co., Inc.*, 980 F.2d 912, 923 (3d Cir. 1992) (where sufficiency of the named plaintiff was satisfied after a class was modified, to consist of fifteen class representatives for the sub categories of the twenty-one fraudulent equity securities, “a coverage that fully satisfie[d] the requirements of the Rule”).

86. *Baby Neal*, 43 F.3d at 57. (citations omitted). *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (noting advancement of a class action promotes “the efficiency and economy of litigation which is the principal purpose of the procedure”).

87. *Hassine v. Jeffes*, 846 F.2d 169, 177.

88. *Gen. Tel. Co.*, 457 U.S. 147, 160.

89. *Id.* (citations omitted).

of the absentees.”⁹⁰ “This approach focuses on the legal and/or factual stance assumed by the class representative as compared with that of the class members.”⁹¹

Fourth, typicality requires an inquiry into “whether the named plaintiff’s individual circumstances are markedly different or . . . the legal theory upon which claims based differs from that upon which claims of the absent class will perforce be based.”⁹² The named plaintiff’s “[m]ere anticipation that all class members will benefit from the suit . . . is not enough.”⁹³ The interests must be “sufficiently parallel to ensure a vigorous and full presentation of all potential claims for relief.”⁹⁴

B. *In Re NFL*

On January 31, 2012, the Judicial Panel on Multidistrict Litigation ordered, consolidation of the following proceedings against the National Football League, et al. in the Eastern District of Pennsylvania before the Honorable Anita B. Brody.⁹⁵ To certify a class the plaintiff’s must meet the prerequisites of the Federal Rules of Civil Procedure Rule 23(a).⁹⁶ Plaintiffs’ Master Administrative Long-Form Complaint lists the parties to the litigation by reference of, “Plaintiffs and Plaintiffs-Spouses are those persons identified in the individual Short-Form Complaints, which adopt, in whole or in part, the allegations and Counts herein.”⁹⁷ The accompanying Original Class Action Complaint identifies five (5) individuals⁹⁸ as representatives of Plaintiffs to the class and states, “Plaintiffs are representatives of Classes, as defined by Fed R. Civ. P. 23(b)(2), and bring this action for medical monitoring relief on behalf of themselves and classes identified herein with respect to which the NFL has acted or refused to act

90. *Baby Neal*, 43 F.3d 48, 57 (citations omitted).

91. *Weiss v. York Hospital*, 745 F.2d 786, 809 n.36 (3d Cir. 1984).

92. *Baby Neal*, 43 F.3d at 58 (citations omitted).

93. *Id.*

94. *Id.* (noting, where the “plaintiff’s factual or legal stance is not characteristic of that of other class members, the typicality prerequisite has not been met”).

95. *In re NFL Players’ Concussion Injury Litig.*, 842 F. Supp. 2d 1378 (2012).

96. FED. R. CIV. P. 23(a). *see also*, *In re Nat. Football League Players Concussion Injury Litig.*, 775 F.3d 570, 579 (3d Cir. 2014) (noting a court should not certify a class until the prerequisites of 23(a) are met).

97. Plaintiffs’ Master Administrative Long-Form Complaint at 28, *In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION*, 961 F. Supp. 2d 708 (E.D. Pa. June 7, 2012) (No. 2:12-md-02323-AB).

98. Master Administrative Class Action Complaint for Medical Monitoring; Original Class Action Complaint at 5-9, *In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION*, 961 F. Supp.2d 708 (E.D. Pa. June 7, 2012) (No. 2:12-md-02323-AB).

on the grounds that apply generally to the Classes.”⁹⁹ NFL Parties (Defendants) filed a 12(b)(5) motion to dismiss based on failure of service of process proscribed in the Federal Rules of Civil Procedure 4(c), which was denied.¹⁰⁰

Plaintiffs then filed a motion to conditionally certify a settlement class and subclass.¹⁰¹ Plaintiff’s Class Action Complaint identified the class as:

- (1) All living NFL Football Players who, prior to the date of the Preliminary Approval and Class Certification Order, retired, formally or informally, from playing professional football with the NFL or any Member Club, including American Football League, World League of American Football, NFL Europe League and NFL Europa League players, or were formerly on any roster, including preseason, regular season, or postseason, of any such Member Club or league and who no longer are under contract to a Member Club and are not seeking active employment as players with any Member Club, whether signed to a roster or signed to any practice squad, developmental squad, or taxi squad of a Member Club (“Retired NFL Football Players”); (2) Authorized representatives, ordered by a court or other official of competent jurisdiction under applicable state law, of deceased or legally incapacitated or incompetent Retired NFL Football Players (“Representative Claimants”); and (3) Spouses, parents, children who are dependents, or any other persons properly under applicable state law assert the right to sue independently or derivatively by reason of their relationship with a Retired NFL Football Player or deceased Retired NFL Football Player (“Derivative Claimants”).

Class representatives were identified as Sean Wooden (subclass 1¹⁰²) and Kevin Turner (subclass 2¹⁰³).¹⁰⁴ Sean Wooden and Kevin Turner

99. *Id.* at 15.

100. Memorandum of Law in Support of National Football League’s Motion to Dismiss Plaintiff’s Complaints at 2, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. August 30, 2012) (No. 2:12-md-02323-AB) 2012 WL 5974500.

101. Motion of Proposed Co-Lead Class Counsel, Class Counsel, and Subclass Counsel for an Order at 40, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. January 6, 2014) (No. 2:12-md-02323-AB).

102. “Plaintiff Shawn Wooden is a class representative for the Florida Medical Monitoring Class. He resides in Pembroke Pines, Florida. Mr. Wooden played professional football in the NFL from 1996-2004. He played as a safety for the Miami Dolphins and the Chicago Bears. During his career in the NFL he experienced repeated traumatic head impacts. After his retirement from football he has experienced neurological symptoms. Mr. Wooden is at increased risk of latent brain injuries caused by these repeated traumatic head impacts and therefore is in need of medical monitoring.” Plaintiff’s Master Administrative

did not identify any claims on behalf of themselves. All counts were written as, “Retired NFL Football Players”¹⁰⁵ without identification of the representative plaintiff to the subclass he seeks to represent and an analysis of count asserted by the named representative to each claim. The Class Action Complaint included the following claims alleged by plaintiffs, the class, and the subclasses: medical monitoring, negligent misrepresentation, pre-1968 negligence, post-1968 negligence, negligence from 1987-1993, post-1994 negligence, negligent hiring, negligent retention, fraudulent concealment, fraud, wrongful death and survival actions, civil conspiracy based on fraudulent concealment, and loss of consortium.¹⁰⁶ Plaintiffs state typicality is met by the representatives Shawn Wooden and Kevin Turner, “in that each named Plaintiff and all members of the proposed Subclass are Retired NFL Football Players or assert rights and claims as a ‘Derivative Claimant’ or ‘Representative Claimant’ of a Retired NFL Football Player, as these terms are defined in the proposed Class and Subclass definitions.”¹⁰⁷ Plaintiffs’ analysis of typicality states the following:

In the case of the proposed medical monitoring program, which includes baseline assessments, and an education fund, the

Class Action Complaint for Medical Monitoring and Original Class Action Complaint at 4, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 775 F.3d 570 (3d Cir. 2014) (E.D. Pa. December 24, 2014 (No. 2:12-md-02323-AB.)).

Subclass 1 consists of “all Retired NFL Football Players who were not diagnosed with dementia, Alzheimer’s Disease, Parkinson’s Disease, ALS and/or Death with CTE prior to the date of the Preliminary Approval and Class Certification Order and their Representative Claimants and Derivative Claimants.” *Id.* at 17.

103. “Plaintiff Kevin Turner is a resident and citizen of the State of Alabama, residing in Birmingham, Alabama. Mr. Turner is a retired NFL football player. He played professional football in the NFL from 1992-1994 for the New England Patriots and from 1995- 1999 for the Philadelphia Eagles as a fullback. Mr. Turner was diagnosed with ALS in June 2010.” *Id.* at 17.

Subclass 2 consists of “all Retired NFL Football Players who were diagnosed with dementia, Alzheimer’s Disease, Parkinson’s Disease, ALS and/or Death with CTE prior to the date of the Preliminary Approval and Class Certification Order and their Representative Claimants and Derivative Claimants, and the Representative Claimants of deceased Retired NFL Football Players who were diagnosed with dementia, Alzheimer’s Disease, Parkinson’s Disease, ALS and/or Death with CTE prior to death or who died prior to the date of the Preliminary Approval and Class Certification Order and received a post-mortem diagnosis of CTE.” *Id.* at 17.

104. Plaintiff Class Action Complaint at 17, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 961, F. Supp. 2d 708 (E.D. Pa. January 6, 2014 (No. 2:12-md-02323-AB)).

105. *Id.* at 252.

106. *Id.*

107. *Id.* at 23.

representative Plaintiffs and the Subclass members as a whole will benefit from such relief, and their interests are aligned, because they retired from playing professional football for the NFL, and because of their consequential increased risk of neurocognitive impairment, including ALS [Amyotrophic Lateral Sclerosis], Alzheimer's, Parkinson's, and dementia. The diagnostic testing, education, and collection of data will work to benefit the entire Class.¹⁰⁸

The representative plaintiffs seek to hold the NFL Parties liable for damages as a result of the NFL Parties' failure to warn of the dangers and the concealment of the dangers of NFL Football.¹⁰⁹

Subsequent to preliminary certification by Judge Brody, members of the settlement class filed a motion for leave to assess the adequacy, fairness, and reasonableness of the proposed settlement.¹¹⁰ Reasons listed by the parties for request for leave include: failure to compensate specific neurocognitive impairments,¹¹¹ failure to credit eligible seasons in non-American NFL leagues,¹¹² and the undetermined offset to compensation of the parties.¹¹³

In January of 2014, Judge Brody issued a memorandum addressing the preliminary approval of the proposed settlement between the Plaintiffs and NFL Defendants.¹¹⁴ The court held the settlement did not meet the requirements set out in the Fed. R. Civ. P. Rule 23(e).¹¹⁵ After the court issued its memorandum, the court held the class was preliminary certified for settlement under Rule 23(a).¹¹⁶ The court held, Shawn Wooden and Kevin Turner satisfied the 23(a)(3) requirement of typicality because, "all claims asserted by subclass representatives and settlement class members are based on the same legal theories of negligence and fraud and arise from the same alleged wrongful conduct by the NFL Parties."¹¹⁷ However, not long after, objecting parties filed for appeal with the

108. *Id.* at 24.

109. Motion of Proposed Co-Lead Class Counsel, Class Counsel, and Subclass Counsel for an Order at 43, *In re National Football League Players Concussion Injury Litigation*, 961 F. Supp. 2d 708 (E.D. Pa. Jan. 6, 2014) (No. 2:12-md-02323-AB).

110. Memorandum of Law in Support of Sean Morey, Alan Faneca, Ben Hamilton, Robert Royal, Roderick Cartwright, Jeff Rohrer, and Sean Considine's Motion for Leave to Conduct Limited Discovery at 1, *In re National Football League Concussion Injury Litigation*, 961 F. Supp. 2d. 708 (E.D. Pa. September 13, 2014) (No. 2:12-md-02323-AB).

111. *Id.* at 4.

112. *Id.* at 6.

113. *Id.* at 5.

114. *In re National Football League Concussion Injury Litigation*, 961 F. Supp. 2d. 708, 713 (E.D. Pa. 2014).

115. *Id.* at 714.

116. *In re National Football League Concussion Injury Litigation*, 301 F.R.D. 191, 204 (E.D. Pa. 2014).

117. *Id.* at 201.

Third Circuit.¹¹⁸ The Third Circuit court wrote, “the court must first determine that ‘the requirements for class certification under Rule 23(a) and (b) are met, and must separately ‘determine that the settlement is fair to the class under [Rule] 23 (e).’”¹¹⁹ The court further quoted the *Manual for Complex Litigation* by stating, “The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b).”¹²⁰ However, the Third Circuit lacked jurisdiction because the District Court certified the class for settlement purposes only and reserved certification for a later date.¹²¹

After the Third Circuit Opinion was issued, Judge Brody ordered for amendments to the settlement agreement to ensure satisfaction of the 23(e) requirements.¹²² Ultimately, Judge Brody issued a memorandum granting the certification and approval of the class settlement.¹²³ The court found typicality was satisfied because the Third Circuit has set a low threshold requirement for satisfaction of typicality.¹²⁴ Further, Judge Brody explained typicality was met because both representatives “seek recovery pursuant to the same legal theory.”¹²⁵ The court relied on *Baby Neal v. Casey* quoting, “[C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims.”¹²⁶ Moreover, Judge Brody stated, because some of the putative class members as indicated on the Short-Complaint form¹²⁷ also seek medical monitoring, and some of the class members have a theory in tort of negligence and in contract of fraud, the remaining differences between the class “are immaterial to the typicality analysis.”¹²⁸

118. *In re National Football League Players Concussion Injury Litigation*, 775 F.3d 570 (3d Cir. 2014).

119. *Id.* at 581.

120. *Supra* note 119.

121. *Id.* at 584.

122. Order at 2, *In re National Football League Concussion Injury Litigation*, 961 F. Supp. 2d 708 (E.D. Pa. February 2, 2015).

123. Mem. at 132, *In re National Football League Concussion Injury Litigation*, 961 F. Supp. 2d 708 (E.D. Pa. April 22, 2015) (No. 2:12-md-02323-AB) 2015 WL1822254.

124. *Supra* note 123 at 13.

125. *Id.*

126. *Id.*

127. The Short-Complaint form is a fill in the blank or check the box complaint form that lists the injuries and legal theories of which the putative class member may opt-in to the class.

128. *Id.*

C. *The District Court Wrongfully Applied the Baby Neal Typicality Requirements*

I. *Application of Baby Neal*

After review of the precedent in the Supreme Court of the United States, Court of Appeals Third Circuit, and the intent of the drafters of Rule 23(a), the District Court's analysis is flawed. Certification of the National Football League Concussion Injury Litigation is improper absent application of the *Baby Neal* test. The Court's determination that Shawn Wooden and Kevin Turner are sufficient representatives of the class should be reversed on appeal. The *Baby Neal* test requires the court to: (1) evaluate the sufficiency of the named plaintiff; (2) assess whether the action can be efficiently maintained; (3) assess whether legal theories of the named plaintiffs potentially conflict with those of absentees *and*; (4) inquire into whether the named plaintiff's individual circumstances are markedly different or the legal theory upon which the claim is based.¹²⁹

First, the court failed to evaluate the sufficiency of the named plaintiff.¹³⁰ Typicality requires an evaluation of the "sufficiency of the named plaintiff,"¹³¹ but does not require that all the "putative class members share identical claims."¹³² "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory."¹³³ To determine sufficiency of the named plaintiff the district court must "assess whether the class representatives themselves present those common issues of law and fact that justify class treatment, thereby tending to assure that the absent class members will be adequately represented."¹³⁴ The plaintiff must make the required presentation demonstrating that he/she satisfied the requirements of that rule.¹³⁵

129. *Baby Neal*, 43 F.3d 56-58 (emphasis added).

130. *Id.*

131. *Supra* note 130.

132. *Id.*

133. *Id.* at 58 (citations omitted).

134. *Hoxworth v. Blinder, Robinson, & Co.*, 980 F.2d 912, 923 (3d Cir. 1992).

135. *Weiss v. York Hospital*, 745 F.2d 786, 810-11 (3d Cir. 1984) (noting defendant's argument that "dichotomy between those who have applied and been rejected and those who are afraid to apply" was found to not be "enough to carry the day, for, in essence, there is only one class advanced in this case—the osteopathic physicians in the York MSA who are the intended victims of York's discriminatory admissions policy"). *See also Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992) (where sufficiency of the named plaintiff was satisfied after a class was modified, to consist of fifteen class

The District Court's evaluation of the named plaintiffs merely stated, "Wooden and Turner seek recovery pursuant to the same legal theories as the absent Class Members. [Wooden and Turner] claim the NFL Parties should have known of, or intentionally concealed, the risks of head injuries in NFL Football. The claims of all Class Members, Wooden and Turner included, derive from the same wrongful course of conduct: the NFL Parties' decision to promote and structure NFL Football in a way that increased concussive impacts,"¹³⁶ and is absent an analysis.

First, the court failed to evaluate sufficiency of Shawn Wooden and Kevin Turner from the complaint. Even though sufficiency does not require Shawn Wooden or Kevin Turner to share identical claims with the putative class members, the claims of Wooden and Turner were aggregated to cover the range of negligence and fraudulent concealment claims. However, factual differences between Shawn Wooden, Kevin Turner, and the putative class members will not render the claims under the legal theory of tort and contract atypical because the claims asserted by the class arise from the same course of conduct,¹³⁷ playing professional football in the NFL.¹³⁸ Conversely, the putative class members played for various teams, under direction of various coaches, with medical supervision from various team trainers and team medical staff, which is not the "same course of conduct."¹³⁹ Moreover, the NFL has changed in game play to ensure player safety.¹⁴⁰ Since the changed rules of play over the various periods of the NFL, the conduct from 1929¹⁴¹ is not the same conduct as the conduct in 1938¹⁴² or the conduct in 1979.¹⁴³ Furthermore, the Plaintiff's complaint is absent an analysis presenting Shawn Wooden and Kevin Turner's common issues of law and fact. The complaint merely asserts, "[t]here are questions

representatives for the sub categories of the twenty-one fraudulent equity securities, "a coverage that fully satisfie[d] the requirements of the Rule.").

136. Mem. at 13, In re NATIONAL FOOTBALL LEAGUE CONCUSSION INJURY LITIGATION, 307 F.R.D. 351 (E.D. Pa. May 27, 2015) (No. 2:12-md-02323-AB) 2015 WL1822254.

137. The District Court refers to "wrongful course of conduct" however the standard is same course of conduct. The writer believes using the term "wrongful" displays bias and resulted in an inaccurate analysis, *see Id.* at 372.

138. Mo. of Proposed Co-Lead Class Counsel, Class Counsel, and Subclass Counsel for an Order at 43, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. Jan. 6, 2014) (No. 12-md-2323).

139. Complaint at 17, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. June 7, 2012) (No. 2:12-md-02323-AB) 2012 WL 2045382.

140. *Id.* at 117.

141. Adding a field judge. *See Id.* at 92.

142. Penalizing unnecessary rough conduct. *See Id.*

143. Mandating equipment. *See Id.*

of law and fact common to the members of the Class and Subclasses.”¹⁴⁴ The burden rests on Shawn Wooden and Kevin Turner, the named plaintiffs, to demonstrate that the requirements of the claims asserted are met.¹⁴⁵ The complaint is absent assertion that the named plaintiffs satisfy the elements of the rule of the claim(s) in the complaint.¹⁴⁶ Also, the Plaintiff’s complaint does not set out the named plaintiffs’ satisfaction of the elements for a wrongful death suit, various negligence theories, or fraudulent concealment for the years that proceeded the named plaintiffs’ years of play in the NFL. Thus absent of the demonstrative requirement that the first prong of typicality is met, the District Court’s evaluation of the sufficiency of the named plaintiffs was flawed.

Second, typicality requires an assessment of “whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of the absent class so as to assure that the absentees’ interests will be fairly represented.”¹⁴⁷ The named plaintiffs does not have to “endure[] precisely the same injuries that have been sustained by the class members, only that the harm complained of to be common to the class, and that the named plaintiff demonstrate a personal interest or ‘threat of injury . . . [that] is “real and immediate,” not conjectural or hypothetical.”¹⁴⁸ The named plaintiff may have incentives “plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed.”¹⁴⁹ However, the determination of whether the absentees’ interests will be fairly represented “generally involve considerations that are ‘enmeshed in factual and legal issues comprising the plaintiff’s cause of action.”¹⁵⁰

The District Court’s holding that the injuries sustained by one of the objecting class members’ “short form complaint demonstrate[d] that his damages stemm[ed] from the same source as Wooden and Turner’s damages: ‘repetitive, traumatic sub-concussive and/or concussive head

144. The complaint sets out common questions of law satisfying F.R.C.P. 23(b)(2), however prerequisites set out in F.R.C.P. must be met prior to any other provisions in the rule. *See Id.* at 25

145. *Supra* note 136.

146. Complaint at 41-245, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 2012 WL 2045382 (E.D. Pa. June 7, 2012 (No. 2:12-md-02323-AB).

147. Complaint, *supra* note 146 at 57. (citations omitted). *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974) (noting advancement of a class action promotes “the efficiency and economy of litigation which is the principal purpose of the procedure.”).

148. *Hassine*, 846 F.2d 169, 177.

149. *Gen. Tel. Co.*, 457 U.S. 147, 160.

150. *Id.* (citations omitted).

impacts during NFL games and/or practices”¹⁵¹ is flawed. Shawn Wooden¹⁵² and Kevin Turner¹⁵³ do not “[e]ndure precisely the same injuries,”¹⁵⁴ as the members of the class and assert the harm common to the class is neurological impairment.¹⁵⁵ Kevin Turner currently diagnosed with ALS,¹⁵⁶ suffers a “real and immediate” threat of neurological impairment. Shawn Wooden alleged he experiences neurological symptoms¹⁵⁷ and is at risk of a “hypothetical or conjectural”¹⁵⁸ harm of neurological impairment, but he is undiagnosed of any neurological impairment.¹⁵⁹ The named plaintiffs, class, and subclass as a whole complain of neurological impairment, undistinguished from each other appearing to share interests.¹⁶⁰ The District Court noted, similar to the interests of the named plaintiffs’ pleadings the objecting class member sought medical monitoring.¹⁶¹

Next, the court made the determination the absent members’ interests are ensured because the injuries complained of by the member of the class “sound in negligence and fraud,” and the factual difference of the objecting member of the class participating in NFL Europe, rather than NFL America, and any remaining differences “are immaterial to the typicality analysis.”¹⁶² However, the District Court erred by stating the remaining differences other than the harm alleged and the legal claim asserted are “immaterial to the typicality analysis.”

151. Mem. at 13, In re NATIONAL FOOTBALL LEAGUE CONCUSSION INJURY LITIGATION, 307 F.R.D. 351 (E.D. Pa. Apr. 22, 2015) (No. 2:12-md-02323-AB) 2015 WL1822254 (citations omitted).

152. Undiagnosed of neurological impairment.

153. Diagnosed with ALS.

154. *Supra*, note 88 at 156.

155. Mem., *supra* note 151 at 13.

156. Mot. of Proposed Co-Lead Class Counsel, Class Counsel, and Subclass Counsel for an Order at 17, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. Jan. 6, 2014) (No. 2:12-md-02323-AB).

157. *Id.*

158. *Supra* note 89, at 17.

159. Motion of Proposed Co-Lead Class Counsel, Class Counsel, and Subclass Counsel for an Order at 17, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. January 6, 2014) (No. 2:12-md-02323-AB).

160. Plaintiff’s Class Action Complaint at 17, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 961, F. Supp. 2d 708 (E.D. Pa. January 6, 2014) (No. 2:12-md-02323-AB).

161. *Id.*

162. Memorandum at 13, In re NATIONAL FOOTBALL LEAGUE CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. April 22, 2015) (No. 2:12-md-02323-AB).

The second prong of the *Baby Neal* typicality analysis considers the “factual and legal issues comprising of the plaintiff’s claim.”¹⁶³ To determine whether the interests of the named plaintiffs are aligned with those of the absent members of the class, factual and legal issues of the plaintiffs are considered.¹⁶⁴ The objecting class member played in NFL Europe and suffers from symptoms of CTE in contrast to the named plaintiffs who both played in the NFL American league; specifically, Wooden who suffers from ALS or Turner who is undiagnosed. However, to prove a claim of negligence, the element of causation requires an analysis into the facts and the relationship between the facts which resulted in the harm. Causation is proven using the “*but for*” analysis. But for the conduct of the NFL, the injury of the sub-traumatic contacts to the head would not have occurred. The second prong of the *Baby Neal* test for typicality may be met if the facts which resulted in the harm in the NFL Europe League and other sub-leagues, are similar to the facts which resulted in the harm in the NFL American League.

Third, because typicality “is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict” with absentee members of the class, it requires that the “common claims are comparably central to claims of the named plaintiffs as to claims of the absentees.”¹⁶⁵ “This approach focuses on the legal and/or factual stance assumed by the class representative as compared with that of the class members.”¹⁶⁶

The District Court’s decision is absent an analysis of the “legal and/or factual stance assumed by the class representative[s] as compared with that of the class members,”¹⁶⁷ because the court wrote in its’ opinion the class representatives like other members of the class seek the same remedy.¹⁶⁸ Further, the court only analyzed the class representatives claims compared to the objecting class members, not compared to the class as a whole.

Typicality “is intended to preclude certification”¹⁶⁹ of the Retired NFL Player class “where the legal theories”¹⁷⁰ of Shawn Wooden and

163. *Supra* note 89, at 13.

164. *Id.*

165. *Baby Neal*, 43 F.3d 48, 57 (citations omitted).

166. *Weiss*, 745 F.2d 786, 809 n.36.

167. *Supra* note 92, at 13.

168. Memorandum at 13, In re NATIONAL FOOTBALL LEAGUE CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. April 22, 2015) (No. 2:12-md-02323-AB).

169. *Supra* note 91, at 13.

170. *Id.*

Kevin Turner potentially conflict with the absentee members of the class.¹⁷¹ It requires that the “common claims”¹⁷² of negligence and fraudulent concealment are “comparably central”¹⁷³ which focuses on the “legal and/or factual”¹⁷⁴ stance of claims of Shawn Wooden and Kevin Turner, as well as to the claims of the absentee members of the class. Shawn Wooden and Kevin Turner “assert fourteen claims”¹⁷⁵ which can be generally grouped into negligence and fraudulent concealment claims.¹⁷⁶ Here, the named plaintiffs potentially conflict with absentee members of the class because the legal theory of tort, specifically a claim of negligence, requires an inquiry into the facts to prove causation.

Meeting this burden is difficult because since consolidation of the cases, “5,000 players have filed over 300 similarly situated lawsuits against the NFL parties.”¹⁷⁷ The absentee class members have played on various teams, in different positions, for various NFL leagues, during different years of in game play.¹⁷⁸ Further analysis into individual facts of Shawn Wooden and Kevin Turner would likely show contrasting causation during the course of their careers in professional football because Wooden and Turner played in the NFL American league in different years, held different positions, on different teams, for a various amount of seasons.¹⁷⁹ Thus the class should not be certified because typicality is intended to preclude certification and the District Court did not apply the third prong of the *Baby*

171. *Supra* note 91, at 13.

172. *Id.*

173. *Id.*

174. *Id.*

175. “The Class Action Complaint includes claims for medical monitoring, negligent misrepresentation, pre-1968 negligence, post-1968 negligence, negligence from 1987-1993, post-1994 negligence, negligent hiring, negligent retention, fraudulent concealment, fraud, wrongful death and survival actions, civil conspiracy based on fraudulent concealment, and loss of consortium.” Motion of Proposed Co-Lead Class Counsel, Class Counsel, and Subclass Counsel for an Order at 6 n.3, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. January 6, 2014) (No. 2:12-md-02323-AB).

176. Memorandum at 2, In re NATIONAL FOOTBALL LEAGUE CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. April 22, 2015) (No. 2:12-md-02323-AB).

177. *Id.*

178. Memorandum of Law in Support of Sean Morey, Alan Faneca, Ben Hamilton, Robert Royal, Roderick Cartwright, Jeff Rohrer, and Sean Considine’s Motion for Leave to Conduct Limited Discovery at 1, In re NATIONAL FOOTBALL LEAGUE CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. September 13, 2014) (No. 2:12-md-02323-AB).

179. Plaintiff Class Action Complaint at 4, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 961, F. Supp. 2d 708 (E.D. Pa. January 6, 2014) (No. 2:12-md-02323-AB).

Neal test there is a potential conflict between Wooden, Turner, and the absentee class member.¹⁸⁰

Lastly, typicality requires an inquiry into “whether the named plaintiff’s individual circumstances are markedly different or . . . the legal theory upon which claims based differs from that upon which claims of the absent class will perforce be based.”¹⁸¹ The named plaintiff’s “[m]ere anticipation that all class members will benefit from the suit . . . is not enough.”¹⁸² The interests must be “sufficiently parallel to ensure a vigorous and full presentation of all potential claims for relief.”¹⁸³

The court’s “[m]ere anticipation that all class members will benefit from the suit,”¹⁸⁴ is not sufficient to meet the requirements of typicality.¹⁸⁵ The District Court’s analysis into whether Shawn Wooden and Kevin Turner’s individual circumstances are markedly different compared to the absent class members is minimal.

The court held, “repetitive, traumatic sub-concussive and/or concussive head impacts during NFL games and/or practices”¹⁸⁶ sustained by the named plaintiffs are the same as the members of the class. However, the claims upon which some derivative representative plaintiffs and the absentee class members will perforce be based differ and the court’s holding the claims of the class representatives are typical of those who they represent is flawed.¹⁸⁷ The interests of Shawn Wooden and Kevin Turner must be “sufficiently parallel”¹⁸⁸ to the interests those who claim wrongful death and other theories of negligence or fraudulent concealment. Although the settlement covers six (6) forms of relief,¹⁸⁹ the named plaintiffs have

180. *Supra* note 91, at 4.

181. *Baby Neal*, 43 F.3d at 58 (citations omitted).

182. *Supra* note 94, at 4.

183. *Id.* (noting, where the “plaintiff’s factual or legal stance is not characteristic of that of other class members, the typicality prerequisite has not been met”).

184. *Supra* note 94.

185. Plaintiff’s complaint states, “[t]he diagnostic testing, education, and collection of data will work to benefit the entire Class.” Plaintiff’s Class Action Complaint at 24, In re NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. January 6, 2014) (No. 2:12-md-02323-AB).

186. Memorandum at 13, In re NATIONAL FOOTBALL LEAGUE CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. April 22, 2015) (No. 2:12-md-02323-AB) 2015 WL1822254.

187. *Id.*

188. *Supra* note 94.

189. Memorandum at 7, In re NATIONAL FOOTBALL LEAGUE CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. April 22, 2015) (No. 2:12-md-02323-AB) 2015 WL1822254.

not “ensure[d] a vigorous and full presentation of all potential claims for relief.”¹⁹⁰

Shawn Wooden’s relief of medical monitoring, and Kevin Turner’s relief of money damages stemming from his injuries are markedly different individual circumstances from class members who suffer from wrongful death or various traumatic sub-concussive injuries. Thus, the fourth typicality prong is not met.

2. Comparison to *Amchem* Requirements

This case is much akin to *Amchem*.¹⁹¹ In *Amchem*,¹⁹² after parties reached a settlement agreement for a fund that included an administrative distribution mechanism,¹⁹³ the Supreme Court held, the representatives must possess the same interest, same injury, and the diverse medical conditions must have *discrete* subclasses.¹⁹⁴ Like *Amchem* the representative plaintiffs, Shawn Wooden and Kevin Turner, seek to represent all retired football players, of all NFL teams, including European teams, their respective spouses and families, diagnosed and undiagnosed.¹⁹⁵ The interest of the named plaintiffs is to hold the NFL liable for damages Kevin Turner and Sean Wooden possess the same injury of neurocognitive impairment as other class members.¹⁹⁶ or possibility of neurocognitive impairment as members of the class¹⁹⁷ are representative of only two subclasses that cover a wide array of injury, not distinct to each representative’s claim of injury.¹⁹⁸ However, the diverse medical conditions of CTE, Parkinson’s Disease, and Alzheimer’s Disease do not have discrete subclasses or representatives of those classes. Further, the subclass of derivative representatives for claims of wrongful death does not have a discrete subclass and representative.

190. *Supra* note 95.

191. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

192. *Id.* at 603.

193. The Third Circuit held the District Court erred because it “took the view that Rule 23 requirements are lower for settlement classes.” *Georgine v. Amchem Prods.*, 83 F.3d 610, 626 (3d Cir. 1996).

194. *Id.* (*emphasis added*).

195. *Supra* note 101. *Supra* note 102. *Cf.* to *Amchem* where nine lead plaintiffs as representatives of the class with varying medical conditions were found to not satisfy typicality. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 602 (1997).

196. *Id.*

197. *Id.*

198. *Supra* note 96.

Judge Brody set a low threshold for satisfying typicality¹⁹⁹ similar to *Amchem*'s district court holding, which the Court of Appeals reversed and the Supreme Court upheld the reversal.²⁰⁰ The Supreme Court of the United States specifically stated in *Amchem* all prerequisites, including typicality, must be met even when taking into account a possible settlement of the class action²⁰¹ such as the decision that was before Judge Brody. Thus the NFL Concussion Injury Litigation is much akin to *Amchem* and the Retired Football Player class should not have been certified.

CONCLUSION

The District Court's analysis of the typicality requirement is flawed. *Baby Neal* is the controlling case in the Third Circuit.²⁰² The class representatives failed to make the required representation in the complaint that the named plaintiffs satisfied the sufficiency requirements of the claims asserted.²⁰³ Further, the District Court erred by stating, "[t]he Third Circuit has 'set a low threshold for satisfying' the typicality requirement" ruling against Supreme Court precedent.²⁰⁴ Moreover, incentives of the named plaintiffs must be aligned with those of the class.²⁰⁵ In this case the named plaintiffs failed to make the representation that incentives of the named representatives are aligned with those of the class. Typicality is intended to preclude certification²⁰⁶ and requires an inquiry into whether the individual circumstances or the named representatives are so different, absentee class member's interests would not be protected.²⁰⁷ Absent proof from the named representatives' satisfaction of typicality, an analysis of the named representatives is non-existent and the class should not be certified.

This article urges the Third Circuit Court of Appeals to order discrete subclasses be formed. The Third Circuit should also require named plaintiffs, make the required presentation demonstrating the named

199. Memorandum at 7, In re NATIONAL FOOTBALL LEAGUE CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. April 22, 2015) (No. 2:12-md-02323-AB) 2015 WL1822254.

200. *Supra* note 72.

201. *Supra* note 50.

202. *Supra* note 77.

203. *Supra* note 82.

204. Memorandum at 7, In re NATIONAL FOOTBALL LEAGUE CONCUSSION INJURY LITIGATION, 961 F. Supp. 2d 708 (E.D. Pa. April 22, 2015) (No. 2:12-md-02323-AB) 2015 WL1822254.

205. *Supra* note 85.

206. *Supra* note 89.

207. *Supra* note 91.

plaintiffs' satisfaction of the requirements of the rule for the subclass each representative seeks to represent. Similar to *Amchem* the various facts of each member may pose too large of a problem to certify the class. Moreover, speculation as to whether an undiagnosed player will suffer an injury is too remote.²⁰⁸

Therefore, on appeal the Third Circuit should decertify the class in the National Football League Injury Concussion Litigation.

208. *Cf.* *Georgine v. Amchem Products Inc.*, 83 F.3d 610, 632 (noting, “[S]ome will incur little or no physical impairments. Given these uncertainties which will ultimately turn into vastly different outcomes, the futures plaintiffs share too little in common to generate a typical representative. It is simply impossible to say that the legal theories of named plaintiffs are not in conflict with those of the absentees”).