

NFL Concussion Settlement Unfair, Lawyers Argue

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Attorneys representing dozens of former NFL players in the nationwide concussion litigation argued in a federal appeals court Thursday that the league's \$1 billion settlement left certain players suffering from brain trauma without compensation.

The roughly 90 players on appeal took issue with the settlement—reached in April after extended debate—because it didn't include payment for players diagnosed with chronic traumatic encephalopathy (CTE) after the presiding judge's settlement approval date. CTE is a degenerative neural disease associated with repeated blows to the head. It was historically referred to as dementia pugilistica, or the state of being "punch drunk."

The settlement was structured to compensate more than 20,000 former players who were diagnosed with Alzheimer's disease, dementia, ALS and other neurocognitive diseases related to their time in the league, but it only compensates for CTE if the player had died before the April 22 approval date. At this point, with research on the disease still in its infancy, CTE can only be diagnosed after death. The settlement provides \$4 million for each player with CTE who died before April 22.

"We are very much in favor of a settlement," attorney Steven Molo told the three-judge panel of the U.S. Court of Appeals for the Third Circuit in Philadelphia, but the problem with the current setup, he noted, was that provisions still needed to be made for players who develop CTE in the future—at the very least, medical and psychological treatment.

Molo faced scrutiny from the panel at the outset. Third Circuit Judge Thomas M. Hardiman asked Molo how ex-players could be treated and compensated for CTE while they're living if a diagnosis can only come from an autopsy.

Molo said he believed science would develop a way to diagnose the disease in living patients within the next five years. The current settlement, he added, did not take into account the evolution of science.

"What we want are some kind of rights, some kind of compensation for these claims," Molo said.

Hardiman fired back that the settlement appeared to provide meaningful compensation for 98 percent of the players involved, but Molo wouldn't budge, reiterating that CTE was the central issue and not properly addressed.

Another lawyer for the players, Deepak Gupta, echoed Molo's sentiments as he told the panel that the settlement created a "conflict between those who are presently injured and those who will be."

Gupta also said the settlement doesn't pay attention to symptoms said to precede CTE, such as suicidality and depression.

However, Hardiman cautioned Gupta that taking that route would make the settlement overly broad.

"Now the settlement's going to be watered down," he said. "Every field goal kicker who's depressed is part of the class."

After argument from three more lawyers for the players, counsel for the NFL, Samuel Issacharoff, a professor of constitutional law at New York University School of Law, told the panel that the appeal was based on a "fundamental misunderstanding" of what the settlement is supposed to do.

"This settlement is an insurance policy for future players," he said, noting that 7,500 players have already tried to enroll despite it not yet being open. But it is not based off of future science, he added, alluding to Molo's comments that a diagnosis for CTE in the living could emerge within five years.

Third Circuit Judge Thomas L. Ambro asked Issacharoff what the NFL would do if CTE could be diagnosed in a player's lifetime and could be attributed to football.

Issacharoff said even if that were the case, it would be difficult to prove that CTE is linked specifically to NFL football.

There have been high school football players who have died from CTE, he continued.

Issacharoff said settlements have an inherent risk for all parties. While the players could choose to accept payment and release the NFL from responsibility for future claims before science can link CTE to football, the NFL has the risk of settling cases for injuries it might theoretically not be responsible for.

"It may turn out that the advance of science shows that ALS is not related to football," Issacharoff said.

Christopher Seeger, who jointly represents the roughly 20,000 players who have agreed to the settlement, said the objectors have come up with a laundry list of demands that are prolonging an otherwise reasonable resolution to the case.

"These appeals effectively stand between truly injured retired players and their sole prospect for obtaining benefits while still alive," Seeger said in an email to The Legal. "We hope the court will reject these arguments and affirm the settlement so former players can finally receive the care and support they urgently need."

The concussion litigation has been marked by disagreement among the players' lawyers since the first iterations of the settlement. U.S. District Judge Anita Brody of the Eastern District of Pennsylvania, who has handled the case, rejected the first deal the parties struck for \$760 million just over a year-and-a-half ago and sent them back to the drawing board. The lead counsel for the players and the lawyers for the NFL came back in the summer of 2014 with a second deal that did away with the \$675 million cap on the fund from which injured former players would draw—the judge's chief concern was that there wouldn't be enough money in the fund to compensate all eligible players over the 65-year life of the fund.

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