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## NFL concussion deal offers hope to affected ex-players

In February 2011, two-time Super Bowl champion, four-time Pro Bowler and NFL Man of the Year recipient Dave Duerson died of a self-inflicted gunshot wound to the chest.

Notes left behind requested that his brain be examined posthumously at the Boston University "NFL Brain Bank." Subsequent neuropathological examination in Boston revealed that Duerson was suffering from chronic traumatic encephalopathy (CTE), an insidious brain condition found in athletes subjected to repetitive head trauma.

Duerson's CTE had robbed his brain in areas that control memory, judgment and impulse control. Duerson was 50 years old.

Later that same year, groups of former NFL players began filing lawsuits against the NFL alleging that the NFL failed to protect them from long-term brain damage and hid from them the risks of developing it.

The lawsuits detailed the mood and behavioral issues, the cognitive dysfunction, the memory lapses and the lack of impulse control affecting many of the former players.

More than 300 suits on behalf of more than 5,000 former NFL players were filed.

The cases, including the wrongful-death case brought by the Duerson estate (represented by Corboy & Demetrio P.C.) were eventually consolidated by the Judicial Panel on Multi-District Litigation before a single federal judge in the Eastern District of Pennsylvania. *In re National Football League Players' Concussion Injury Litigation*, 842 F. Supp. 2d 1378 (J.P.M.L. 2012). The cases were assigned to U.S. District Judge Anita B. Brody. Corboy & Demetrio serves in a leadership role on the Plaintiff's Executive Committee.

After hearing arguments on the NFL's motions to dismiss based on the terms of the collective bargaining agreement,

Brody ordered the parties to mediation. In August 2013, the parties announced that a settlement had been reached which would have created a \$675 million fund to compensate former NFL players suffering from neurodegenerative disease.

But, after reviewing the proposed settlement's terms for adequacy, reasonableness and fairness, Brody denied preliminary approval of that proposed settlement. *In re National Football League Players' Concussion Injury Litigation*, 961 F. Supp. 2d 708, 715 (E.D. Pa. 2014).

Of primary concern with the initial proposal was that the fund was not robust enough to cover all future claims. Brody wisely pondered the likelihood of numerous claims and wrote "it is difficult to see how the monetary award fund would have the funds available over its life span to pay all claimants..." Id.

After denial of preliminary approval, the parties resumed further settlement discussions. Eventually, the parties reached a second agreement that, along with other tweaks, uncapped the monetary award fund. No longer was the NFL's liability capped at \$675 million.

Instead, the uncapped fund proposed to be established by the NFL would ensure compensation of all valid claims that could, and would, be brought by former NFL players through the lifetimes of the retirees — expected to last until the year 2080.

In April 2015, the uncapped settlement was approved by Brody. *In re National Football League Players' Concussion Injury Litigation*, 307 F.R.D. 351 (E.D. Pa. 2015).

Some members of the class appealed, arguing that the settlement class was improperly certified and that the district court abused its discretion in approving the settlement.

### SPORTS TORTS

BY WILLIAM  
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Last week, the 3rd U.S. Circuit Court of Appeals, in a unanimous opinion authored by Judge Thomas L. Ambro, affirmed the district court's order approving the settlement. *In re NFL Players Concussion Injury Litigation*, 2016 U.S. App. LEXIS 6908 (3d Cir. Pa. April 18, 2016).

The 3rd Circuit held that the settlement was fair, reasonable and adequate.

The 3rd Circuit's ruling brings the cases one step closer to final resolution.

Should the appellants forego the filing of a petition for en banc rehearing in the 3rd Circuit (or if such petition is denied), the only available remedy would be upon

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certiorari to the U.S. Supreme Court. If that is denied the settlement will become effective. Upon its effective date, certain time limitations will begin to run.

That effective date of the settlement will have significant ramifications upon retired NFL players and their families. A

retired player, with or without current manifestations of brain disease, must register within 180 days of the effective date or risk being barred forever from benefiting from this settlement.

To repeat, if a retired NFL player fails to register within 180 days of the effective date, that player, and his family, will be forever barred from qualifying for any of the funds earmarked for them by the NFL.

Certainly, the settlement is not perfect. But, in the end, "It is the nature of a settlement that some will be dissatisfied with the ultimate result." *In re NFL Players Concussion Injury Litigation*, 2016 U.S. App. LEXIS 6908 (3d Cir. Pa. April 18, 2016)

While imperfect, the settlement will provide significant value to retired NFL players who are now, or someday may be, living their lives with damaged brains: All will receive baseline neurological testing and as many as one in three will qualify for significant compensation in the event of a neurodegenerative disease diagnosis (i.e., dementia, Alzheimer's disease, Parkinson's disease, amyotrophic lateral sclerosis (ALS) and death with CTE prior to April 22, 2015.)

Estimates vary, but actuarial data suggest that more than 600 claims will be paid by the NFL in the first year of the settlement with additional claims paid when presented throughout the 65-year life span of the settlement.

As Ambro noted, "This settlement will provide nearly \$1 billion in value to the class of retired players. It is a testament to the players, researchers and advocates who have worked to expose the true human costs of a sport so many love. Though not perfect, it is fair."

What would be unfair is if retired NFL players miss out on the value the settlement provides by failing to timely register.