

Sports Litigation Alert

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The NFL Head Trauma Settlement: For the Love of the Game?

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The announcement just before Labor Day weekend that the NFL was settling the claims of thousands of former players who suffered serious head trauma from playing professional football generated big headlines and strong reactions. Not surprisingly, the participants in the settlement – the former players, their attorneys and the NFL — expressed satisfaction, or at least resignation, that the deal was fair for all involved. Equally expected, many commentators expressed strong views about the resolution, mostly lamenting how the settlement amount was inadequate, either because it would not provide sufficient compensation to the players or because the amount was simply too easy for the profitable NFL to pay. The settlement is unprecedented and worthy of discussion, but a closer look reveals that the fairness of the deal remains very much an open question.

The Deal

Although documentation of the specifics of the settlement were not made public, news outlets widely reported the NFL would settle all claims for close to a billion dollars, nearly half of which would be paid in the next three years with the balance paid in pieces over the next 20 years. Sources revealed the NFL will pay \$685 million into a pool to compensate former players suffering serious neurological injury from football-induced head trauma. Individual awards taken from this pool would be determined by representatives of the former players, not

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the NFL, based on the nature and seriousness of the players' conditions, a provision that was a point of particular importance to the former players involved in the case.

Once administered, individual awards reportedly would be capped at a maximum of \$5 million per individual for sufferers of Amyotrophic Lateral Sclerosis (ALS), commonly referred to as Lou Gehrig's Disease, \$4 million for sufferers of Parkinson's and \$3 million for those with Alzheimer's or dementia. As part of the deal, the NFL also agreed to pay \$10 million to fund additional research on head trauma, \$75 million to fund testing of former NFL players to determine whether they suffer cognitive impairment and an amount that could exceed \$200 million to pay the attorneys for the former players.

Winners and Losers?

I do not know personally any of the former players, lawyers or members of the league involved in this case, so my views are armchair opinions. At the same time, a substantial part of my law practice involves representing survivors of traumatic brain injury and other acquired brain injuries in civil cases so I have a very good idea how individual brain trauma cases impact survivors and how their cases can play out in court. Many commentators have suggested the answer to who won and lost in this settlement can be seen in black and white terms. I disagree.

To me, the settlement seems to represent what many settlements represent: substantial and uncomfortable compromise by both sides, intended to avoid the uncertainties and risks of the courtroom. The question of whether the settlement is truly fair is impossible to answer because the answer depends largely on evidence of the NFL's accountability that has never been made public. In addition, none of us can evaluate fairly information about the nature and extent of neurological injury suffered by former players, much of which is now unknown and will likely remain so for years to come.

Case Considerations

The nature of the settlement, however, is revealing on a few important points. It seems fair to infer from the

NFL's willingness to pay nearly a billion dollars that it had serious concerns about revealing what it knew about the potentially devastating effects of repetitive head trauma in past years and the reasons why it apparently did not reveal its knowledge to its players or fans. If, as is claimed by the players, the NFL had this knowledge and put players at risk by withholding it, then the NFL unquestionably is both legally and morally culpable for these players' injuries. And of course, such facts would expose the NFL to significant civil liability. By settling the lawsuit, the NFL effectively can close the chapter on this issue, heading off both a potential public relations nightmare and a possible damages award of a far higher amount in response to any damaging evidence.

At the same time, one should not ignore that the NFL had some prominent defenses at its disposal that threatened the players' potential recoveries. If the lawsuit proceeded, for example, the players would carry the difficult burden of demonstrating that the NFL's conduct — and not repetitive football traumas during childhood, high school and college football participation — were the cause of the players' neurological injuries. Additionally, the NFL posited serious legal challenges to many of the players' claims based on the terms of their collective bargaining agreement. It has been widely reported that the presiding judge relayed to the parties that she considered many of the plaintiffs' claims vulnerable to this legal attack. While some players' claims likely would have survived, many claims faced the grim possibility of outright dismissal.

Although it is easy to criticize the lawyers — who certainly will receive enormous fees — for selling the players short, the truth is the case was no easy win, and commentators suggesting otherwise ignore the sometimes cruel realities of high stakes litigation. Critics who point out how easily the immensely profitable NFL will be able to pay the settlement amount miss the point: a settlement like this must be focused on fairly compensating injured plaintiffs, without regard to the dent it makes in the NFL's coffers.

Is it Enough?

If hundreds of the former players that were part of the case have or in the future develop serious neurological diseases such as ALS, Parkinson's, Alzheimer's or dementia, the amount of the settlement will be inadequate to compensate the plaintiffs and woefully so. This would be true for two reasons: (1) because an otherwise healthy, young person stricken with serious neurological illness requires significant care and suffers significant and dramatic loss in quality of life and longevity that, taken to-

gether, would justify much larger individual awards than the settlement can fund; and, (2) the \$685 million amount would be quickly devoured if there are many distributions in the \$3-\$5 million range. This is simple arithmetic: There are thousands of plaintiffs, and a mere 137 individual distributions of \$5 million, or 228 distributions of \$3 million, would eat up the entire \$685 million compensation pool.

Also, one should not underestimate the tragic effects that "minor" neurological impairment can have on the lives of otherwise young, healthy people. There is no such thing as a minor neurological impairment, and no money is enough to compensate one who suffers cognitive impairment due to another's carelessness. Memory impairment, depression, insomnia and other cognitive disabilities short of ALS, Parkinson's and Alzheimer's have the effect of transforming a person's life in deeply unsettling and devastating ways.

Understanding whether and how these conditions will affect many of the former players involved in the case, however, probably would not be possible by the time the case would reach its natural end. This means more uncertainty and, equally important, substantially more delay for those seeking compensation. While the net recovery of individual plaintiffs will surely be inadequate compensation for their losses, settlement is a sure thing and will give much needed financial assistance to many needy former players. And it will do so now, without the need for lengthy appeals.

Based on publicly available information, there is no clear winner in this settlement. Is it enough money to compensate all of the players involved? Of course not. Then again, the \$2 billion the players reportedly initially sought also would fall short of this goal. As it stands today, I see no way to accurately assess whether the NFL or the players — or neither — prevailed by this result. The settlement buys the NFL closure, but it also buys the players certainty and control. It's far from a perfect solution, but then again, settlements rarely are.

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