

Chicago Daily Law Bulletin®

Volume 161, No. 88

Concussion class action closer to a conclusion

On April 22, U.S. District Judge Anita Brody in Philadelphia produced a 132-page opinion approving the settlement between the National Football League and a class of thousands of former football players who accused the NFL of negligence and failure to inform players of the link between repeated traumatic head impacts and long-term brain injuries.

Brody concluded that the settlement is “fair, reasonable and adequate” pursuant to Federal Rule of Civil Procedure 23(e).

Reflecting on the strength of the settlement, Brody acknowledged that she had to evaluate “whether the settlement represents a good value for a weak case or a poor value for a strong case.” She continued on by explaining to objectors that “[t]he settlement allows class members to choose certainty in light of the risks of litigation.” According to Brody, the settlement allowed the plaintiff class to avoid collective bargaining rules and potential legal defenses that the league could have raised at trial.

Pursuant to the settlement, players who suffer from neurocognitive impairments, such as a decline in memory and processing speed, are eligible for awards up to \$3 million; Parkinson’s and Alzheimer’s sufferers can get \$3.5 million; while ALS victims are, at maximum, eligible for \$5 million.

The settlement was originally submitted for Brody’s approval in August 2013, however, on two occasions, the judge asked for the parties to amend their agreement — first, regarding the cap on the total amount of damages and second, regarding the limit on medical monitoring spending under the agreement.

These limitations — \$675 million and \$75 million respec-

tively — have been entirely eliminated from the approved deal. Nonetheless, the NFL still estimates that it will have to pay no more than \$900 million under the settlement.

The league has requested that the settlement cover all of the more than 20,000 retired players, not just those who joined the lawsuit. However, more than 200 players have opted out of the eligible class. One particular reason former players have opted out is the lack of coverage provided for those suffering from chronic traumatic encephalopathy, or CTE.

CTE, a degenerative brain disease that includes symptoms such as memory loss, depression and mood swings, has become heavily associated with head trauma in football. Former NFL players such as linebacker Junior Seau and safety Dave Duerson are among those that have been posthumously diagnosed with CTE.

In her opinion, however, Brody highlighted that CTE compensation cannot be provided for living former players “because no diagnostic or clinical profile of CTE exists, and the symptoms of the disease, if any, are unknown.” Also problematic for compensating for CTE is the prevailing recognition that CTE can only be diagnosed after death.

In response to the objections, Brody quickly offered that the settlement does compensate for neurocognitive symptoms and ailments associated with CTE, noting that a majority of players who have been posthumously examined would have received compensation under the settlement if still living. However, Brody specifically excluded some symptoms of CTE, including irritability, aggression, depression and suicidal tendencies.

Moving forward, appeals from the settlement will likely be heard from former players who opted out after finding the terms

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of the deal to be unfavorable. The opportunity to receive more substantial compensation and greater healthcare benefits are not the only attraction to those who have opted out. For example, the attorney handling Seau’s separate litigation has noted that the settlement allows the NFL to bypass discovery burdens that may shed more light about how the league handled concussions and related head injuries.

Despite the potential benefits to opting out, those who have chosen to do so may end up with nothing. New lawsuits could potentially be defeated due to the NFL’s preemption defense tied to collective bargaining requirements for arbitration and not litigation. Even if the retired players and their families were forced to pursue arbitration, their grievances may be dismissed as untimely. While the timeliness requirement has fluctuated over time, the general range in which grievances must be raised falls within 45 to 60 days after an injury was known or reasonably should have been

known to a player.

Other risks attendant to the decision to opt out of the settlement include the NFL’s ability to use legal defenses such as a lack of sufficient causation and assumption of risk. Similarly, any appeals from the settlement class will likely be met with vast deference from Brody given her previous demands for revisions to the deal and the lengthy approval process. Further complicating matters, appeals from the settlement class will have a forestalling effect on the disbursement of the settlement funds.

When the case is fully settled, Brody will have to rule on how much the lawyers representing the players will be paid. The NFL has already said that it would not contest as much as \$112.5 million in fees, which would be paid in addition to the settlement costs.

Though the settlement can be seen as a positive outcome for many retired players, the league will continue to face questions about how it addresses safety on the field. Due to the fact that the settlement applies only to retired players, future retirees could file similar suits in the coming years.

Such players would face the same legal challenges that the NFL presented in this matter. In addition, the NFL’s handling of concussions has changed since the decades addressed in the settled suits. The league now requires concussed players be removed from practice or play, and players are prohibited from returning to play until they receive medical clearance. The league has also added rules against hits to the head and neck and stiffened penalties, including fines and suspensions.

Though it is unclear what the result of future lawsuits will be, the NFL will have to continue to develop its protocol on how it deals with the potential for concussion and brain injury.