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PRO FOOTBALL

Judges Skeptical of Ex-N.F.L. Players' Appeal Over Head Injury Settlement

By **KEN BELSON** NOV 19, 2015

PHILADELPHIA — An effort to compensate professional football players for the possibility they will develop brain disease from repeated head hits was met with open skepticism from federal appellate judges Thursday as they weighed whether to reverse a lower-court ruling excluding the claims.

The lower court had approved a settlement in April that would pay up to \$5 million to retirees who have severe neurological conditions stemming from their [N.F.L.](#) careers. The court, however, kept out a class of players who had argued that they should benefit from the settlement because in the future they may develop the disease chronic traumatic encephalopathy, or C.T.E.

Currently, C.T.E. can be detected only by an autopsy of the brain, and the families of several former players who died and were found to have the condition stand to receive up to \$4 million.

Those awards apply only to players found with C.T.E. before the settlement was approved on April 22, while all other players with C.T.E. would not be compensated. In addition, the lawyers for the appellants said, the settlement does not account for potential tests that could diagnose C.T.E. in living patients, something experts estimated could come in five to 10 years.

“We should at least be able to account for” future scientific developments, said Steven Molo, a lawyer representing several players who appealed to the United States Court of Appeals for the Third Circuit.

In response to questions from two judges, Thomas L. Ambro and Thomas M. Hardiman, Mr. Molo said he did not object to the settlement over all and accepted the April cutoff date for retired players to receive compensation of up to \$4 million. But he wanted protections put in place for players who develop symptoms associated with C.T.E., such as mood swings and depression.

The judges appeared skeptical, noting that those conditions were widely prevalent in the general population and that players who developed the conditions would not necessarily have C.T.E.

“So now the settlement is going to be watered down by every field-goal kicker who is depressed,” Judge Hardiman said.

Judge Ambro added that it was uncertain when, or if, an accurate test for C.T.E. in living patients could be developed.

“It takes a long time to get the science,” he said.

During the 90-minute hearing, arguments splintered into several directions. One lawyer said that the former safety Shawn Wooden, who serves as a representative for healthy former players who have not developed a severe

neurological disorder, was an inadequate representative of the class because he did not claim to have symptoms associated with C.T.E.

Another lawyer said the entire class-action case should be unwound so players could sue the N.F.L. individually, while another said that his client did not opt out of the settlement because his chances of succeeding by suing the N.F.L. were slim.

The appeals court judges noted that the settlement included a provision that obligates lawyers for the N.F.L. and the retired players to have good-faith negotiations in the coming years to consider future science and other issues. The appellants' lawyers said that was inadequate because the N.F.L. would have veto power over any amendments.

Michael Kaplen, a co-writer of a friend-of-the-court brief filed on behalf of the [Brain Injury Association of America](#), went further. He said that arguing about whether C.T.E. was or was not compensated was a distraction from the more immediate physical, emotional and behavioral impairments that players receive from repeated head hits.

He also doubted the N.F.L. would willingly amend the settlement in the years ahead.

“I have a bridge to sell you if you believe the N.F.L. is going to come back in 10 years and reopen this,” he said.
