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PARTIES SEE MEDIATED SETTLEMENT BETWEEN N.F.L. AND FORMER PLAYERS AS A WIN-WIN – JUDGE CALLS A TIME-OUT

On August 29, shortly before the 2013 football season began, the NFL and 4,500-plus retired football players reached a \$765 million settlement over the league's handling of neurological injuries. With retired federal judge Layn Phillip acting as a mediator, this agreement will get financial help to the retired players in need faster and cheaper than by continuing to litigate. *Judge Orders N.F.L. Concussion Case to Mediation*, The New York Times, (July 8, 2013), http://www.nytimes.com/2013/07/09/sports/football/judge-orders-nfl-concussion-case-to-mediation.html?_r=0&adxnnl=1&adxnnlx=1387319477-XNZ9dollar1W2kKf+LkoVw.

The former players needed a settlement sooner rather than later with the numbers of victims continuing to climb. Cases included 34 incidents of Chronic Traumatic Encephalopathy (CTE), seven players living with Lou Gehrig's disease, and many others living with dementia or Alzheimer's. *More Details Emerge about Proposed NFL Concussion Settlement*, The Washington Times, (September 5, 2013), <http://www.washingtontimes.com/blog/screen-play/2013/sep/5/more-details-emerge-about-proposed-nfl-concussion-/#ixzz2nlbTsshw>. Absent a certified litigation class, every case would have to be addressed individually, which would be complicated, time consuming, and expensive, with a highly uncertain outcome. These factors combined made a negotiated agreement through mediation a much more attractive prospect.

The biggest hurdle going to trial for the players was to prove head trauma from playing NFL football caused their impairments. Concussions are different from broken bones or pulled muscles in that they often go unreported. The players would have the uneasy task of proving that their concussions came from the NFL and not from high school, college, or some other event. Additionally, they would have to prove the concussion caused the neurological problems they are currently suffering. In this settlement, players no longer have to link specific events to causation, but merely need to show signs of neurological problems to receive a payout. The difficulty with proving causation in court is believed to be the factor that kept this settlement from reaching into the billions. *For Retired NFL Players, Concussion Settlement a Safe Bet*, Time, (August 30, 2013), <http://keepingscore.blogs.time.com/2013/08/30/for-retired-nfl-players-concussion-settlement-a-safe-bet/#ixzz2nlaqvPFc>.

If the critics of the deal are correct, the NFL benefited from not having to go forward with a factual discovery. *A Mediated Settlement May Not Be the Best Solution to the NFL Concussion Crisis*, The Huffington Post, (July 18, 2013), http://www.huffingtonpost.com/michael-v-kaplen/a-mediated-settlement-may_b_3616499.html. It is alleged that the league's Mild Traumatic Brain Injury Committee had engaged in fraudulent conduct to conceal a concussion epidemic. Now the committee will not have to disclose internal files detailing what it knew, and when, about concussion-linked brain problems.

The NFL argued that many of the retired players did not have the right to sue because they played under previous collective bargaining agreements. However, a few hundred players who played during years when there was no labor contract in place were parties to the suit. The expectation that these players were likely to win the right to sue could only have added to the NFL's desire to negotiate a settlement through mediation. *NFL, Players Reach Concussion Deal*, ESPN, (August 29, 2013), http://espn.go.com/nfl/story/_/id/9612138/judge-nfl-players-settle-concussion-suit.

Perhaps most importantly, this settlement prevents long-term damage to the NFL's reputation and, in turn, its bottom line. The final bill will cost each team owner about \$30 million. This is only 10 percent of the average franchise's 2013 revenue, which *Forbes* placed at \$286 million. This is much less than the owners would have paid as losers in the concussion lawsuit, and probably less than most owners thought they would have paid in a settlement. *Concussion Lawsuit Settlement a Win for the NFL*, Sports Illustrated, (August 29, 2013), <http://sportsillustrated.cnn.com/nfl/news/20130829/nfl-concussion-lawsuit-settlement/#ixzz2nlvzgsO9>.

Still, the retired players got a lot out of this agreement. The settlement sets up a \$675 million fund to deal with currently existing cognitive impairments and those that currently retired players develop in the future. Players' awards are based on a diagnosis and the amount of time in the NFL. For example, a player diagnosed with ALS is eligible for the full compensation of \$5 million if he spent five seasons in the NFL. Four seasons earn a player 80 percent, three seasons 60 percent, two seasons 20 percent, and anything less earns only 10 percent in compensation. *More Details Emerge about Proposed NFL Concussion Settlement*, The Washington Times, (September 5, 2013), <http://www.washingtontimes.com/blog/screen-play/2013/sep/5/more-details-emerge-about-proposed-nfl-concussion-/#ixzz2nlbTsshw>The negotiated settlement will cover all of the estimated 15,000 to 18,000 living retired players, deceased players' authorized representatives, and family members, even those who were not parties to the suit.

The \$675 million will be paid in installments with most coming from league and team insurance - half of it within three years and the remainder over the following 17 years. *In the End, Settlement Not Surprising*, ESPN, (August 29, 2013), http://espn.go.com/nfl/story/_/id/9612467/questions-answers-nfl-retired-players-lawsuit-settlement. Important to many retired players is that the determinations regarding who qualifies and the amount of the award will be made by independent doctors and fund administrators agreed upon by the parties. The federal court in Philadelphia, and not the NFL, will retain ultimate oversight. It is believed by economists and actuaries who evaluated the fund that, through this process, the amount of money in compensation will last 65 years. In addition to the \$675 million fund, retired players will have access to \$75 million for baseline medical assessments, \$10 million for research and education, and attorney's fees will be an additional payment by the NFL.

While the parties see this proposed settlement as a win-win, on January 14, 2014, Judge Anita Brody denied preliminary approval of the settlement. While acknowledging the good faith efforts of the parties to reach a negotiated settlement, Judge Brody stated in her ruling that she was not provided with sufficient documentation that the agreed upon figure would be adequate to pay for qualified claims. In her opinion, the numbers just do not add up. If she receives the documentation she is seeking, it could lead to a quick approval; if not, the parties will have to return to the negotiation table. *Judge Anita Brody denies preliminary approval for NFL concussion settlement*, Sports Illustrated, (January 14, 2014), nfl.si.com/2014/10/13/nfl-concussion-lawsuit-settlement-2/.

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