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Could Objectors' Letter Put CTE in NFL Settlement?

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A lawyer for several former NFL players objecting to the league's \$1 billion concussion litigation settlement sent a letter this week to the federal appeals court reviewing the case with the hope that it would broaden the class of those entitled to compensation.

However, attorneys said that it was uncertain as to whether the letter would actually have an impact in incorporating compensation for chronic traumatic encephalopathy (CTE) in the settlement.

The letter, written by attorney Steven Molo of Molo Lamken in New York on behalf of seven of the approximately 90 objectors, recounted a recent discussion between Jeff Miller, National Football League executive vice president of Health and Safety Policy, and members of the U.S. House of Representatives Energy and Commerce Subcommittee on Oversight and Investigations. At that "roundtable" discussion, according to Molo's letter, Miller said there was a link between CTE and football. CTE is a degenerative neural disease associated with repeated blows to the head. It was historically referred to as dementia pugilistica, or the state of being "punch drunk." Currently, CTE can only be found through autopsy.

The roughly 90 players on appeal took issue with the settlement—

reached in April after extended debate—because it didn't include payment for players diagnosed with CTE after the presiding judge's settlement approval date. The settlement provides compensation for diseases like Alzheimer's and Parkinson's and covers a class of -approximately 21,000 former players.

"The NFL's admission is stunning in that it is a complete about-face from the position they have taken throughout the litigation," Molo told *The Legal*.

Asked if the letter would have an impact on the settlement, Molo said, "It is supplemental authority relevant to the decision the court is about to make."

The NFL's attorney, Lynn B. Bayard of Paul, Weiss, Rifkind, Wharton & Garrison in New York, did not return a call seeking comment.

Christopher Seeger of Seeger Weiss in New York, co-lead counsel for the retired NFL players in agreement with the terms of the settlement, said in a statement that he welcomed "the NFL's acknowledgement of what was alleged in our complaint: that reports have associated football with findings of CTE in deceased former players."

However, he added, "as the district court correctly held, the scientific study into CTE is in its infancy and a reliable method for detecting it in living people does not exist."

Seeger said that 99 percent of the class wants the settlement as is and that 8,000 retired players have already enrolled for benefits even though the claims process has not been opened, since appellate review is still under way.

Charles "Chip" Becker of Kline & Specter represents 38 objectors in the Third Circuit.

"The settlement leaves a huge swath of guys out in the cold," Becker said, because it provides no compensation for CTE.

As for Miller's statements before the -congressional committee, Becker said, "This is the beginning of the NFL's acknowledgement that football is a delivery system for repetitive traumatic injury to the brain."

But it is unclear as to whether the so-called admission will lead the Third Circuit to order a change in the settlement.

Becker said the information in the letter is not of record, and the court will decide what weight it wants to give the letter's contents when evaluating "whether it is -reasonable for the settlement to bar compensation from 15,000 former players who may suffer from CTE but who will not develop a diagnosis recognized by the settlement."

As for Molo's letter, Becker said he wasn't sure the letter presented anything new, "but it does under-

score the rapidly growing social awareness that football causes permanent and debilitating brain damage to those who play."

Eric Weitz of Messa & Associates said Miller's statement, by way of Molo's letter, is important for the process of the Third Circuit's review, which is to determine the fairness, accuracy and reasonableness of the settlement.

But realistically, "I think it's unlikely the letter will upset it," Weitz said, especially since the majority of the class members want the settlement to go through.

"I think it presents a huge burden for the objectors to say that it is not fair when 99 percent of the people think it is," Weitz said.

The concussion litigation has been marked by disagreement among the players' lawyers since the first iterations of the settlement. U.S. District Judge Anita Brody of the Eastern District of Pennsylvania, who has handled the case, rejected the first deal the parties struck for \$760 million almost two years ago and sent them back to the drawing board. The lead counsel for the players and the lawyers for the NFL came back in the summer of 2014 with a second deal that did away with the \$675 million cap on the fund from which injured former players would draw—the judge's chief concern was that there wouldn't be enough money in the fund to compensate all eligible players over the 65-year life of the fund.