

Blog Entry: As American as Football, Apple Pie and Class Actions

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Two cert petitions in a football-related class action are pending before the U.S. Supreme Court: *Gilchrist v. National Football League*, case no. 16-283 and *Armstrong v. National Football League*. Both are scheduled to be considered by the Court at its December 9, 2016 conference.

The petitions arise from *In re: NFL Players Concussion Injury Litigation*, filed in the Eastern District of Pennsylvania. Both arrived at the Court after the Third Circuit affirmed the district court's orders overruling objections to its orders certifying the class and approving its settlement with the NFL.

The class consisted of over 20,000 retired players, and the settlement broadly provided for "(1) an uncapped Monetary Award Fund that provides compensation for retired players who submit proof of certain diagnoses; (2) a \$75 million Baseline Assessment Program that provides eligible retired players with free baseline assessment examinations of their objective neurological functioning; and (3) a \$10 million Education Fund to instruct football players about injury prevention." The "Qualifying Diagnoses" entitling class members to monetary recovery include a "Level 1.5 Neurocognitive Impairment," providing for a maximum award of \$1.5 million; a "Level 2 Neurocognitive Impairment," \$3 million maximum; Parkinson's Disease, \$3.5 million maximum; Alzheimer's Disease, \$3.5 million maximum; death with chronic traumatic encephalopathy ("CTE"), \$4.5 million maximum; and ALS, \$5 million maximum.

In turn, the class members released all claims against the NFL "arising out of, or relating to, head, brain and/or cognitive injury, as well as any injuries arising out of, or relating to, concussions and/or sub-concussive events," including CTE-related claims.

In *Gilchrist*, petitioner, the son of a former NFL player who died from CTE, objected to the settlement because it placed a lower monetary value on death with CTE than it did on ALS, and also because he claimed that "the assessment, analysis, and ascribed value of the various conditions suffered by retired NFL players were fundamentally unfair and not justified by the science." He asks the Court to determine "under what circumstances *Daubert* must be satisfied for a class to be certified under Federal Rule of Civil Procedure 23 when challenged expert testimony is at issue." He also asks this:

Is it fundamentally wrong and an abdication of fiduciary duties to absent class members under Federal Rule of Civil Procedure 23 for the lower courts to have approved the NFL's head trauma class action settlement where there was no adversarial discovery on, and no definitive assessments about, the disputed "scientific" propositions regarding head trauma that were the basis for vastly disparate relief to class members along with a comprehensive release of claims?

In *Armstrong*

, petitioners took issue with the fact that the settlement provided no monetary benefits for those receiving a *post*-settlement CTE diagnosis while those with a *pre*-settlement CTE diagnosis could receive up to \$4 million. They argued that the settlement was negotiated on the class members' behalf "by lawyers representing clients with *current* injuries" (emphasis added), and asked the Court to determine "whether approval of such a settlement is consistent with Rule 23's adequacy-of-representation requirement and due process."

We'll be following these cert petitions and will keep you posted, while we stay tuned to the tsunami of college and pro football awaiting us in the weeks and months ahead.