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Sports & Entertainment Beat

# A Legal Analysis Of The NFL Concussion Lawsuits

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With high-profile deaths of iconic NFL players such as Junior Seau and Dave Duerson making headlines over the past couple years, the long-term health and well-being of NFL players has come to the forefront as the hot topic of the day. Nowhere has this issue gained more notoriety and exposure than in the series of lawsuits filed against the NFL by retired players.

More than 4800 former players are suing the NFL for withholding and concealing information about the long-term effects of repeated head trauma. Players allege that the NFL knew about the dangers of repeated blows to the head including dementia, depression and Alzheimer's (all known side effects of the disease, Chronic Traumatic Encephalopathy, or "CTE"), but knowingly concealed evidence from players while glorifying and promoting the violence of the game.

The NFL's main defense is grounded in the legal doctrine of pre-emption. Under the pre-emption doctrine, any disputes between unionized workers (NFL players) and their employers (NFL teams) are pre-empted by the Collective Bargaining Agreement ("CBA") and required to be submitted to arbitrators rather than heard in a court of law. The NFL asserts that the claims of former players for injuries suffered during their playing careers are pre-empted from being brought in a court of law. As such, these claims would be covered under the CBA in existence during their playing careers which would require private arbitrations for any disputes.

The NFL also asserts an assumption of risk defense - that players assumed the risk of playing professional football and knew about the inherently violent nature of the sport (including the risk of concussions), yet voluntarily exposed themselves to it and did not retire or stop playing due to the risk. The NFL raises this key question to further support its claim: even with new concussion protocols in place and information readily available about CTE and the long-term effects of repeated head trauma, how many players have voluntarily retired from the NFL due to the known risks? Only one known active NFL player comes to mind - former St. Louis Rams offensive guard Jacob Bell - who voluntarily retired in May 2012 citing long-term health concerns.

Fraud and concealment lie at the heart of the players' case. Fraud and concealment serve as the "get out of jail free card" for players and the way around the pre-emption doctrine. Players assert that claims involving fraud or concealment by the NFL fall outside the scope of the CBA and are not pre-empted from being heard in a court of law, where significant money damages would ostensibly be available. Case law being cited by players' attorneys and being referenced by U.S. District Court Judge Anita Brody (who is hearing

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the case) supports this legal stance - that claims involving fraud and concealment fall outside the realm of a collective bargaining agreement between a union and an employer and can be heard in a court of law.

It is perhaps the real fear of a jury trial and the corresponding PR nightmare for the NFL that has spurred settlement negotiations with the players. Although a $765 million settlement was reached in the original federal class action lawsuit in August 2013, Judge Brody rejected the settlement earlier this year asserting that this amount was likely insufficient to cover the health care needs of affected players. Judge Brody has requested the NFL to show their work and demonstrate how this amount will be enough to cover the affected class of plaintiffs. If ultimately approved by Judge Brody, the $765 settlement would represent a huge victory for the NFL. Given the time value of money, which becomes especially relevant since the settlement would be paid out over the course of twenty years, the settlement would amount to nothing more than a financial speed bump for the NFL, which is a multi-billion dollar enterprise. The settlement would represent only 0.5% of the NFL's annual revenues which totaled over $9 billion in 2013.

Although not the huge payday that the players had envisioned, any type of settlement in this case would represent a major, groundbreaking development in player health and safety that will change policy and benefit future generations of NFL players for years to come.

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