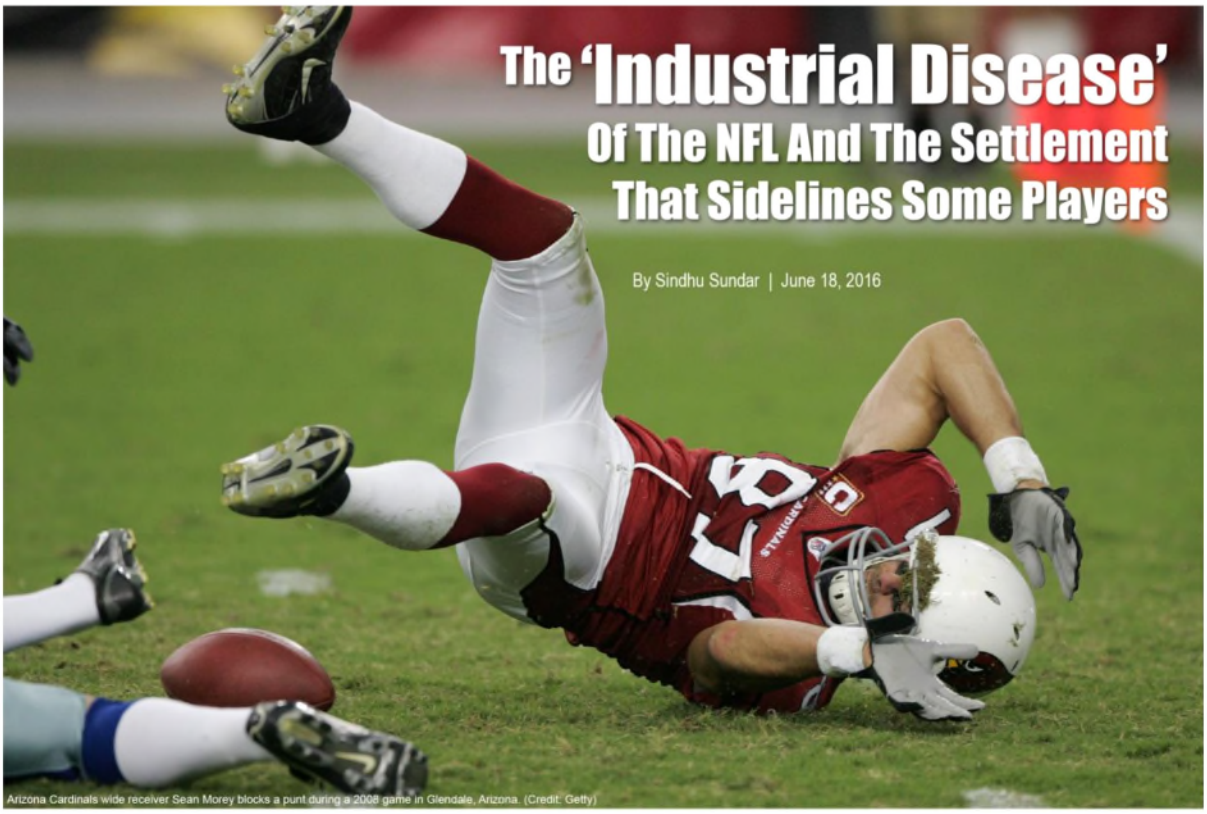
Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com



Arizona Cardinals wide receiver Sean Morey blocks a punt during a 2008 game in Glendale, Arizona. (Credit: Getty)

The line into the federal courthouse in Philadelphia was so long that November morning in 2014 that a judge had assigned a special security detail to manage the crowd. Taking their places inside a courtroom were top litigators from around the country, along with retired NFL players and their families, all waiting their turn for airtime in front of a federal judge considering whether to approve one of the largest, most controversial settlements in history.

Among the assembly was Eleanor Perfetto, the widow of a former Pittsburgh Steelers guard, mentally rehearsing her lines. She repeated an affirmation: "Tell 'em what you're gonna say. Tell 'em, and then tell 'em again." Joining her in opposition to the settlement were other wives, former players and veteran corporate litigators, including Steven Molo of MoloLamken LLP and Dwight Bostwick of Zuckerman Spaeder LLP.

Lawyers for the NFL were there, including Brad Karp of Paul Weiss Rifkind Wharton Garrison LLP. So too was Chris Seeger of Seeger Weiss LLP, the lead counsel for plaintiffs in the case and one of the main architects of the settlement.

The so-called fairness hearing is a forum for proponents and critics of class action settlements to personally make their case to a judge before final approval. On this day, they had gathered before U.S. District Judge Anita Brody, who presides over the consolidated multidistrict litigation against the NFL by

some 5,000 former players alleging the league covered up studies detailing the potentially serious long-term implications of concussions they sustained on the field.

"The question for your honor today is not whether the settlement is perfect, but whether it's fair, reasonable and adequate," Seeger told Judge Brody. "And under the circumstances of this case and the controlling Third Circuit law, this settlement is entitled to a presumption of fairness."

After several years of litigation, the league had agreed to a settlement that offered a bottomless fund over a 65-year period to compensate a class of some 22,000 former NFL players. The deal offers payments ranging from $1.5 million to $5 million for each retired player diagnosed with some of the most serious degenerative conditions connected to traumatic brain injuries, including dementia, Alzheimer's disease and Parkinson's disease.

But the hearing that day would focus on a controversial feature of the settlement: how it treats CTE, or chronic traumatic encephalopathy, the neurodegenerative condition whose reputation as "the industrial disease of football" spurred the earliest NFL concussion suits in 2011. The settlement offered up to $4 million in compensation to the family of each former player diagnosed with CTE, but it applied only to a group of deceased players who had died within a narrow time frame.

Some 200 objectors have argued that the provision blocks thousands of former players from receiving any meaningful recovery for the condition. Many stepped up to the podium that day to make their argument against the deal. In April 2015, five months after the hearing, Judge Brody signed off on the settlement. The final terms included a slightly expanded window for CTE claims but otherwise largely mirrored the original. This past April, the Third Circuit upheld that ruling, and in early June the appeals court denied a motion for the full court to rehear the matter.

Regardless of whether this is the end of the road for the objecting class, the battle, which involves legal heavyweights on both sides of the divide, has left many former players and families fuming. And it highlights what some believe is a serious shortcoming of class actions that can sometimes incentivize swift resolutions negotiated by attorneys who arguably represent a subsection of the class, leaving many plaintiffs out in the cold.

Buffalo Bills fullback Cookie Gilchrist is brought down by Boston Patriot Chuck Shonta during a 1965 exhibition game in Boston. (Credit: AP)

Although the phenomenon of behavioral and neurological changes had been observed in boxers since the 1920s, some of the most definitive research on football players' concussive blows — which rattle a brain within its casing — came in the mid-2000s.

Dr. Bennet Omalu, who directs the University of Virginia's research on sports concussions and brain injuries, was among the first to study the brains of players who had died after exhibiting mystifying personality changes. The players included Pittsburgh Steelers offensive lineman Terry Long, who died in 2005 after drinking antifreeze, legendary Steelers center Mike Webster, who suffered years of financial ruin after a career for which he was inducted into the Pro Football Hall of Fame in 1997, and Philadelphia Eagles safety Andre Waters, who shot and killed himself in 2006. Omalu's detailed post-mortem examinations showed that they had all suffered from CTE.

The condition, which the Centers for Disease Control and Prevention says can be caused by repeated concussions or traumatic impacts to the head, causes the formation of clumps of tau protein in the brain, which causes brain cells to degenerate. Cross-sectional photographs of the brains of players diagnosed with CTE appear clouded with dark masses of tau protein compared with those without the condition.

The lawsuits by retired players, which started rolling in during the summer of 2011, accused the league of knowing about the clear link between repeated head trauma and CTE but doing little to acknowledge it or to protect players from it. Instead, the league fostered an image of football players as indestructible, the suits claimed, selling photos on its website of dangerous collisions between players during games, even if it sometimes fined the players for such impacts.

> I know a great back, a Hall of Famer, who is sleeping on a park bench in the same city where he was a star.
>
> — Ex-NFLer Chester "Cookie" Gilchrist during 1974 congressional testimony

In the 1970s, Canadian Football League player Chester "Cookie" Gilchrist, who had also played briefly for NFL teams including the Buffalo Bills, sought to spread awareness about the difficulties that he observed football players had in readjusting to life once they retired. He broached the issue directly with the NFL, writing to then-Commissioner Pete Rozelle in 1973 to urge the league to sponsor some kind of counseling program.

Gilchrist was unable to pinpoint the cause of the financial and mental instability and addiction issues that seemed to affect many of his fellow players, attributing it then to professional players' difficulty in coming down from a "high, fast way of living." But he described mental health and addiction problems in players that have in more recent years come to be associated with CTE.

"I know a great back, a Hall of Famer, who is sleeping on a park bench in the same city where he was a star," he said, according to remarks presented to the House of Representatives in February 1974.

"Big Daddy Lipscomb died of an overdose of heroin. Lenny Ford died drunk and broke in some rundown hotel," he said, referring to famed NFL lineman Eugene Lipscomb and former Cleveland Browns player Leonard Ford, who reportedly died after a yearslong battle with alcoholism.

Rozelle declined Gilchrist's proposal in late 1973, citing financial reasons. "As I told you on the telephone, your plan for player counseling is a most constructive one, but not feasible for financial participation for this office now," he wrote.

Gilchrist himself died in January 2011 after suffering from decades of cognitive impairment, according to his son Scott Gilchrist, who is objecting to the settlement and is represented by Jared Beck and Elizabeth Lee Beck of Beck & Lee, a personal injury firm in Florida.

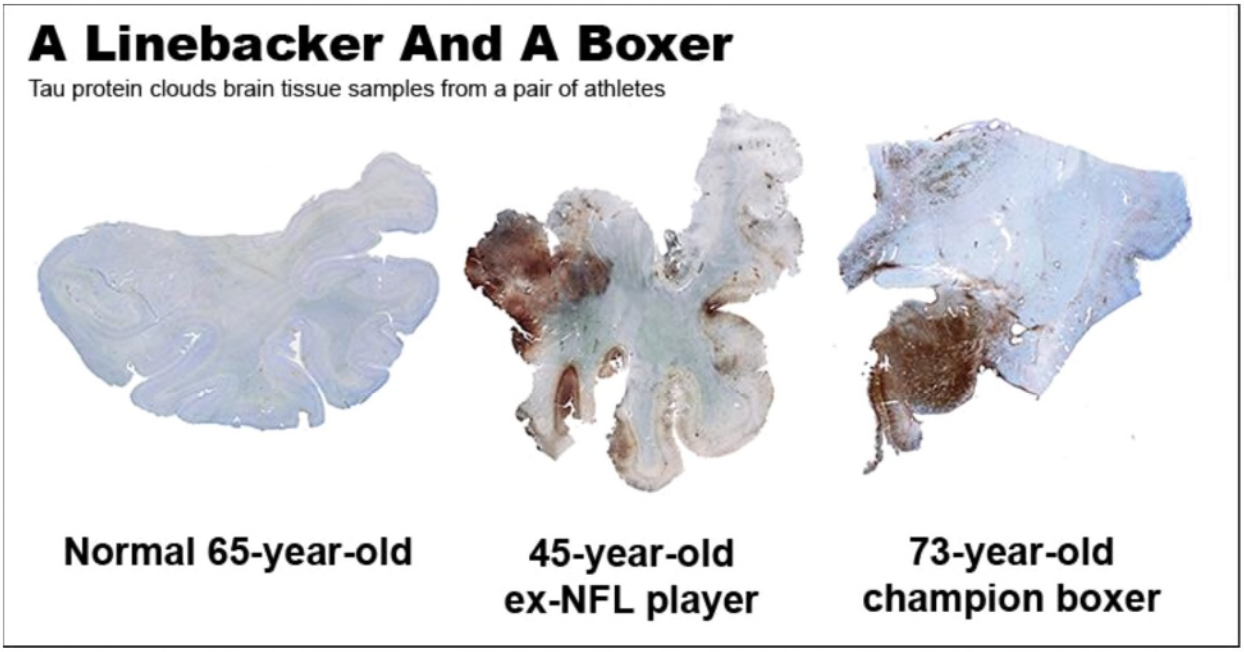
Cookie Gilchrist had separated from Scott's mother when Scott was about 11 and grew estranged from his family over time, the younger Gilchrist told Law360. One of the things Scott remembers clearly about his father is him urging his two sons to never play football, advice that Scott heeded.

"I did not want to end up like my father, having no lasting relationship with anyone," he said.

Although his father's estate could be eligible for compensation under the terms of the settlement, which covers some deceased players diagnosed with CTE, Scott Gilchrist has argued that the settlement is flawed in part because it treats CTE so differently from other degenerative conditions less uniquely associated with football, including ALS, a neurological condition that damages nerves in the brain and spinal cord and impairs muscle control.

Only five football players have been diagnosed with ALS, he wrote in a letter to Judge Brody in October 2014 objecting to the settlement. But neurology researchers at Boston University have found more overwhelming evidence of CTE in the brains of players they have examined, he said.

Judge Brody acknowledged this in her April 2015 order approving the settlement, noting that Boston University researchers had found CTE in the majority of the 93 deceased players whose brains they examined. She remarked, however, that this number was not statistically significant. She also said that since CTE could presently be diagnosed only after a patient's death, there was no reliable "diagnostic or clinical profile" that the settlement could use to compensate players who might be living with the condition.



Left: Whole brain section from a control subject. Middle: Whole brain section from ex-NFL linebacker John Grimsley, which researchers say shows extensive CTE. Right: Whole brain section from a world champion boxer with severe dementia. (Credit: Dr. Ann C. McKee, Boston/Boston University School of Medicine)

The deal to end the NFL concussion litigation has changed a few times since the NFL's attorneys from firms including Paul Weiss and lead plaintiffs class counsel first proposed it in August 2013.

The latest version of the uncapped settlement compensates families of former players who died before the settlement's final approval in April 2015. The original version had limited the window for death with

CTE recoveries to families of players who died before Judge Brody gave the settlement her preliminary approval in July 2014.

More than a dozen attorneys representing former players, including some 164 players and family members who have opted out of the deal, have argued that the latest version of the settlement remains problematic because it's not clear what compensation, if any at all, it offers most former players likely afflicted with CTE but still alive.

Objectors have argued, in particular, that the settlement excludes numerous CTE-related claims covering depression, mood disorders, severe headaches, vision problems, extreme sensitivity to light and sound, and unpredictable fits of rage and irritability that many former players and their families argue have hindered their employment and damaged personal relationships.

The settlement, in fact, requires former players who accept the deal to waive their rights to sue for many such claims in the future.

"It's an unusual release in that it's both broad and specific," Molo, who represents some of the earliest objectors to the deal, told Judge Brody. "As your honor can see, it says, 'The class members waive and forever discharge and hold harmless the released parties from any and all past, present and future claims,' then it talks generally about claims arising out of or relating to brain or cognitive injury, but then specifically — specifically it says 'arising out of or relating to CTE.'"

> [The settlement] is a testament to the players, researchers, and advocates who have worked to expose the true human costs of a sport so many love. Though not perfect, it is fair.
>
> — Chris Seeger
> lead counsel for plaintiffs

Attorneys for the NFL and lead plaintiffs counsel who negotiated the deal contend that the objectors have mischaracterized the settlement. They argue it compensates many ailments associated with CTE in living former players, including certain more advanced stages of dementia. Furthermore, ailments such as headaches and mental and behavioral disorders also exist in the general population and have not been conclusively linked to CTE, they argue.

The deal represents several months of extensive negotiations and is viewed as a win by the great majority of the class, lead plaintiffs attorneys say. Barely 1 percent of the more than 22,000 players in the class have opted out of the deal, and objectors who have not opted out represent a similarly low percentage, Seeger told Judge Brody at the fairness hearing.

Some 8,000 former players have already pre-registered for benefits under the settlement, even though the registration program hasn't officially opened, lead attorneys have said.

"This settlement will provide nearly $1 billion in value to the class of retired players," Seeger said in a statement to Law360. "It is a testament to the players, researchers, and advocates who have worked to expose the true human costs of a sport so many love. Though not perfect, it is fair."

Yet, in addition to the CTE-related claims, one of the chief criticisms of the settlement is that many former players and families who haven't opted out are nevertheless uncertain about what kind of recoveries they may be eligible for.

Perfetto, who got her chance to speak at the fairness hearing, made just that point when she stood before Judge Brody.

Her husband, the Steelers' Wenzel, died in 2012 after a battle with dementia and CTE that lasted more than a decade. A guard for the Steelers and San Diego Chargers in the 1960s and 1970s, he told a

neurologist in the 1990s that he had been knocked out on the field so many times that he lost count of the number of concussions sustained in his seven-year career. Once, he regained consciousness on the field with no memory of where he was and began running in the wrong direction, he told the doctor.

He was eventually diagnosed at the age of 56 with early onset dementia, a condition that the settlement compensates. What Perfetto argued is that the deal offers much lower, or unclear, recoveries for players diagnosed with such degenerative ailments later in their lifetime. Such provisions unfairly punish former players who could have gotten tested and diagnosed a lot sooner if not for the NFL's allegedly fraudulent efforts to undermine research that showed links between concussions and long-term cognitive impairment, she said.

The symptoms of Wenzel's declining health over the last two decades of his life bore some of the hallmarks of the kind of life-altering, CTE-related mental decline experienced by many former players who once built multimillion-dollar careers on their machine-like strength.

Perfetto, who said that she and her husband had "no inkling" that his football injuries would return to haunt him this way decades after he left the league, said she first noticed something amiss in the early 1990s, when he began to misplace keys and checkbooks.

"It was kind of odd, but when something like that happens once or twice, you don't immediately think, 'This person has cognitive impairment,'" she said.

But his symptoms worsened over the next few years, to the point that he had trouble continuing his job as a substitute teacher at a high school in Queen Anne's County, Maryland. It wasn't until 1999 that he underwent a monthslong battery of tests to rule out conditions that had seemed more likely for his age, including metabolic problems, strokes or brain tumors. He was ultimately diagnosed with early-stage dementia and, after death, with CTE.

CTE causes not only memory loss but also confusion, impulsivity and problems with temper control. Perfetto found her husband one afternoon in early 2000 in their bedroom with yellow envelopes containing photographs strewn all over the floor. He had been looking for some photos by emptying envelopes one by one onto the floor in an uncharacteristic frenzy, forgetting to slip them back in when he was done searching each one.

By the time Perfetto finally admitted him to an assisted living facility in early 2007, he could no longer dress or feed himself. She started having to cut food into pieces he would be able to pick up with one hand because he struggled to hold cutlery.

In one of the most startling turns, her once genial and warm husband had trouble recognizing her, and he would sometimes grow hostile or try to run away when she approached.

It's those kinds of intertwined symptoms of aggression, mental health problems and confusion — which can often strike former players well before a formal dementia diagnosis — that objectors say the settlement doesn't properly address.

San Diego Chargers linebacker Junior Seau tackles Pittsburgh Steelers wide receiver Ernie Mills during the 1995 AFC Championship in Pittsburgh. (Credit: AP)

Class action settlements — especially high-profile deals — tend to draw publicity and criticism, but the objections and criticisms in this case have come from parties represented by a much wider range of law firms than usual, from small to midsize plaintiffs outfits to corporate litigators including Molo, Bostwick and Steven Strauss of Cooley LLP.

Judge Brody, herself, rejected the first proposed settlement in January 2014. Her concern then was that the settlement, which at the time proposed to offer a total compensation of $675 million for injury claims, could run out of funds.

Molo was among the first lawyers to oppose the settlement. He represents seven former players including Sean Morey, an NFL wide receiver who played for teams including the New England Patriots, Arizona Cardinals and Pittsburgh Steelers. Philadelphia-based Hangley Aronchick Segal Pudlin & Schiller has worked alongside Molo's firm in the case.

"Sean had a lot of relationships with former NFL players and a deep passion for their well-being," Molo said. "It's sad, outrageous to think that these people went out and effectively were defrauded out of their health."

Molo became involved in the litigation when Morey approached him in early 2014 and requested that he look over the settlement.

"I wanted a corporate litigation firm to look at the settlement and tell me whether it was fair," Morey told Law360. "And it seemed as though the NFL had done everything in its power to optimize the exclusion of people from [the settlement's] benefits."

Morey, who retired from the NFL in 2010 at the age of 34, believes the settlement doesn't acknowledge the reality of players' health problems. The head-splitting migraines that began in 2007 when he was a special teams player for the Cardinals — and drove him to exit

> I've had hundreds of those headaches since I retired. In my career, I have broken ribs, torn ligaments, separated my shoulders, broken and dislocated half my fingers, but this is a pain I'd never known existed.
>
> — Ex-NFLer Sean Morey

professional football not long after he signed a contract with the Seattle Seahawks — continue to dog him, he said.

Even for professional athletes familiar with a life of extreme pain and injury, the unique rattling of concussive migraines can be uncharted territory, he said.

"I've had hundreds of those headaches since I retired," he said. "In my career, I have broken ribs, torn ligaments, separated my shoulders, broken and dislocated half my fingers, but this is a pain I'd never known existed."

The family of NFL linebacker Junior Seau, who killed himself in 2012 after a nearly decadelong psychological decline, enlisted the expertise of Cooley's Strauss to oppose the settlement. Strauss said the case came to him after a 10-year relationship with Seau that began when he represented him in a suit involving the notorious investment adviser John Gillette, who pled guilty in the late 1990s to defrauding professional athletes.

Jesse Solomon, a former linebacker for teams including the Minnesota Vikings, leaned on Bostwick and Cyril Smith of Zuckerman Spaeder. That firm was representing Solomon in a separate dispute with the NFL over disability benefits, including in a federal court case in Maryland. It had also won a case against the NFL's pension plan in 2005 on behalf of the estate of Mike Webster.

Solomon, a 52-year-old former player for teams including the Minnesota Vikings, has endured chronic ailments that his attorneys argue the settlement ignores. As a linebacker, Solomon was more exposed to concussive blows on each play. In the course of his nine-year NFL career, he suffered nearly 70,000 "full-speed contact hits," according to court documents in his separate suit against the NFL over disability benefits.

"Mr. Solomon described often hitting players so hard that he would have 'triple vision' after an impact, and numerous hits where 'everything would go silent and then the volume would increase,'" according to his attorneys' summary judgment filing last July in his disability suit.

Solomon now suffers from "near-daily migraines," severe depression and anxiety. A neurologist appointed by the NFL's disability plan had concluded that Solomon "probably is demonstrating features of CTE," his attorneys have argued.

"The central flaw [with this settlement] I think is that it is just completely unjust," said Bostwick, his attorney. "The most widespread allegations in these suits are about CTE, not Parkinson's or dementia."

A host of plaintiffs attorneys are also involved in the opposition movement, including Lance Lubel of Lubel Voyles LLP in Texas, Thomas Demetrio of Corboy and Demetrio, a personal injury firm in Chicago, and John Pentz, who runs a small law firm in Sudbury, Massachusetts.

For his part, Molo filed a motion to intervene in May 2014 arguing that the settlement unfairly compensated only a few ailments while neglecting the "breadth of affiliations linked to mild traumatic brain injuries," including memory loss, and that it sharply reduced payments — by 75 percent — to players who may have suffered stroke or brain injury after leaving the NFL.

Molo chose to file a motion to intervene rather than a statement of objection because he wanted a seat at the negotiating table, he said. Judge Brody declined the motion, six months before the fairness hearing.

Minnesota Vikings defensive end Mark Mullaney (77) and linebackers Jesse Solomon (54) and Scott Studwell (55) collapse on Washington Redskins running back George Rogers (38) during a 1986 game in Washington. (Credit: Getty)

The objectors appealed Judge Brody's decision to grant final approval to the settlement to the Third Circuit. In upholding the deal, the appeals court ruled that the settlement's CTE provisions were acceptable.

The objectors had argued that the settlement treats victims of CTE differently because it imposes an "arbitrary" deadline for compensable CTE-related deaths. But the Third Circuit took Seeger and the lower court's view that the funds available to the families of those who died with CTE before the deal's approval was a way to compensate them for not having enough notice of the settlement's terms during their lifetimes.

"The monetary award for CTE is thus an attempt to compensate deceased players who would otherwise be unable to get the benefits available to the class going forward," the three-judge panel wrote. "It is not evidence of a debilitating conflict of interest in the class settlement."

The panel had urged the objectors to accept the concessions built into the settlement, cautioning them not to make "the perfect the enemy of the good."

The limited outcome of the objectors' efforts throws into sharp relief one of the common criticisms of class action settlements and the difficulty in opposing them: These settlements are very difficult to change once they've been negotiated by a narrower group of attorneys who can represent a microcosm within a large class.

"Objectors don't really have an opportunity to shape the settlement or have any kind of input on it, unless it is rejected by an appeals court," said Pentz, who is representing about a half dozen objectors including former Kansas City Chiefs running back Cleo Miller.

> [Jesse] Solomon described often hitting players so hard that he would have 'triple vision' after an impact, and numerous hits where 'everything would go silent and then the volume would increase.'
>
> — Court documents in ex-NFLer's disabilty suit

Pentz sought in vain to persuade a full panel of the Third Circuit to reconsider the April decision.

A settlement "is usually a done deal by the time the preliminary proposal comes out," he said. "It's often presented as a kind of fait accompli."

Litigation experts say that it is typical of class actions, which often involve the claims of hundreds of plaintiffs, for settlement negotiations to largely involve just the defense and plaintiffs attorneys selected by the court to lead the case. The rationale behind limiting involvement this way is to facilitate logistically feasible settlement talks, they say.

It is the prerogative of class counsel to determine to what degree, if at all, they involve other attorneys in the settlement process, and it's not unusual when a settlement is negotiated solely between a defendant and lead plaintiffs attorneys, who were appointed by the court to take on that decisive role on behalf of the class, said Michael von Loewenfeldt, a Kerr & Wagstaffe LLP appellate litigation partner.

"There are a lot of ways that plaintiffs lawyers can work these things out between themselves, and there can be friction on issues of control," said Loewenfeldt, who isn't involved in the NFL litigation. "But in a large MDL, usually there's a steering committee, and the judge makes a decision as to who gets to drive the negotiations, because you can't have too many chefs in the kitchen."

New England Patriots running back Craig James sails over a Detroit Lions defender while being pursued by linebacker Vernon Maxwell during a 1985 game in Foxboro, Massachusetts. (Credit: AP)

Judge Brody appointed Seeger of New York City-based Seeger Weiss as lead plaintiffs counsel in the case in April 2012, after a daylong conference in her courtroom. Sol Weiss of Anapol Weiss joined as co-lead counsel shortly after.

As a personal injury attorney for nearly two decades, Seeger has been a lead negotiator for plaintiffs in major settlements including the $4.85 billion settlement with Merck & Co. in 2008 over its now withdrawn anti-inflammatory drug Vioxx, which patients said caused strokes and heart attacks.

Seeger, who grew up in Bayshore, New York, and was himself an amateur boxer for the Brentwood Police Athletic League, began in 2010 to investigate claims of concussion-related injuries by a group of former NFL players who had been referred to him by another law firm. No other concussion suits had been filed at the time by former professional athletes. But when Judge Brody instructed him and the NFL in July 2013 to mediate the case, he approached it with the familiar calculus of balancing leverage and weaknesses that is inherent to every major injury suit.

The suits generally claimed that the NFL had failed to act on research since the 1920s on "punch drunk" boxers suffering from symptoms similar to CTE, better known then as "dementia pugilistica." They

pointed out that even after the NFL established a committee in 1994 to study mild traumatic brain injury, the league continued to suggest as recently as 2007 that there was no research to show a clear link between repeated concussions and long-term health problems.

"Current research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly," read a pamphlet the NFL issued to players in August 2007. "It is important to understand that there is no magic number for how many concussions is too many."

It wasn't until 2010 that the league finally acknowledged the relationship between repeated concussions and neurodegenerative conditions like dementia, in a notice to players rallying them with the slogan, "Let's take brain injuries out of play."

The class plaintiffs' fraud claims against the NFL have cast a long shadow over the settlement. When the judge ordered the NFL and lead counsel into mediation, she stayed discovery. That meant no depositions were taken in the case, which objectors argued prevented former players from gathering evidence that the NFL had defrauded them by downplaying the effects of concussions. Discovery would have improved the lead counsel's bargaining leverage, they argue.

The players have generally claimed that the NFL had access all along to studies on concussions, and that it set up its 1994 research committee at least partly in response to mounting anecdotal evidence of the dysfunctional lives of former players. But that committee, billed then as the Mild Traumatic Brain Injury Committee, engaged in efforts to discredit research linking untreated concussions to CTE and long-term problems, objectors claim.

"It's extraordinary that a settlement of this nature would be reached without any discovery, and there's been no disclosure by class counsel of any informal discovery," Molo told Judge Brody. "So the NFL avoids, if the allegations that class counsel have put forth are to be true, producing evidence that they in fact sponsor junk science, that they affirmatively lied to their players, all in the name of corporate profit."

So the NFL avoids, if the allegations that class counsel have put forth are to be true, producing evidence that they in fact sponsor junk science, that they affirmatively lied to their players, all in the name of corporate profit.

— Steven Molo,
attorney representing some of the earliest objectors

Amid this controversy, the NFL's executive vice president of health and safety policy, Jeff Miller, made statements in March before lawmakers that seemed to acknowledge that he believed concussions were linked to CTE. At a House Energy and Commerce Subcommittee on Oversight and Investigations roundtable, he appeared to remark on the issue of whether the two were connected, saying, "The answer to that question is certainly yes, but there's also a number of questions that come with that." An NFL spokesman later said Miller's remarks were taken out of context.

But the suits' weaknesses were not insubstantial. If the case were to have advanced to trial, players would have had the near-impossible task of demonstrating that the concussions that caused their neurological problems were sustained during their NFL careers, since they were targeting the league, the lead players' attorneys have argued.

They could have also found themselves blocked by various state statutes of limitations restricting injury claims to within a few years after they occurred. And perhaps most seriously for the players, the NFL had made the argument that all injury suits against it were preempted by the terms of collective bargaining agreements since 1968. Those agreements preclude lawsuits over issues arising from health-related claims, the league argued. Judge Brody has never ruled on that issue.

"It's important to keep in mind — and this has been missing from the public debate — that the NFL had a fundamental choice to make in this matter," Brad Karp of Paul Weiss, representing the NFL, told Judge Brody at the fairness hearing.

"The league could have fought these claims, successfully fought these claims in my view for many, many years," he pressed on. "The objectors entirely ignore this reality and this context in their extensive papers."

NFL spokesman Brian McCarthy declined to comment for this story.

The lead plaintiffs attorneys have taken the position that the NFL has strong arguments, and they note that it has prevailed on them in a number of cases. A California federal court ruled in December 2011 in a suit by former NFL linebacker Vernon Maxwell and others that their negligence claims were preempted by the players' collective bargaining agreements. U.S. District Judge Manuel Real ruled that the former players' negligence claims were "inextricably intertwined with and substantially dependent upon an analysis of" the medical care provisions of their collective bargaining agreements. The ruling in that case came before NFL concussion suits were consolidated in Pennsylvania federal court in June 2012.

"This is what the players were up against, your honor," Seeger told Judge Brody at the fairness hearing.

Not all attorneys in the concussion suits buy into that view, even if they acknowledge the potential for the NFL to wield the preemption argument as leverage in the consolidated litigation.

Former players for the Arizona Cardinals, represented by attorneys including Andy Schermerhorn of the Klamann Law Firm in Kansas City, Missouri, who had specifically sued the team and not the league, have sought to break away from the settlement and the consolidated litigation.

In May 2014, they won a crucial ruling by Catherine Perry, a Missouri federal judge, who found that the former players' negligence claims weren't preempted by the collective bargaining agreements, as they arise "as a function of common law." That suit was before Judge Perry at the time because the U.S. Judicial Panel on Multidistrict Litigation was still considering whether to merge it with the larger MDL in Pennsylvania. The JPML eventually consolidated it in April, a decision that the former Cardinals players are still fighting.

"It seems to me that there was a lot of fear in the minds of attorneys representing the class, that the claims themselves might be dismissed on preemption grounds," Schermerhorn told Law360. "I feel that that fear is unfounded, but it likely resulted in ultimately getting a settlement that's far inferior to what would have been negotiated by counsel who thought their claims were stronger."

With the Third Circuit's decision to deny rehearing en banc, attorneys critical of the deal are left with few options. They could advise their clients to accept the settlement, or, if they have opted out, to opt back in. The settlement had allowed class members to opt back in until just before its final approval in April 2015, but the settlement website also indicates that the claims administrator may consider opt-in requests past that deadline.

> If you can't get a judge in the Third Circuit to be interested, the chance of a Supreme Court justice wanting to hear it is doubtful.
>
> — John Pentz, attorney representing several objectors

Some have toyed with the possibility of taking the fight up to the Supreme Court, though they acknowledge the battle would be an uphill one.

"If you can't get a judge in the Third Circuit to be interested, the chance of a Supreme Court justice wanting to hear it is doubtful," Pentz said.

In March, Tracy Scroggins, a former Detroit Lions linebacker and defensive end, brought a new CTE class action against the league under racketeering laws, drawing on a recently released New York Times report that said NFL concussion researchers had used flawed data that downplayed the effects of head injuries on players. The NFL denied the newspaper's report, and the suit has been consolidated with the MDL before Judge Brody.

While the terms of the settlement prevent players from bringing concussion-related claims, Timothy Howard, an attorney representing players in the racketeering suit, argues that their claims are distinct from those covered by the deal and that Judge Brody will have to rule on the issue.

Molo believes the work of the objectors has been, in many ways, successful. He estimates that the objections raised in the case led to improvements in the settlement, including allowing a larger group of families to recover for players who died with CTE, which have increased the value of the settlement by more than $100 million. Molo said he is still weighing options in the wake of the Third Circuit's decision.

Bostwick believes the issue of CTE will always be a thorn in the side of the settlement.

"The final chapter has not been written for the NFL," he said. "The science on CTE will continue to evolve, more former NFL players will suffer from CTE, and the legal loophole in the settlement will be exposed for what it is — an injustice."

Sindhu Sundar is a feature reporter who has covered NFL concussion suits since 2013.