UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15-2206, 15-2217, 15-2230, 15-2234, 15-2272, 15-2273,
15-2290, 15-2291, 15-2292, 15-2294, 15-2304, and 15-2305

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS CONCUSSION INJURY LITIGATION

Cleo Miller; Judson Flint; Elmer Underwood; Vincent Clark, Sr.;
Ken Jones; Fred Smerlas; Jim Rourke; Lou Piccone;
James David Wilkins, II,

Appellants in 15-2217

(E.D. Pa. No. 2-12-md-02323)

PETITION FOR REHEARING *EN BANC*

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
Anita B. Brody, District Judge

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STATEMENT IN SUPPORT OF *EN BANC* REHEARING

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, *i.e.*, the panel's decision is contrary to the decision of the Supreme Court in *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), and the decision of this Court in *In re Prudential Ins. Co. Am. Sales Practices Litig.*, 148 F.3d 283 (3rd Cir. 1998). Because the science underlying CTE is, in the words of the District Court, "nascent" and "in its infancy," Class Counsel was disarmed in their settlement negotiations with the NFL, and there were no ripe CTE claims to be settled as part of a class action. The Supreme Court insisted in *Amchem* that the underlying claims to be settled by the class action ***and the science supporting those claims*** be mature at the time of settlement.[1] Here, the immaturity and

[1] Likewise, this Court stated in *In re Prudential* that a factor in the approval of a settlement is "the maturity of the underlying substantive issue, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits..." 148 F.3d at 323. Here, the CTE claim is as immature as it is possible for a claim to be, by the parties' admission. There has been no CTE trial, the science is nascent, there was no merits discovery, and the court could not possibly forecast the probable outcome of a CTE trial because such a claim is not even ripe under Article III.

recency of CTE as a unique disease was instead used as a *justification* of the settlement.

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STATEMENT OF ISSUES

1. May a court approve a class action settlement of unripe and immature claims?

STATEMENT OF THE COURSE OF PROCEEDINGS

This appeal arises from the settlement of a class action lawsuit against the NFL by a class of retired NFL players for injuries caused by traumatic brain injury sustained while playing in the NFL. The centerpiece of this litigation when it was filed was the condition known as Chronic Traumatic Encephalopathy, or CTE, which was first discovered in the brain of former Steeler Mike Webster, and is commonly referred to as the "industrial disease" of the NFL. Of the 79 former NFL players who have had their brains autopsied following their deaths, 76 were found to have evidence of CTE. A. 138, A. 5416.

Over the course of the litigation, Class Counsel, despite having alleged claims for personal injury related to CTE in the complaints, lost confidence in the viability of the CTE diagnosis, conceding that the science on CTE was too immature to support recovery for class members suffering from that condition. Rather than amending the class definition or deleting the CTE claims from the complaint, however, Class Counsel proceeded to settle those claims for no compensation, while obtaining recovery for other,

rarer, conditions that are not exclusively associated with head trauma. Class Counsel explicitly conceded that this tradeoff had taken place, and that releasing all future CTE claims for no compensation had been traded for enhanced compensation for Alzheimer's, Parkinson's Disease and ALS. A. 3860 ("Expanding the settlement to include CTE would have meant making cuts elsewhere, such as abandoning coverage for ALS, Alzheimer's Disease, or Parkinson's Disease.").

Appellants, along with many other class members, objected to the settlement on the grounds that it improperly releases the unripe CTE claims for no consideration, uses the unripeness of the CTE claims as the justification for their release for no consideration, and treats similarly situated class members differently based upon an arbitrary deadline for Death with CTE claims. The district court approved the settlement over these objections on April 22, 2015. A. 58. A panel of this Court affirmed the district court's decision on April 18, 2016.

STATEMENT OF FACTS

In July 2011, 73 former professional football players sued the NFL in California state court, alleging that the NFL failed to protect them from the chronic risks of head injuries in football. The NFL removed the case to federal court, and the JPML transferred the California case and others to the Eastern District of Pennsylvania in January 2012.

The Amended Complaint alleged, and the Settlement covers, several distinct physical conditions. The centerpiece of this action was a claim for compensation for the condition known as CTE, which affects far more people than the other conditions covered in the settlement: ALS, Parkinsons Disease and Alzheimers. CTE is characterized by headaches, depression, aggression, mood swings, and suicidality.

ALS, Parkinsons and Alzheimers are, in the words of the District Court, "all well-defined and robustly studied conditions." A. 151. CTE, in contrast, is "nascent" and "in its infancy." A. 136-137. "The Court first determined that '[t]he study of CTE is nascent, and the symptoms of the disease, if any, are unknown.'" Panel Decision at p. 61. Despite the fact that no living class member can state a claim for CTE, let alone a viable one, the District Court approved the settlement because it provides compensation for the other four conditions, and because some of the players whose brains

showed signs of CTE *post-mortem* also reportedly suffered from one of the covered conditions. Panel Decision at p. 62.

ARGUMENT

I. Unripe Claims Based Upon Immature Science Are Not Appropriate For Class Settlement.

As the Fifth Circuit held in *Castano v. The American Tobacco Co.*, 84 F.3d 784 (5th Cir. 1996), a tort must be "mature" before it is appropriate for class resolution. "The plaintiffs' claims are based on a new theory of liability and the existence of new evidence." *Id*. at 748.

> "Fairness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units even single-plaintiff, single-defendant trials until general causation, typical injuries, and levels of damages become established. Thus, "mature" mass torts like asbestos or Dalkon Shield may call for procedures that are not appropriate for incipient mass tort cases, such as those involving injuries arising from new products, chemical substances, or pharmaceuticals."

Id. at 748-749 (quoting MANUAL FOR COMPLEX LITIGATION §33.26).

Similarly, this Court held in 1998 that a factor to be considered in the approval of a class action settlement is "the maturity of the underlying substantive issue, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits..." *In re Prudential Ins. Co. Am. Sales*

Practices Litig., 148 F.3d 283, 323 (3rd Cir. 1998). The NFL Concussion Settlement violates every one of these prongs. There have been no individual CTE trials to create data points that can be used to assess the Settlement's denial of compensation for CTE. There has been no merits discovery. The science is, by everyone's admission and boasting, immature, "nascent," and in its "infancy." Indeed, "'the longitudinal epidemiological studies necessary to build a robust clinical profile will still take a considerable amount of time.'" Panel Decision at p. 64.

In *In re Diet Drugs Prods. Liab. Litig.*, 2000 U.S. Dist. LEXIS 12275 (E.D. PA 2000), on which the District Court in this case heavily relied, the court took pains to ensure that both the tort and the science underlying it were mature and sufficiently developed to guide a reasonable settlement matrix.

> In addition, the science underlying this litigation is sufficiently mature. While superiority concerns may exist where litigation involves a novel legal theory or where injuries have a considerable latency period or where there is inadequate evidence to support liability, causation and damages, none of those concerns exist here.

In re Diet Drugs Prods. Liab. Litig., 2000 U.S. Dist. LEXIS 12275 at *172 (E.D. PA 2000).

The district court in *Diet Drugs* also ensured that class counsel were not disarmed in their ability to push for a better deal for the class

because they had some leverage through litigation. *Id*. at *137. Here, in contrast, Class Counsel, by their own admission, had no leverage to insist on coverage of CTE for living class members as part of the Settlement, since they did not have sufficient science to diagnose CTE in living persons or to succeed in an individual case for CTE.

In this case, the science could not be more immature or undeveloped, as the district court held, and the Panel recognized. "The Court first determined that 'the study of CTE is nascent, and the symptoms of the disease, if any, are unknown.'" Panel Opinion, *Exhibit A*, at p. 19. "At the time of the Court's decision, only about 200 brains with CTE had been examined, and the only way currently to diagnose CTE is a post-mortem examination of the subject's brain." *Id*. at p. 20. Again, as found by the Panel, the symptoms of CTE are "unknown," yet the claims of all class members for this yet unknown disease have been prospectively released.

More significantly, however, than Class Counsel being disarmed, the undeveloped nature of CTE science means that no living class member can state a claim for CTE. There are no ripe Article III claims for CTE among living NFL retirees.

Class members who have yet to be diagnosed with a concussion-related disease have suffered no injury caused by the NFL, and therefore

cannot allege a claim for damages at this time. They lack Article III standing to sue the NFL, and therefore may not be included in a settlement class. "[T]he proceeding is a nonadversarial endeavor to impose on countless individuals without currently ripe claims an administrative compensation regime binding on those individuals if and when they manifest injuries... [E]xposure-only claimants lack standing to sue: Either they have not yet sustained any cognizable injury or, to the extent the complaint states claims and demands relief for emotional distress, enhanced risk of disease, and medical monitoring, the settlement provides no redress." *Amchem*, *supra*, 521 U.S. at 612.

The Supreme Court did not reach the standing issues in *Amchem* because this Court had resolved the matter on a logically antecedent issue, but the Supreme Court did hold that "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act." *Id*. at 613. The Supreme Court noted that if it had not reversed on certification, the jurisdictional and standing issues would "loom larger." *Id*. at n.15.

In this case, the Article III issue is even starker than it was in *Amchem*. At least in that case, the diseases of mesothelioma and asbestosis were well-defined, diagnosable and supported by expert and scientific

evidence. Here, CTE is an entirely new and unexplored condition that is only in its infancy, as both the District Court and Panel recognized in their opinions. It is impossible for any living person to state a claim for CTE, because the condition may only be confirmed *post mortem*, and because the very symptoms of the condition are "unknown," in the words of the Panel. In this context, it was reversible error for Class Counsel to allege, and then release, thousands of claims for CTE when there is no adequate lead plaintiff suffering from the condition who can state a claim against the NFL for CTE.

In this case, Class Counsel alleged unripe claims for a disease that is only beginning to be studied, but may affect up to 75% of all former NFL players. Class Counsel then used CTE's scientific infancy *against* the class members by arguing that, because Plaintiffs could not prevail on a litigated CTE claim since the science was too new, it was fair to release the claims for no consideration (while obtaining consideration for other, more well-defined diseases). The District Court and the Court of Appeals Panel then adopted this reasoning without considering the more fundamental implication that, if the claims for CTE would fail for lack of scientific and medical development and understanding, then they do not exist for purposes of Article III.

CONCLUSION

For the foregoing reasons, this Court should GRANT this petition for *en banc* rehearing, and proceed to hear argument and decide the important issue presented in this appeal consistent with *Amchem* and *In re Prudential Ins. Co.*.

Appellants,
By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2016 I filed the foregoing Petition via the ECF filing system for the United States Court of Appeals for the Fifth Circuit, and that as a result each counsel of record received an electronic copy of this Brief on April 28, 2016.

/s/ John J. Pentz
John J. Pentz