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Ex-Players Drop Case to Force NFL to Pay Workers' Compensation for Concussions

By [Andrew G. Simpson](#) | December 28, 2016



The federal court case brought by 38 former National Football League players seeking to [force the NFL](#) to recognize chronic traumatic encephalopathy (CTE) as a covered disease under workers' compensation has been withdrawn.

Instead of pursuing their joint case, the players will file separate workers' compensation claims in individual states, according to their lawyer.

On Dec. 21, in the U.S. District Court for the Southern District of Florida in Ft. Lauderdale, Judge Beth Bloom dismissed the suit (*Gaiter et al. v. National Football League*) without prejudice.

That same day, the plaintiffs' lawyers — Tim Howard and Miguel Amador of Howard & Associates in Tallahassee— voluntarily withdrew their complaint. The attorneys gave no explanation in their withdrawal notice.

While the Florida lawsuit may have been a "Hail Mary" pass of sorts, filing individual state claims for CTE is no sure way to score either.

However, attorney Howard later explained that the players have decided to proceed with filing state claims.

"We are going forward aggressively state-by-state as that is the least risky approach to secure the recoveries for our clients," Howard told *Insurance Journal*.

Earlier, on Dec. 5, Judge Bloom had stayed the case pending a decision on whether it should be transferred to the federal court in Pennsylvania that is handling multidistrict litigation involving concussions and the NFL.

The U.S. district court in eastern Pennsylvania, under U.S. District Judge Anita B. Brody, oversaw a [consolidation of concussion lawsuits](#) against the NFL and [reached a settlement](#) valued at as much as \$1 billion in potential benefits for more than 22,000 former players. Earlier this month, the U.S. [Supreme Court let stand](#) that concussion settlement, deciding against hearing [complaints by some former players](#) that the settlement is inadequate and unfairly treats current versus future brain injuries differently.

More than 200 players have opted out of the \$1 billion settlement to pursue their own suits against the NFL.

The group of 38 former NFL players who sued for workers' compensation benefits say they developed CTE as a result of head injuries they suffered while playing in NFL games. Their suit, filed on Nov. 21, targeted the NFL and its 32 teams individually as defendants.

The players maintain that there is ample scientific and statistical evidence to prove a connection between CTE and head trauma but that the NFL has denied the science and the link while promoting "junk science" and refusing to pay CTE-related claims.

Their suit asked the federal court to force the NFL to recognize CTE in living players as an occupational disease and pay the players benefits.

The lawsuit had also asked the court to declare that the NFL players' collective bargaining agreement as well as state workers' compensation laws must recognize CTE among professional athletes as a workers' compensation eligible disease.

The case withdrawal leaves the players pursuing individual claims in various states, which is a path they had hoped to avoid.

The players argued that declaratory relief was in order because they have strong reason to believe the NFL will deny their workers' compensation claims if they file individually, as the suit says the NFL has historically done.

Finding in favor of the plaintiffs will be "averting a guaranteed deluge of judicial and administrative entanglements" as the number of living players diagnosed with CTE continues to grow, the suit claimed.

Little Chance

The workers' compensation [case brought in federal court](#) did not have a great chance of succeeding, according to lawyers reached after the complaint was filed but before it was withdrawn.

"The first real hurdle here is that it is questionable as to whether a federal court is even the proper forum to determine a state workers' compensation issue. The answer is most likely no," Justin R. Parafinczuk, a civil trial attorney and partner with the Florida firm Koch Parafinczuk & Wolf, P.A., told Insurance Journal.

He said the complaint essentially asked the federal court to declare CTE a compensable occupational disease under workers' compensation laws that vary by state.

"This request would basically strip the defendants' rights to defend themselves at a traditional worker's compensation hearing, where the plaintiff or, as referred to in worker's compensation, the claimant would have the burden to prove these allegations to a worker's compensation judge, and the defendants would be able to present all available defenses," he said. This would require the federal court to do an "extensive analysis of the worker's compensation laws of every state where a defendant resides," something he said the court would be "highly unlikely" to undertake.

The other hurdle was the players' Collective Bargaining Agreement, under which CTE is not recognized.

"The plaintiffs are requesting that a federal judge—not the parties to the contract—add a term to the contract the parties bargained for that was not intended to be there, purely for the purpose to open the door to more litigation against the defendants," said Parafinczuk. "A court even contemplating siding with the plaintiffs on this argument would have to consider the dangerously slippery slope of unilaterally adding terms to a contract between private parties and the precedent that it would set. From a constitutional standpoint, virtually all case law is against a federal court taking such action."

Attorney Kimberly J. Fernandes, a partner in the firm of Kelley Kronenberg who handles workers' compensation claims in Florida and Georgia, agreed the complaint by the NFL players was a long shot.

"[S]eeking a court order declaring that states must cover these players under workers' compensation is not a proper cause of action," she replied to an *Insurance Journal* query. "The simple checks and balances system that we all learned about as kids with regard to the three branches of government tells us that a court cannot dictate what laws the state legislatures should enact."

Fernandes and others said that the real value of the complaint might be to bring more media coverage to the issue of players' CTE and workers' compensation.

State Obstacles

While the Florida lawsuit may have been a "Hail Mary" pass of sorts, filing individual state claims for CTE is no sure way to score either.

Professional athletes face various obstacles when it comes to degenerative brain disease claims, writes [Matthew Friede in the Hamline Law review](#). These include statutes of limitations that can bar claims for a disease that may develop over many years. Also, some states prohibit or limit workers' compensation benefits for professional athletes while most do not recognize cumulative trauma claims. Even if CTE is recognized as compensable, athletes must establish causation for their disabilities, according to Friede.

Duke Niedringhaus, a broker with J.W. Terrill in St. Louis, Mo. who has brokered workers' compensation for professional sports teams, agreed the 38 players faced an uphill battle with their lawsuit. He said he thinks the lawsuit seemed "outside the scope of a typical work comp adjudication process at the state level."

When it comes to coverage for players' CTE, Niedringhaus said there is plenty of uncertainty as well.

"It's a big, gray cloud right now, depending on the state and the situation of a given player. Are they a current player or a player that retired 25 years ago? I think that's going to be an uphill battle to get that kind of claim scenario covered based on some statute of limitations," he told *Insurance Journal* when the complaint was filed.

Other than CTE

Niedringhaus sees cases such as this one as an opportunity to draw attention to the importance of workers' compensation for professional athletes beyond CTE cases.

When reporting on professional football athletes sidelined with injuries, the media often overlooks the fact that many of them are covered by workers' compensation in other situations, according to Niedringhaus.

"Even in the insurance world, most people think that athletes are not subject to work comp, but they are very much part of the work comp policy structured by the teams," he said.

He said the real exposure for insurers writing professional athletes is on the medical side.

"Every state is different, every definition of the injury, the time limits of reporting it, lifetime of reopening medical, which is, in some states, cumulative trauma definitions. But the one universal theme of every state system is unlimited, lifetime medical for compensable claims," he said.

"When you talk work comp and lifetime medical, you're really talking about appreciating the value of the balance sheet of the insurance company for a claim exceeding the team deductible. The financial exposure might carry on for 5, 10, 30 years down the road," he said.

The players participating in the workers' compensation lawsuit included Tony Gaiter, New England Patriots and San Diego Chargers, 1997-1998; Sedrick Irvin, Detroit Lions, 1999-2001; Warren Williams, Pittsburgh Steelers, 1988-1992; Henri Crockett, Atlanta Falcons and Minnesota Vikings, 1997-2003; Ernest Givens, Houston Oilers, 1986-1994; Dexter Carter, San Francisco 49ers and New York Jets, 1990-1995; Tracy Scroggins, Detroit Lions, 1992-2000; William Floyd, Carolina Panthers, 1998-2000; and Quinn Gray, Jacksonville Jaguars and Kansas City Chiefs, 2003-2008.