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House Settlement Submitted for Court Approval: Impact on the Future of College Athletics

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On July 26, the plaintiffs in *In Re: College Athlete NIL Litigation* (a/k/a the *House* litigation) filed formal settlement documents (*i.e.*, the proposed settlement) with the U.S. District Court for the Northern District of California, thereby advancing the settlement approval process in the hopes of concluding the class-action lawsuits[1] involving the National Collegiate Athletics Association (NCAA) and the Power Five athletics conferences — the ACC, Big Ten, Big 12, Pac-12, and the SEC.

The proposed settlement attempts to resolve three issues: (1) the payment of back damages to former NCAA athletes for their claims related to name, image, and likeness (NIL), academic-related awards, and other benefits they were unable to earn due to NCAA rules; (2) the provision of increased benefits by institutions to student-athletes on a go-forward basis, including additional NIL opportunities for student-athletes paid directly by the institutions; and (3) the elimination of scholarship limits in favor of roster limits.

Terms of the Proposed Settlement

In a recent episode of our *Highway to NIL Podcast*, we discussed the potential terms of the *House* settlement, which involved three proposed classes and subclasses: the "Injunctive Relief Class,"[2] the "Social Media Damages Sub-Class,"[3] and the "Group-Licensing Damages Sub-Class."[4] These classes of student-athletes are ultimately seeking backpay (in addition to injunctive relief) to compensate them for lost NIL revenues they could not earn when they were participating in NCAA athletics, including lost NIL broadcast revenues, video game revenues, and third-party NIL deals.

The proposed settlement that has been submitted to the court recommends the payment of these backpay damages in the amount of $2.78 billion, to be paid over 10 years. This equates to approximately $280 million annually, with the precise distribution of these backpay damages to be determined by the plaintiffs. The proposed settlement also allows the Power Five conferences and other Division I schools that choose to participate in the new structure, to provide increased benefits to its student-athletes, including benefits for NIL, institutional brand promotion, and other rights.

Under this new model, member institutions would be allowed to distribute additional payments/benefits to student-athletes above existing scholarships, capped by a "pool" amount that is up to 22% of the average Power Five conferences' athletic media, ticket, and sponsorship revenue to student-athletes — expected to be between $20 million and $22 million per school per year, when the settlement goes into effect at the start of the 2025-26 academic year. The capped "pool" amount would be recalculated every three years with a 4% annual increase in

the second and third years of each period, ending at $32.9 million per school by the 2034-35 academic year.

Under these settlement terms, student-athletes would retain the ability to receive compensation for NIL deals from third parties. The NCAA believes the terms of the proposed settlement will allow them to create a more "robust and effective enforcement and oversight program" to ensure that the third-party deals are "legitimate NIL activity."

The proposed settlement would also eliminate NCAA Division I athletic scholarship limits in all sports, replacing those limits with roster limits the NCAA would set (*e.g.*, football limited to 105 players on a roster; men's and women's basketball limited to 15 players). Notably, these changes to roster limits will not result in the loss of scholarships for current student-athletes or reduce the number of scholarships below what the NCAA currently allows. Member institutions will still have discretion to offer partial or full scholarships provided they do not exceed roster limits.

Distribution of the Settlement Proceeds

Under the terms of the proposed settlement, all student-athletes will have an opportunity this coming fall to object to certain terms of the settlement or to opt out of it altogether. If a student-athlete opts out, they will retain the right to sue the NCAA in the future for alleged antitrust violations. However, if enough student-athletes decide to opt out of the settlement, the NCAA and the Power Five conferences have the ability to back out of the settlement themselves. The specific number of student-athlete opt outs that would trigger this provision is unknown, as it was redacted in the proposed settlement.

With respect to the damages that represent compensation to former student-athletes for the money they may have otherwise made during their careers had NIL been allowed, the proposed settlement provides that all student-athletes who played Division I sports from 2016 — the statute of limitations on antitrust claims[5] — through the present, are eligible to receive a portion of those damages. The plaintiffs' attorney, Steve Berman, indicated that the football and men's basketball players from the Power Five conference schools could receive an average of $135,000, and the women's basketball players from the same conference schools could receive an average of $35,000. For some, the payouts will likely be based in part on the student-athlete's potential earning power had they been able to sign NIL deals while in school.

Additional Considerations and Issues

NIL Collectives

Under the proposed settlement, member institutions would be permitted to compensate student-athletes directly through revenue sharing and through the NCAA lifting its previous restrictions prohibiting schools from directly engaging in NIL deals with student-athletes (which the NCAA previously indicated it would continue to "enforce" in the wake of *Tennessee v. Virginia*). And while the settlement is silent on collectives and third-party NIL compensation, it makes clear that third-party NIL compensation paid to student-athletes will *not* be counted as part of the revenue capped funds schools can pay. Accordingly, it is likely that collectives will continue to operate after the *House* settlement just as they have been operating since the Interim NIL Policy took effect. With collectives being able to offer student-athletes supplemental compensation beyond the revenue-sharing payments, it would not be surprising to see an increase in the number and use of collectives.

Title IX

One notable absence from the proposed settlement is a framework that addresses Title IX regulations and the federal requirement that schools "provide equal athletic opportunity for members of both sexes."[6] Given that the proposed settlement creates a system where many schools would be sharing close to half of the revenue they generate with student-athletes as one group rather than on a sport-by-sport basis, whether some or all of those benefits must be shared equitably under Title IX becomes a significant compliance issue for schools. Because the proposed settlement does not provide any guidance on how to apply Title IX to these new benefits, it ostensibly leaves schools to decide for themselves how (or, perhaps, even whether) to apply Title IX to these benefits. The likely result of this uncertainty will be disparate positions being taken by different schools, and the need for litigation to sort it all out.

Antitrust Concerns

Even under the terms of the proposed settlement, the NCAA may still face future antitrust litigation, particularly with respect to the rules and regulations relating to eligibility and compensation for student-athletes as the settlement was not bargained with a player's union. While the settlement purports to resolve several antitrust lawsuits brought by former athletes, the terms of this settlement may be interpreted by some as still permitting the NCAA to restrain student-athlete compensation. For example, it would not be surprising to see someone argue that the 22% cap on compensation violates antitrust laws because the cap and percentage were not collectively bargained.

Congress has not granted federal antitrust protection to the NCAA, and the granting of such an exception does not appear to be imminent, especially in an election year. Major League Baseball is currently the only major sport in the U.S. with a general exemption from antitrust laws. However, other professional sports leagues have relied on a nonstatutory labor exemption that permits them to negotiate collective bargaining agreements (CBA) with player unions. As these CBAs primarily concern the terms and conditions of employment and are the result of arms-length bargaining, the nonstatutory exemption immunizes both the professional leagues and union from antitrust liability. The NCAA could attempt to go this route as well, though it may not be able to do so if it successfully lobbies Congress to declare that student-athletes may not engage in collective bargaining and are not employees.

Conclusion

Judge Claudia Wilken is expected to review the proposed settlement terms over the next several weeks and decide whether to accept them on a preliminary basis by early September or sooner. Notices about the details and terms of the settlement would then be sent out to student-athletes on October 1, allowing for student-athletes to object to its terms by January 14, 2025. Once the student-athletes have had a chance to review the terms, Judge Wilken will make a final ruling in early 2025.

Troutman Pepper will continue to monitor any developments from this case.

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[1] The class-action lawsuit involves three cases: *House v. NCAA*, *Hubbard v. NCAA*, and *Carter v. NCAA*.

[2] The "Injunctive Relief Class" is comprised of all current and former student-athletes who compete on, or

competed on, an NCAA Division I team anytime between four years prior to the filing of the complaint — or 2016 — and the date of judgment.

[3] The "Social Media Damages Sub-Class" is comprised of all current and former student-athletes who compete on, or competed on, an NCAA Division I team at a school that is a member of one of the Power Five conferences anytime between four years prior to the filing of the complaint — or 2016 — and the date of judgment.

[4] The "Group Licensing Damages Sub-Class" is comprised of all current and former student-athletes who compete on, or competed on, an NCAA Division I men's or women's basketball team or a football bowl subdivision team, at a school that is a member of one of the Power Five conferences, anytime between four years prior to the filing of the complaint — or 2016 — and the date of judgment.

[5] The statute of limitations under the Sherman Antitrust Act of 1890 is "four years from the date of the most recent injury." *See* 15 U.S.C. § 15b.

[6] *See* 34 C.F.R. § 106.41(c).

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