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The Implications of the NCAA Antitrust Settlement

This past month, the National Collegiate Athletics Association (NCAA) agreed to a settlement framework with the plaintiffs in three class action antitrust lawsuits¹ which will forever change the landscape of collegiate athletics. For as long as college athletics has been in existence, the participating student-athletes have been considered “amateurs,” meaning they could not be paid directly for their participation or performance in their respective sports. This concept of amateurism has been at the core of college athletics and is an ideal the NCAA has fiercely protected for decades through litigation and lobbying efforts. Over the past decade, amateurism’s viability has been significantly threatened by previous unfavorable antitrust verdicts² and widespread state name, image, and likeness (“NIL”) legislation. However, pending United States District Court Judge Claudia Wilken’s final approval, this settlement appears to be the final and fatal blow to amateurism.

The NCAA and the antitrust plaintiffs agreed to a \$2.8 billion settlement for damages incurred by current and former student-athletes who had their ability to earn NIL compensation unlawfully restricted by the NCAA. Most importantly, this settlement will allow each Power 4 (Big Ten, SEC, ACC³, and Big 12) school to pay student-athletes⁴ direct compensation for use of their NIL, largely stemming from lucrative media rights deals. While allowing these student-athletes access to revenue sharing is long overdue, this settlement framework, in its current form, may have many potentially negative implications on college athletics.

Issues With Compensation and Enforcement

The settlement framework, as it is widely currently understood⁵, states that each Power 4 school **may** pay student-athletes up to 22% of the revenue generated by their athletic department. On average, this will be approximately \$25 million, but will vary from school to school, and from year to year. However, according to Don Gibson, Professor of Practice in the Sports Law and Business Program at the Arizona State University College of Law, the optional nature of this settlement defeats its very purpose as there is no mandate to actually pay the student-athletes. Thus, some Power 4 schools could choose to ignore this part of the settlement without repercussions, although they would be at a significant competitive disadvantage.

¹ House v. NCAA; Carter v. NCAA; Hubbard v. NCAA

² In Re NCAA Student-Athlete Name & Likeness Litigation, 724 F.3d 1268 (9th Cir. 2013); O’Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015); NCAA v. Alston, 595 U.S. ___ (U.S. 2021)

³ Notre Dame is included in the “Power 4” designation despite being independent in football; they are an ACC basketball member.

⁴ The vast majority of these payments will go to football and men’s basketball student-athletes.

⁵ The settlement framework is not yet public, but this has been widely reported by media outlets.

⁶ The NCAA has essentially chosen to not prosecute violations of their NIL policy which previously disallowed “pay for play” agreements.

Further, if the 22% is to be treated as a “salary cap,” this will require the NCAA or the Power 4 Conferences to promulgate extensive rules to regulate and monitor how schools disburse these funds. As they have demonstrated for decades, the NCAA’s enforcement of its rules is often arbitrary and ineffective; and this has been especially evident in recent years since the expansion of NIL in 2021⁶. Effective promulgation of and compliance with these potential rules seems unlikely without a substantial increase to the NCAA’s enforcement powers, or the advent of a new governing body for the Power 4.

However, and especially considering the above critique of the NCAA, it is much more likely the 22% figure will operate as a “salary floor” for many of the top Power 4 schools. Under this premise, larger athletic departments will circumvent the supposed cap by paying student-athletes additional compensation through individual NIL deals funded and coordinated by private boosters, in essence creating a pseudo-luxury tax system for college sports. Thus, this settlement framework will do very little to stop the “NIL arms race” that has plagued college athletics for the past three years.

College Athletics is a Business

As a result of this settlement, Power 4 schools can now pay student-athletes 22% of all revenue generated by their athletic department, or risk being at a disadvantage to their competition. Accordingly, the average Power 4 athletic department must now add \$25 million to their budget. Thus, athletic departments will have to figure out how to cut costs or increase revenue streams to make up the difference. This will require some unpleasant changes that will not be kind to fans, students, or many student-athletes.

At nearly every school, with some exceptions, the only sports that generate a profit are football and men’s basketball. These sports traditionally subsidize the rest of the athletic department, which operates at a substantial loss. According to Professor Gibson, because of this settlement, it is very possible many athletic departments will cut non-revenue generating sports. While schools must remain compliant with Title IX, all non-revenue generating sports—largely Olympic and female sports—will be at risk of relegation to club status. Further, Professor Gibson anticipates athletic departments will pass on some of the increased costs to fans and the student body, and seek increased financial support from donors to meet the new payment requirements. This likely will mean increased ticket prices, tuition fees, and solicitations for donations.

Logistics Issues and the Professionalization of Football and Men’s Basketball

Like the NCAA’s NIL policy from 2021, this settlement has created an entirely new landscape of college athletics without contemplating the logistics of executing the framework. Under the settlement framework, Power 4 schools are now forced to manage a salary pool without any guidelines or regulations for how to pay the student-athletes, who have not negotiated a collective bargaining agreement, nor are (yet) considered employees. This will require each athletic department to enter into revenue sharing agreements with individual student-athletes, who will have to negotiate compensation and contractual terms. Thus, it will be crucial for future and current student-athletes to obtain competent representation in these negotiations to secure the best deal possible.

Without a collective bargaining agreement in place, each school will be free to set the contractual terms of their choosing, creating potential chaos due to a lack of uniformity. Schools will consider relevant factors such as compensation amount, term length, opt-out clauses, and morals clauses in negotiations. It will be especially interesting to see how schools and student-athletes approach term

length negotiations, particularly in the current era of the transfer portal where student-athletes leaving a school after one season to pursue increased NIL compensation has become widespread.

Further, it will be interesting to see how programs manage a salary pool. Athletic departments such as Nebraska, which reported revenue of \$143,423,944 million in 2023⁷, will have approximately \$31.5 million to pay to student-athletes. I anticipate that all major athletic departments will hire new positions that will act as salary pool specialists, including hiring general managers to oversee football and men's basketball. This likely will emulate a professional sports team's front office.

Simply put, this settlement framework will require athletic departments to substantially overhaul their operations, which will now look much closer a professional sports organization. This will cause significant logistical challenges, both for athletic departments and for student-athletes, who are now functionally professional athletes without a union.

Inequitable Settlement Cost Distribution

Over the next 10 years, the antitrust plaintiffs will receive \$2.8 billion. The amount given to each of the plaintiffs will be determined by "sports economists" who will devise a formula based on career statistics and high school recruiting rankings to determine an athlete's "brand value." However, despite only the Power 4 conferences being named as defendants, all member schools of the NCAA will be burdened by this settlement cost. Forty percent of the money will come from the NCAA reserve fund, and then the other 60% will come from the NCAA Division One member conferences.

Of this money, approximately 60% will come from smaller conferences who will have future March Madness and NCAA Championship television revenue payments garnished by the NCAA. It is estimated this will cost each non-Power 4 school approximately \$1.3 million over the next 10 years, a substantial cost relative to their small budgets. Ivy League Executive Director Robin Harris stated, "It feels like the NCAA is bailing out the biggest spenders, and conferences like ours are paying for the majority of the settlement."

Further Bifurcation of College Athletics

As noted above, this settlement applies only to the Power 4 conferences, all of which have lucrative media rights deals in place for the next decade. This means the "Group of 5"⁸ football conferences and all non-Power 4 basketball conferences⁹ have no mandate to pay student-athletes under this settlement framework. These schools presumably could elect to directly pay student-athletes, but it is highly unlikely most small-conference schools could afford to. Thus, this settlement framework has created a fully bifurcated college athletics landscape, in which the Group of 5 schools operate as the minor leagues feeding into the Power 4.

⁷ <https://sports.usatoday.com/ncaa/finances>

⁸ American Athletic Conference (AAC), Conference USA, Mountain West, Sun Belt, MAC; likely to also include former PAC-12 members Washington State and Oregon State

⁹ There are 32 Division One basketball conferences, 28 of which are not part of this settlement. Presumably, conferences like the Big East and the Mountain West may have some schools that will be able to afford to directly pay players. However, the vast majority of college basketball conferences will not compensate student-athletes directly.

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While this phenomenon has already been seen in recent years with the NCAA's elimination of transfer restrictions¹⁰, I expect this settlement to further bifurcate the Power 4 and the Group of 5. Unheralded recruits will use the "Group of 5" schools as a launching pad to get paid in the Power 4¹¹; and those who don't succeed initially at a Power 4 school will use a transfer to a Group of 5 school as an opportunity to prove they belong back in the major leagues. This is not necessarily a bad thing, but it is the reality of the modern college athletics landscape.

Future of NIL

Since the 2021 NCAA NIL policy went into effect, student-athletes have been free to negotiate their own NIL deals. As stated above, it appears this aspect of the NIL landscape will remain unchanged. However, NIL collectives, and those who donate to them, may be more incentivized to work directly with the athletic departments, who can now give the money straight to individual student-athletes. But for schools with deepest-pocketed fans, booster-funded NIL deals will allow for these schools to functionally override any imposed salary cap.

Thus, collectives will continue to have significant value to athletic departments, especially the smaller Power 4 schools who are going to struggle the most to pay the full 22% allowed under the settlement framework. Booster and donor support will continue to be essential to the operations of college athletics.

Conclusion

Pending its approval, the NCAA antitrust settlement framework will forever change the landscape of college athletics. If you are a current or prospective student-athlete or have a son or daughter who is a current or prospective student-athlete, contact a Kutak Rock attorney for guidance on these issues.

¹⁰ This year, 239 former "Group of 5" football student-athletes transferred up to a Power 4 school; 325 former Power 4 student-athletes transferred down to a "Group of 5" school.

¹¹ I anticipate it will be even more difficult for Group of 5 schools to retain their top talent. The flow from Group of 5 up to Power 4 will likely be more quality over quantity; with the inverse being true from Power 4 to Group of 5.

