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EXECUTIVE SUMMARY

Congressional Briefing Paper

Preliminary Assessment: Title IX and Other Implications of the Proposed Settlement of *House v. NCAA*, *Hubbard v. NCAA*, and *Carter v. NCAA* on Intercollegiate Athletics Programs

July, 2024

On May 23, 2024, the NCAA and the highest-powered athletic conferences -- the Big Ten, SEC, Pac-12, Big 12, and ACC (often referenced as the NCAA Division I Power Five conferences) -- jointly announced a proposed settlement to resolve three pending federal antitrust lawsuits: *House v. NCAA*, *Hubbard v. NCAA*, and *Carter v. NCAA* (hereafter referred to as “three lawsuits”). Each of these cases, all pending in the Northern District of California, includes both the NCAA and the Power Five conferences as defendants. This briefing paper examines the proposed settlement and implications for college athletics including the application of Title IX to revenue-sharing, NIL payments and athlete employment.

An actual settlement agreement needs to be developed and signed by the parties (as opposed to the reported current 13-page term sheet). The sequence of events once there is a signed agreement is a) the court must preliminarily approve the agreement, b) an opt out and objection period of at least 30 days, and c) finally the court, after reviewing the objections and number of opt outs, will decide whether to order a final approval. The final approval would be subject to appeal. Pursuant to the media reports of the term sheet (which has not been disclosed to the public), there are at least two core parts of the proposed settlement: one for past damages and the other for injunctive relief focusing on the next ten years.

With respect to past damages, the NCAA would pay **approximately \$2.8 billion** to past and current Division I college athletes over a 10-year period for NIL payments that, but for the NCAA rules, the athletes would have received.

More specifically, of the \$2.8 billion, the NCAA will pay approximately \$1.15 billion from its reserves, catastrophic insurance, new revenues, and budget. The remaining \$1.65 billion will be paid by reducing distribution payments it makes to conferences from its Final Four Men’s

Basketball revenues by an average of 20 percent over the next ten years. The Power Five conferences will pay 40 percent of the \$1.6 billion and the remaining Division I conferences, none of which were named defendants in any of the three lawsuits, will pay 60 percent – a point of contention.

In addition to the past damages relief, the second core part of the proposed settlement provides for injunctive relief. More specifically, Division I institutions will be permitted to share revenues with college athletes going forward **for a 10-year period**, with an initial cap of 22 percent of the average of the annual revenue of the institutions in the Power Five conferences. The proposed agreement includes escalation clauses that may result in increased dollar amounts that the schools may provide to their athletes. The NCAA estimates that these revenue-sharing payments will provide \$10-\$15 billion (\$1 to \$1.5 billion dollars per year) to college athletes. It is not clear the extent to which non-Power Five conferences will have the resources to participate in revenue-sharing.

The proposed settlement terms would also require the elimination of the NCAA's current constitutional principle prohibiting institutions from compensating athletes for participating in a sport other than for grants-in-aid and compensation and benefits tethered to educational expenses. Further, it is reported that the settlement would reconfigure Division I scholarship and roster limits.

In addition to the implications discussed herein, it strikes us that without a Congressional antitrust exemption or classification of athletes as employees who are permitted to collectively bargain, any cap on institutions for revenue-sharing or pay-for-play, such as the proposed 22 percent cap, likely is an illegal restraint on pay by the NCAA and Power Five who arguably have market power. Thus, the imposition of such a cap could immediately subject the NCAA and Power Five conferences to additional antitrust litigation by athletes who seek to recover more than 22%.

Notably absent from media reports about the potential implications of the proposed settlement, that we discuss herein, are:

- the financial impact with regard to institutions' Title IX obligations to provide equal financial assistance, benefits, and treatment to male and female athletes;
- whether the NCAA Board of Governors or any divisional governance body had the authority to approve a settlement framework that on its face appears to be in violation of the NCAA's constitutional provisions without a special convention and vote of the membership;
- the viability of non-revenue sports and impact on the success of our Olympic or World Championship USA national teams; and
- the future business model of the entire intercollegiate athletics industry.

Significantly, there is much dispute in the press and among the parties about how Title IX applies to the settlement agreement's proceeds to athletes. [One of the plaintiff's attorneys has stated](#) that 90 percent of the settlement dollars for past damages would go to male athletes (75 percent to football and 15 percent to men's basketball), 5 percent to women's basketball and 5 percent to "other" with no indication of sport or sex. The cost of the settlement for past damages must therefore include an additional Title IX compliance expense estimated to be close to 90 percent as explained herein. And, the future revenue sharing similarly must be provided proportionally to men and women. Certain reports state that Title IX does not apply to either the past damages or future revenue sharing payments; that Title IX can be evaded by payments made through third parties and that the application of Title IX to such cash payments that have not been made to parties previously must be decided in the future by the courts. Both of these are wrong – Title IX cannot be evaded by funneling the payments through non-school entities and the cash payments are financial assistance and treatment and benefits that must be proportionally provided to women and men. More specifically, while Title IX regulations clearly cover all NCAA member institutions that are recipients of federal financial aid, they also cover entities comprised of the member institutions such as conferences and the national governing organization. Title IX applies to all forms of financial assistance provided to college athletes whether labeled scholarships, revenue-sharing, pay-for-play, NIL payments, employment, or similar classifications of cash payments or benefits. Current law requires that male and female athletes are entitled to equal amounts proportional to their percentage of athletics participants in any past or future year in which settlement payments for past damages are made or revenue is shared in the future. The formulas for each institution to determine its specific additional Title IX equity obligation are provided.

These and other issues are considered in this briefing paper.

***Prepared by The Drake Group**

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