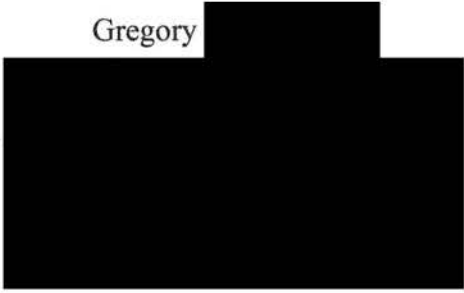


Gregory



FILED

DEC 31 2024

CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

December 29, 2024

VIA FedEx

The Honorable Claudia Wilken
Senior United States District Judge
United States District Court for the
Northern District of California
1301 Clay Street
Oakland, CA 94612

Re: In re College Athlete NIL Litigation; Amended Proposed Settlement

Dear Judge Wilken:

As a fascinated observer of these proceedings, I am very appreciative of your publishing to the case history file correspondence from interested parties in the matter. Unlike other correspondents, I am neither a party who might be injured by the proposed settlement nor a litigator who represents such a party. My interest in this matter is solely fairness and equity to future players, both of which I believe would be compromised by the proposed settlement in order to assure certain plaintiffs and their counsel of their settlement payments.

Unfortunately, the proposed settlement attempts to shift the burden of the financial uncertainty of a probable trial outcome from the named plaintiffs (and their class as identified in the September 2023 class certification, collectively, the "Past/Present Players") and the named defendants to unrepresented third parties who were added to the injunctive relief class only by virtue of the proposed settlement in July 2024, are as yet unidentified and only will be known when they enroll in college (the "Future Players"). That shifted burden takes the form of a future antitrust compromise, thus also transferring a measure of wealth from the Future Players to the Past/Present Players in the process.

I will attempt to elucidate in outline form. In short, the following characterize the proposed time-structured settlement:

1. It shifts the burden to future third parties of the risk that the defendants could not presently pay in full either an expected damages award exceeding \$4.5 billion or a probable settlement amount of approximately half that.

2. The risk that defendants could not presently pay in full has multiple components:
 - a. The NCAA has a net worth less than \$1 billion.
 - b. The NCAA has recurring annual income of less than \$1.5 billion.
 - c. The NCAA is an unincorporated not for profit association under which corporate form the member schools have uncertain moral or legal compunction under the several laws of their respective domicile States to contribute to the capital of the association through either payment or performance.
 - d. Consequently, a damages award at trial might provide to plaintiffs and their counsel nothing more than a judgment lien against a likely insolvent debtor -- a place to stand in line to wait for a slim hope of full payment.
 - e. Two of the defendant conferences are corporations whose member schools have no corporate obligation and uncertain moral or contractual compunction to contribute to the capital of the corporation through either payment or performance.
 - f. The remaining defendant conferences are unincorporated not for profit associations whose member schools have uncertain moral or legal compunction under the several laws of their respective domicile States to contribute to the capital of the association through either payment or performance.
 - g. Much of the NCAA's wealth and recurring income is based on basketball revenues, whereas much wealth and income for football playoff schools is generated independently of the NCAA through the playoffs.
 - h. Football playoff schools and their conferences increasingly speak of power over and independence from the NCAA and other non-playoff football schools. These positions are voiced by the conference and school leadership, as well as the legislatures and attorneys general of States where the football playoff schools are domiciled.
 - i. In the context of a trial judgment this perceived uncertainty of the NCAA's ability to pay could be likely to generate much further time-consuming litigation among the NCAA, the conferences defendants and their respective member schools concerning who, if anyone, has an obligation to contribute to the damages award, thus presenting another reason for a time structured settlement that would shift risk to an unidentified, unrepresented class.
3. The foregoing factors also help to inform the risk that financial institutions would be unlikely to provide regular periodic income streams to the NCAA, secured by its assets, that could be assigned to past/present players to provide secure time-structured payments.
4. The future third parties to whom the risk would be shifted:
 - a. Were not identified at the outset of the case and for four years were not offered to the court as a party in the case;
 - b. Are unidentified today;
 - c. May remain unidentified for 9 or more years; and
 - d. Are possibly only 8-9 years old today.
5. Where a risk of loss is transferred to others, a transfer of wealth is received by the transferors from the transferees who accept the risk of loss. More specifically, as in the

case of the proposed settlement where a compensation cap is imposed on Future Players in order to accomplish the shifting of the risk burden, there is a transfer of wealth from Future Players to Past/Present Players.

6. Future Players need and deserve a separate class in this case if they are to be considered to be bound by a settlement that shifts a risk of loss to them from other plaintiffs.
7. Future Players need and deserve independent counsel to identify and protect from the legal risks of the proposed settlement.

This is not merely an Amchem Products case, where all plaintiffs were subject to asbestos exposure conditions that had produced, or were very likely to produce, asbestos related personal injuries and death. The essential, if not only, variable that distinguished those plaintiffs was the element of time and the consequent impacts on common questions of law and fact and on notice and representation. Some knew the full extent of their injuries and some had yet to learn their full extent, but would likely learn that over time. Here, the proposed settlement and the set of individuals who would be impacted by the proposed settlement is more egregious than what was rejected in Amchem Products. While time is also a distinguishing element for the plaintiffs in this matter, Past/Present Players are easily identified, largely from publicly available records, and their injuries, and thus damages, are susceptible of reasonably accurate modeling. As among Past/Present Players, the process of determining the amounts can be said to be fair and the amounts of payments due them can be said to be equitable. On the other hand, the market conditions that would help us to model the injuries of the Future Players and thus their damages under the antitrust exemption proposed by the settlement are largely uncertain. The only thing that is certain is that their ability to bargain for compensation, whether individually or collectively, may be impaired by the proposed settlement. If they are top flight recruits in football or basketball, that probability of impairment approaches certainty. To the Future Players, the proposed settlement cannot be said to be fair or equitable.

If there were a single present payment under the proposed settlement, fairness to Future Players would not be in question as they would not need to be a part of the injunctive relief class. Their function is clear. They are merely there to extend the term of the payout and thus absorb the reasonably probable perceived risk that in the absence of a settlement the NCAA and conferences would leave the plaintiffs with a trial judgment expressed only as a largely uncollectable judgment lien against a likely insolvent unincorporated not for profit association.

It appears from the case history file that a settlement that structures payments over time is believed by the named parties to be the only method to both mitigate the perceived risk that defendants would not pay and generate the likelihood of support for the proposed settlement among the member schools. Shifting the burden to others of the risk that the defendants will be unable to pay a present damages award or settlement presents a most attractive convenience; made especially so when the others are both unidentified and unrepresented by counsel and will readily absorb the loss of any wealth transfers that result.

I do not want to cast aspersions against plaintiffs' counsel, but I do not believe that they are in a position to properly represent the Future Players. The Future Players, whose sole role in the settlement is to provide structural convenience and whose presence serves to benefit plaintiffs'

counsel's primary clients, the Past/Present Players, at the expense of the Future Players, need and deserve their own counsel.

To address these concerns, I encourage you to choose one of three alternatives:

1. Reject the proposed settlement as unfair and inequitable to Future Players, as well as failing to satisfy predominance and representation requirements under Amchem Products;
2. Strike the Future Player members from the injunctive relief class and as releasors and let the plaintiffs and defendants properly bear the perceived risk that payments will not be made over the ten-year period without the cap on player compensation; or, at the least,
3. For the purpose of more fully informing the court's settlement approval analysis, treat the Future Players as hypothetical plaintiffs with standing and require Past/Present Players and defendants to share the cost of appointed counsel for the Future Players. Ideally you would seek the services of an expert class advocate such as Ted Frank.

