# 'Go back to the drawing board' — House-NCAA settlement in danger after judge slams agreement

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Thu, Sep 5, 2024, 9:45 PM EDT · 6 min read

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The House, Hubbard and Carter cases against the NCAA don't appear to be close to a final resolution after all. (Rick Osentoski-USA TODAY Sports)

The NCAA's landmark settlement in the House, Hubbard and Carter antitrust cases is on hold and in danger of not moving forward.

In a two-hour virtual hearing on Thursday, a judge ordered the parties to "go back to the drawing board" regarding language in the settlement that limits third-

party pay to athletes, most notably from boosters and booster-led collectives.

U.S. District Court Judge Claudia Wilken, of the Northern District of California, questioned a portion of the settlement that specifically prohibits school boosters from compensating athletes through endorsement deals — a clause in the document that, the judge believes, would be difficult to enforce and may reduce current payments that athletes are receiving.

The plaintiff attorneys in the case, Jeff Kessler and Steve Berman, and the defendants, the NCAA and power conferences, will now attempt to reach an agreement over amending the language — something that the NCAA and power leagues seem resistant to do. They are expected to report back to her in three weeks.

The current language is a “central part” of the settlement, NCAA outside counsel Rakesh Kilaru told the judge during Thursday's hearing. “Without it, I’m not sure there will be a settlement to submit.”

Based on the judge’s comments, Kilaru later said, “We have to talk about whether we have a deal.”

For some around college athletics, this was very much expected. For others, it was a stunning result that may doom the settlement.

Said one power conference school president: “It’s truly madness. There is no reason to settle under these circumstances. Go to trial and take our chances on appeal.”

The issue — the prohibition of third-party booster payments — resulted in a more than 30-minute discussion between the judge, NCAA counsel Kilaru and the plaintiff attorneys, mostly Kessler. The conversation centered around what is one of the biggest questions related to the settlement: *How will the NCAA and power leagues prohibit and then police third-party booster payments to athletes?*

Such payments are happening now as boosters and booster-led collectives are distributing millions of dollars in salary-like payments to retain and recruit athletes, many of them disguised as commercial and endorsement deals. The settlement would potentially reduce or eliminate such payments, instead permitting schools to directly pay their athletes within a salary-cap system.

However, Wilken suggested that such a move may limit the pay that athletes are currently receiving — some of them “large sums,” she said — and she expressed skepticism that the NCAA could enforce, or should enforce, its policy prohibiting “pay-for-play.”

In one of the more shocking moments, Wilken appeared to acknowledge that she entered the hearing with the understanding that the settlement permitted “pay-for-play” from third-party entities. The NCAA's prohibition on pay-for-play is “not going to be there anymore, right?” she asked Kilaru in one of the hearing’s most jarring exchanges.

Kilaru — to Wilken's confusion — informed the judge that the pay-for-play policy would remain in existence.

She stared blankly at him over the video call with a shake of the head.

“I think we’ve got problems with this,” Wilken said. “I don’t have an idea of how to fix this. I will throw it back on you all to come up with something better and consistent. Keep in mind that taking things away from people doesn’t work well.”

The discussion was a significant development in a case that plaintiff and defendant attorneys expected to be approved. There are more hurdles, too.

Kilaru made clear that the NCAA wants all three cases — House, Hubbard and Carter — to be approved or there is no agreement to settle any of them. Hubbard is in the best position to be approved, but the judge, based on Kilaru's comments, did not approve it.



For now, the House case is on hold until booster language is changed to the judge's liking, and the Carter case has its own issues.

The Carter case has competition from a similar antitrust case, Fontenot v. NCAA. At Thursday's hearing, the NCAA requested the Fontenot case be stayed — and eventually dropped — and its claims be released as part of the settlement. The judge, instead, chose to send the case back to its home in Colorado — a resounding win for Fontenot attorneys, one of which, Garrett Broshuis, argued on their behalf at the hearing.

But the bigger issue remains the clause in the settlement regarding third-party name, image and likeness (NIL) deals — a bugaboo that many around the sport expected to be the target of scrutiny.

The settlement's goal is to shift the payments to athletes from outside entities — such as boosters — to the schools themselves, permitting universities to all share the same amount of pool money with athletes on an annual basis. The pool's cap — 22% of a power conference school's revenue on average — will apply to all schools and will fluctuate based on built-in escalators and school revenue increases. Projections put the Year 1 cap at $20-23 million.

Under the current system, most power conference booster collectives distribute between $5-15 million annually to athletes, though a small number of schools are closer to or above the $20 million mark, like Ohio State.

Several SEC football coaches told Yahoo Sports in July that, under the new revenue-share model, they anticipate distributing $12-17 million to their football rosters.

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Wilken did not question the pool or the cap or even the fact that Title IX is not addressed in the settlement. She instead turned her attention to the clause prohibiting pay to athletes from boosters unless the booster can prove that the pay is for a legitimate endorsement deal and is of "fair market value."

She questioned not only the policing of that clause — "How are you going to enforce something like that?" — but she also took issue with the definition of a "booster" itself. It is an ambiguous term, she suggested, that the NCAA has

used for years to describe a person who has a vested interest in a university and, in some way, supports that university financially.

Kilaru argued in support of the clause, gave the specific definition of a booster and walked the judge through the new enforcement model, which Yahoo Sports reported on Wednesday.

Spearheaded by the power conferences, college leaders are vetting outside entities to manage and enforce the new revenue-sharing model. Third-party endorsement deals — those not from the schools — are to be submitted to a clearinghouse that then determines their validity.

As Kilaru described the process, Wilken vigorously shook her head, in clear disagreement that such a situation could exist.

Kessler joined the conversation, telling the judge that plaintiffs and defendants were “not trying to make anything prohibited [in the settlement] that was not already prohibited. This was not designed to eliminate NIL from boosters currently prohibited.”

Wilken, staring coldly back, “That may be your view, but I’m not sure that is the NCAA’s view.”