

Insights, News & Events

# PAUSED PAYOUTS: TITLE IX APPEAL DELAYS \$2.8B NCAA ATHLETE PAYMENTS IN HOUSE SETTLEMENT

Insights  
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It didn't take long for the first legal challenge attacking the game-changing *House v. NCAA* settlement agreement. Eight female student-athletes filed an appeal to the 9th Circuit Court of Appeals on June 11 arguing that the back pay damages portion of the *House* settlement, recently approved by Judge Claudia Wilken, violates the gender discrimination provisions in Title IX. This Insight will tell you everything you need to know about the appeal and what it means for the landmark settlement moving forward.

## Why are Female Student-Athletes Appealing the Deal?

The *House* settlement is a \$2.8 billion agreement in which the NCAA and major conferences will pay former college athletes for previously denied name, image, and likeness (NIL) earnings and implement a future revenue-sharing model for athletes. [You can read our full summary of the settlement here, along with a seven-step plan for your athletic department and compliance leadership team.](#)

In their appeal, the student-athletes contend that women would not receive their fair share of the \$2.8 billion. They maintain that the calculation used to distribute the damages violates Title IX because female athletes would receive less money than football and men's basketball players.

According to the terms of the final settlement, the damages will be distributed as follows:

- 90% to football and men's basketball student-athletes at P schools that competed between June 15, 2016, to September

## Related People



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- 5% to women's basketball student-athletes; and
- 5% to all remaining student-athletes.

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### How Can These Athletes Challenge the Settlement?

The athletes have standing to appeal because they previously filed objections to the proposed settlement. Notably, many of the objections that challenged the terms of the settlement were related to Title IX. Judge Wilken rejected those objections determining that the antitrust case had nothing to do with Title IX. However, she left the door open to possible future challenges based on Title IX relating to how future payments from schools to student would be made.

### Does Title IX Apply to the Settlement?

This is the billion-dollar question in front of the 9th Circuit Court of Appeals.

- What is known is that Title IX requires institutions who receive federal funding to provide equal opportunities for male and female student-athletes in intercollegiate athletics. What is uncertain is how and whether Title IX will apply to NIL payments (introduced in 2021) and to institutions directly compensating their student-athletes.
- Shortly before leaving office, President Biden's Department of Education's Office of Civil Rights (OCR) issued a "fact sheet" advising schools that NIL compensation paid to college athletes should receive the same treatment as the existing gender-equity standards for athletic scholarships.
- When the Trump administration took over, the [OCR rescinded the Biden OCR guidance](#) and stated that Title IX is silent on the issue of the proper method for revenue-sharing athletics programs to distribute funds to student-athletes.

In evaluating the Title IX implications of the damage payment calculation, the NCAA institutions themselves are not technically paying for the damages. Approximately 60% of the payout derives from the NCAA's insurance and reserves. The remaining 40% derives from reduced revenue distributions to NCAA member institutions. Therefore,

instead of NCAA institutions writing checks to satisfy their obligations, they will simply be receiving less revenue than expected over the 10-year settlement period.

There remains much dispute among the parties about how Title IX applies to the *House* settlement's proceeds to athletes.

- The attorneys who settled the case on behalf of the class of plaintiffs assert that Title IX issues do not belong in the antitrust case and cite the fact that Judge Wilkin rejected objections based on Title IX challenges.
- On the other hand, the student-athletes who filed the appeal maintain the back pay calculation portion of the settlement suggests schools would have paid male athletes over 90% of their revenue going back to 2021 as though Title IX didn't apply, which they claim would violate the law.

### What Happens Next?

The appeal will head to the 9th Circuit where the appellate court will review Judge Wilken's final approval for abuse of discretion. This is a heightened standard, and the appellate court will defer to Judge Wilken's a ruling absent a finding that her decision is determined to be arbitrary and capricious.

- While on appeal, the **back pay damages** will be paused until the litigation is resolved.
- That said, the appeal is not expected to disrupt the **injunctive relief portion** of the settlement agreement such as roster-limits, revenue-sharing, and reporting of NIL deals.

It is likely that this is only the beginning of Title IX challenges as the landscape continues to change at a rapid rate. Until there is clear guidance on the revenue-sharing and Title IX issues, work with your FP counsel to determine your best course of action.

### What Should You Do?

Even with the appeal pending, most terms of the agreement go into effect July 1 – just weeks from now. This includes rules on revenue sharing, NIL, and roster limits. Importantly, institutions outside the Power-4 Conferences have the

option to decide whether to opt in to the terms of the settlement agreement. This is a decision that can be made on an annual basis. Schools intending to opt in must make their decision by March 1 ahead of the upcoming NCAA calendar year.

[Read our full Insight here to review our suggested seven-step plan for compliance.](#)

## **Conclusion**

For questions regarding NIL and Title IX, feel free to reach out to your Fisher Phillips attorney, the authors of this Insight, another member of our [Sports Industry Group](#), or any member of the [Higher Ed Team](#). We'll continue to monitor the status of developing NIL and Title IX legislation and will provide updates as warranted, so make sure you are signed up for [Fisher Phillips' Insight service](#) to receive the latest news directly in your inbox.