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The Decision Before NCAA Member Institutions in Connection with the Pending Class Action Settlement in the Matter of In Re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation

May 16, 2020

The May 18, 2020 deadline for National Collegiate Athletic Association ("NCAA") member institutions to certify their "return-to-play" guidelines as part of the settlement in the matter of In Re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation, MDL No. 2492, Master Docket No. 1:13-cv-09116 (N.D. Ill.) is rapidly approaching. While other NCAA member obligations have been extended as a result of the COVID-19 pandemic, the May 18th deadline is firm and has not been changed. Colleges and universities affiliated with the NCAA are currently faced with a pressing dilemma requiring them to determine whether or not they will impose certain "return to play" guidelines in order to benefit from the release offered in the pending class action lawsuit against the NCAA.

In 2011, NCAA student-athletes commenced a class-action lawsuit against the NCAA alleging that the NCAA "failed to safeguard student athletes" and "engaged in a long established pattern of negligence and inaction with respect to concussions and concussion-related maladies sustained by its student-athletes." After years of litigation and settlement negotiations, on August 19, 2019, the United States District Court for the Northern District of Illinois, Eastern Division, approved a Second Amended Class Action Settlement Agreement and Release ("Settlement Agreement").

The Settlement Agreement provides for a release and dismissal with prejudice in favor of the NCAA and certain NCAA member institutions. Specifically, the Settlement Agreement contemplates a release benefitting NCAA members, including their current and former officers, directors and employees, from claims for medical monitoring arising from or related to concussions or sub-concussive hits or contact sustained by any student-athlete who played an NCAA sanctioned sport on or before July 15, 2016. However, specifically excluded from the released claims are the following: (i) individual personal or bodily injury claims; (ii) personal or bodily injury class claims brought on behalf of a class of persons who allege injury resulting from their participation in a single NCAA-sanctioned sport at a single NCAA member school; or (iii) class claims that do not relate in any way to medical monitoring or treatment of concussions or sub-concussive hits or contact. In order to qualify for a

release, an NCAA member institution must certify that it has implemented a concussion management plan that meets the requirements set forth in Section IX(A) of the Settlement Agreement by May 18, 2020. Section IX(A) requires that a member institution implement the following "return to play" guidelines:

- Every student-athlete at every NCAA member institution will undergo pre-season baseline testing for each sport in which they participate prior to participating in practice or competition.
- An NCAA student-athlete who has been diagnosed with a concussion will be prohibited from returning to play or participating in any practice or game on the same Day on which he or she sustained such concussion.
- Any NCAA student-athlete diagnosed with a concussion by medical personnel must be cleared by a physician before being permitted to return to play in practice or competition.
- NCAA member institutions shall ensure that medical personnel with training in the diagnosis, treatment and management of concussions are present at all Contact Sports games for Divisions I, II, and III.
- NCAA member institutions shall ensure that medical personnel with training in the diagnosis, treatment and management of concussions are available at all Contact Sports practices for Divisions I, II, and III.

The first requirement, which requires pre-season baseline testing for all NCAA student-athletes, has prompted significant discussion among colleges and universities whose students play NCAA sanctioned sports. As written, this requirement seems to suggest that every student athlete be tested every year, regardless of whether or not he or she plays a contact sport or has any history of a concussion or head injury. Pre-season baseline testing is expensive and time consuming and may become a financial burden for NCAA member institutions to test each and every student athlete prior to participation in practice or competition. For that reason, prior to implementing and certifying such a plan, member schools should consider whether those resources may be necessary for other types of testing when students finally return to campus in the wake of the COVID-19 pandemic. Schools must also consider whether the release of claims offered is sufficient given the added obligations. Obviously, the cost benefit analysis is different for every member institution and fact specific. NCAA member colleges and universities are likely considering multiple factors as they decide whether or not to take advantage of the release of claims offered in the Settlement Agreement. Such factors may include, among others: (1) the variety of sports offered by the school; (2) the number of student-athletes at the school; (3) the average number of concussions per year; (4) the statute of limitations for torts and medical malpractice actions in the state where the school is located; and (5) past concussion litigation against the school.

Please note that this is a general overview of issues and developments and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Member institutions should consult with legal counsel to ensure that they are fully informed of the benefits and potential drawbacks associated with certifying their "return-to-play" guidelines in connection with the release offered by the Settlement Agreement.

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