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Collegiate Athlete Litigation: The Antitrust Class-Action Lawsuit that Could End the NCAA

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NCAA sports have been on summer break, but that has not stopped collegiate athletics from making headlines. On June 21, 2021, the Supreme Court issued its decision in *NCAA v. Alston,* 594 U.S. ___ (2021), unanimously striking down an NCAA restriction on the education-related benefits a college can offer student-athletes. Then, on July 1, numerous state laws, and an NCAA rule change went into effect that allow college athletes to receive compensation for their name, image, and likeness (NIL). While those developments have left their mark, what's coming next may have an even bigger impact on the NCAA. Enter *In re College Athlete NIL Litigation* (a.k.a. *In re NIL Litigation),* a class action lawsuit in the United States District Court for the Northern District of California.

The story of *In re NIL Litigation* begins on June 15, 2020 when Grant House, a swimmer from Arizona State, and Sedona Prince, a basketball player from the University of Oregon, filed a class-action lawsuit against the NCAA and the Power Five Conferences (Pac-12, Big Ten, Big 12, SEC, and ACC). About three weeks later on July 8, 2020, Tymir Oliver, a former defensive tackle for the University of Illinois with the same local attorney as House and Prince, filed a substantially similar lawsuit against the NCAA. House, Prince, and Oliver (the Plaintiffs) challenged the NCAA's prohibition against student athletes receiving compensation for their NIL, arguing that the prohibition violates antitrust laws because it constitutes a conspiracy to fix the amount student athletes may be paid for licensing and selling their NIL at $0, and because it prevents student athletes from accessing the market for the licensing and/or sale of their NIL. On behalf of all current and former Division I student athletes who competed during the four years prior to the filing of the lawsuits, the Plaintiffs sought an injunction prohibiting enforcement of the NCAA's restraint on NIL compensation. On behalf of athletes in the Social Media Damages Sub-Class,[1] the Plaintiffs sought social media earnings athletes would have received if not for the NCAA's NIL restraints. And on behalf of athletes in the Group Licensing Damages Sub-Class,[2] the Plaintiffs sought the share of game telecast group licensing revenue athletes would have received absent the NCAA's NIL restraints.

It was no coincidence that these cases were filed in California. Both *House* and *Oliver* relied on California's Fair Pay to Play Act, which would allow student-athletes to monetarily benefit from their NIL beginning in January 2023. The Plaintiffs argued that if the California law (which was the first of its kind at the time) took effect, it would create an unrestricted market for the use of student-athlete NILs. Although the NCAA opposed the Fair Pay to Play Act and continued to enforce NIL restraints, the organization began to loosen its restrictions, voting in October 2019 to allow students to benefit from their NIL and in April 2020 endorsing recommended rule changes issued by an internal working group that would allow athletes to receive compensation for certain activities, including endorsements, autographs, and personal appearances. As such, the Plaintiffs argued that the NCAA's previous positions on NIL benefits were unfounded, and they were therefore entitled to the requested relief.

Fast forward to today. On July 14, 2021, the District Court entered an order combining the *House* and *Oliver* lawsuits into *In re NIL Litigation*. On July 26, 2021, the Plaintiffs filed a Consolidated Amended Complaint. Among other things, the Amended Complaint added a Lost Opportunities Damages Sub-Class[3] and a Former Players Damages Sub-Class,[4]

and added players on FBS football teams at independent schools to the definition of the Group Licensing Damages Sub-Class. The Amended Complaint also cites the *Alston* decision, pointing out that the unanimous Supreme Court rejected the NCAA's position that its amateurism restraints are not subject to traditional antitrust analyses. The NCAA had argued that *NCAA v. Board of Regents,* 468 U.S. 85, 119 (1984)contemplated an antitrust exemption for the NCAA's amateurism model. But the Supreme Court rejected this argument, instead finding that the NCAA is subject to rule of reason antitrust scrutiny because it exercises monopsony (i.e. a single buyer controls the demand for goods or services) power in the market for student-athlete services. Based on this finding, the *Alston* court rejected the existence of an amateurism exemption and found that the NCAA's restraint on education benefits violated U.S. antitrust law.

While Justice Neil Gorsuch made sure to state in his majority *Alston* opinion that it was only intended to apply to the contested restriction on education benefits, it is not difficult to see how the Supreme Court's rejection of an amateurism exception to antitrust law could extend to the challenged NIL restraints in *In re NIL Litigation.* Further, Justice Kavanaugh was not so restrained in his concurring opinion, specifically addressing the legality of the NCAA's remaining compensation rules and stating that they should each be subject to a rule of reason analysis without the benefit of an amateurism exemption. He even went so far as to acknowledge that the NCAA is "suppressing the pay of student athletes" by engaging in price-fixing of the athletes' labor, suggesting that he believes it violates antitrust law to prevent athletes from being paid directly for their labor.

The NCAA has 21 days to answer the Amended Complaint, a deadline that falls on August 16, 2021. This will be the first in-court opportunity the NCAA has to take a position on the Supreme Court's *Alston* decisionand how it affects their amateurism model. One can expect the NCAA to argue that the *Alston* decision is limited to the educational benefits restraint it specifically addressed, and therefore it has no bearing on whether the NCAA should pay damages for past NIL benefits class members would have received if not for the NIL restraints. But with the rejection of the antitrust exemption in the *Alston* opinion and Kavanaugh's questioning of whether any price-fixing measure put in place by the NCAA survives antitrust scrutiny, the NCAA's defense may not hold up. We could be looking at the complete restructuring of the NCAA amateurism model.

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[1] The Social Media Damages Sub-Class is defined as all current and former student-athletes who compete on or competed on an NCAA Division I team in a one of the Power Five Conferences at any time between four years prior to filing the lawsuit and the date of judgment.

[2] The Group Licensing Damages Sub-Class is defined as all former NCAA athletes who competed on a Division I athletic team at any time between four years prior to filing the lawsuit and the date of judgment.

[3] The Lost Opportunities Damages Sub-Class is defined as all current Division I athletes in the second or later year of eligibility (or first year of eligibility after receiving a red shirt the prior year) who receive NIL compensation for all or any part of the period between July 1, 2021 and June 30, 2022.

[4] The Former Player Damages Sub-Class is defined as all former NCAA athletes who competed on a Division I athletic team at any time between June 15, 2016 and the time of trial who would have receive NIL compensation if not for the NCAA's restraints.

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