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COMMENTARY

## NCAA Edges Closer to Being a Professional Sports League With \$2.8B Class Action Settlement to Be Dispersed to Student Athletes

A landmark settlement in *House v. NCAA* was reached whereby the National Collegiate Athletic Association has agreed to pay nearly \$2.8 billion in past damages for name, image, and likeness as part of the settlement to the Power 5 conferences (Big Ten, Big 12, PAC-12, Atlantic Coast Conference and Southeastern Conference).

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Employment Law

By Jeffrey Campolongo and Ashley Dabb | June 17, 2024 at 11:49 AM



Major college athletics programs have gotten one step closer toward becoming professional sports, where athletes are paid a salary, can receive endorsement deals and may be governed by employment laws. Most recently, a landmark settlement in *House v. NCAA*, 545 F. Supp. 3d 804, Case 4:20-cv-03919 (N.D. Ca. 2021), was reached whereby the National Collegiate Athletic Association (NCAA) has agreed to pay nearly \$2.8 billion in past damages for name, image, and likeness (NIL) as part of the settlement to the Power 5 conferences (Big Ten, Big 12, PAC-12, Atlantic Coast Conference and Southeastern Conference).

Grant House, who was a swimmer at Arizona State University, filed suit on behalf of a class of athletes who were challenging the rules of the NCAA that prohibited student-athletes from profiting off of the athletes' NIL. The suit alleged conspiracy to fix prices (at zero) for the athletes' NIL earnings in violation of the Sherman Act, and alleged that the NCAA was unjustly enriched on the backs of the student athletes.

There are still many outstanding questions as to how the settlement would play out. For example, how does the settlement affect equitable distribution under Title IX? Which sports (revenue producing versus nonrevenue producing) would get the lion share of the distributions? Does this mark another pivotal step toward eliminating amateurism in favor of athletes becoming 'employees.'

The agreement calls for the NCAA and the conferences to pay \$2.77 billion over 10 years to more than 14,000 former and current college athletes who say now-defunct, outdated, one-sided rules prevented them from earning money from endorsement and sponsorship deals dating back to 2016. Additionally, this new compensation model would permit (but not require) each school to set aside up to \$21 million in revenue to share with the athletes per year. The cap could rise as revenues rise in subsequent years. All athletes would be eligible to receive payments and schools have the freedom to decide how that money will be split among the sports. Scholarship limits by sport will be replaced by roster restrictions. The deal must be approved by the federal judge overseeing the case and the plaintiffs would have the opportunity to opt out.

UCLA became the first major institution to provide some specificity for the distribution of their revenue sharing policy. UCLA announced recently that it could distribute at least \$20 million a year of athletics revenue to its more than 600 athletes starting as early as August 2025. The policy still has ambiguity in that it is unclear as to whether revenue producing sports like, football and basketball, would be entitled to a larger share of the revenue as compared to the non-revenue producing Olympic sports, like gymnastics and swimming. Another wrinkle to consider is the effect this new policy will have on Title IX. There is currently no clarity on how any discrepancies between the revenue distribution for men's and women's sports would be handled.

These payments to athletes would be in addition to the current name, image, likeness policy in the NCAA which allows current student athletes to receive monetary benefits while competing for their university. As this column explained back in October of last year, the NCAA's interim policy states:

- Athletes can engage in NIL activities if they follow their state's laws where their school is located. Schools must ensure these activities comply with state law.
- Athletes in states without NIL laws can still participate in NIL activities without breaking NCAA rules.
- Athletes are allowed to seek professional service providers for their NIL activities.

There have already been a handful of athletes who have realized significant monetary gains during their college careers and specifically in women's sports where professional opportunities are more limited or nonexistent. College stars like LSU gymnast Livvy Dunne, who signed a multimillion dollar deal with Passes, and basketball player Angel Reese, who had 17 endorsements in 2022-2023 with brands like PlayStation, Raising Canes, McDonald's, Coach, Wingstop, Outback Steakhouse and Amazon, have been able to truly capitalize on their popularity through sizable NIL deals.

The *House v. NCAA* settlement should also impact two other pending antitrust cases, *Hubbard v. NCAA* and *Carter v. NCAA*, which seeks treble damages for all current and former Division I athletes as far back as 2018 and to bar the NCAA from enforcing any rules that prohibit athlete compensation, respectively. There is, however, an outstanding case in Colorado, *Fontenot v. NCAA*, that could create further complications as the judge there previously ruled that the case should stay in Colorado and denied the request for the case to be joined with *Carter v. NCAA*. *Fontenot* is a similar lawsuit seeking to lift NCAA rules on compensation from schools and conferences.

With these continued efforts toward a professional sports system, it seems likely that the players' attempts to unionize will also find forward progress. Northwestern football was the first to seek employee status back in 2015. The National Labor Relations Board (NLRB) regional office ruled that Northwestern University football scholarship players were employees and had the right to form a union and bargain collectively. However, the board declined to exercise jurisdiction after the University appealed the regional decision. Subsequently in 2021, the National Labor Relations Board general counsel Jennifer Abruzzo issued a memorandum to all field offices providing updated guidance regarding her position that certain players at academic institutions (sometimes referred to as student athletes), are employees under the National Labor Relations Act (NLRA), and, as such, are afforded all statutory protections.

The Dartmouth men's basketball team continues to be at the forefront of the unionization conversation as Laura Sacks, the regional director of the NLRB in Boston, ruled that the basketball players are employees under the NLRA. This decision allows the players to unionize, which would require Dartmouth to collectively bargain with them. Sacks based her decision on several factors, including:

- The players perform work that benefits Dartmouth.
- Dartmouth has significant control over the players' work.
- The players receive compensation for their work, including equipment, apparel, lodging, tickets, and other benefits.
- Dartmouth controls when the players practice, play and travel.

The players filed a union petition with the NLRB in September 2023 after approaching the Service Employees International Union (SEIU), a union of about 2 million members in health care and the public sector. In March 2024, the Dartmouth basketball team voted 13-2 to form a union, the same day that Dartmouth appealed the decision. Dartmouth’s appeal is likely to go to the full NLRB and then to the courts, but the appeal does not delay the union election.

Similarly, last May the NLRB Los Angeles office filed a complaint against the University of Southern California (USC) stating that USC has misclassified its football and men’s and women’s basketball players as “student athletes” when they are actually employees.

The road to professionalizing and labor unions seem to be an inevitability for the NCAA as the evolution of lawsuits and subsequent decisions are handed down. It remains to be seen how this will actually impact the economic viability of these academic-athletic institutions and create opportunities, aside from a handful of successful NIL athletes, for the collective of college athletes with this revenue sharing policy.

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