

# Coalition on Intercollegiate Athletics Meeting

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## How Did We Get Here?

- Prior to July 1, 2021, college athletes and high school athletes were not allowed to profit from their NIL. The NCAA's rules prohibited college athletes and prospective college athletes from engaging in NIL activities.
- Doing so would make them ineligible to participate in collegiate athletics. The NCAA's rules prohibiting NIL for college athletes was based on a principle called "amateurism."
- Amateurism basically held that college athletes could not be paid for playing college sports because college athletes are not professionals and play only for the love of the game.
- Over time, college athletics ballooned into a billion-dollar industry filled with 7 figure coaches' salaries, lavish college facilities, and billion-dollar TV broadcasting deals.
- While many college athletes received scholarships, which are immensely valuable, the value was not always commensurate with the value that the athletes' labor bestowed upon the colleges and universities.
- As college athletics ballooned into a billion-dollar industry and coaches and sports administration officials continued to make more money, it became increasingly difficult to justify not allowing the college athletes to get a bigger piece of the pie.
- This disparity led college athletes' rights advocates to seek change for the betterment of college athletes.

I believe that any discussion about how we got to the current state of college athletics should begin with a discussion of the *O'Bannon v. NCAA* case. While the *O'Bannon* case did not directly lead to college athletes' NIL rights, I do believe that it was the catalyst of the current college athletes' rights movement.

### *O'Bannon v. NCAA*

*O'Bannon v. NCAA*, 802 F.3d 1049 (9<sup>th</sup> Cir. 2015).

- Former UCLA basketball standout, Ed O'Bannon sued the NCAA, Electronic Arts (EA), and Collegiate Licensing Company (CLC) after seeing his likeness in a college basketball videogame.
- The avatar in the game looked like O'Bannon, played for UCLA, and wore O'Bannon's jersey number 31. O'Bannon never consented to the use of his likeness and never received any compensation for it.
- Accordingly, O'Bannon sued claiming that the NCAA's amateurism rules precluding payment to current and former athletes for the use of their likeness was a violation of federal antitrust law.
- The key issues in the case were to determine if the NCAA's amateurism rules were subject to federal antitrust law and if so, whether those rules violated federal antitrust law.
- The case went to the United States Court of Appeals for the Ninth Circuit. The Court held that the NCAA's amateurism rules were subject to federal antitrust law and that college athletes should be able to receive additional compensation up to the cost-of-attendance.

- From this case, college athletes could receive athletic scholarships that covered the cost of attendance.

While this case did not directly lead to college athletes gaining NIL rights, it was a catalyst and I believe laid the ground work for college athletes to successfully challenge the NCAA's rules as a violation of federal antitrust law.

## **How did we get to the current state of NIL in college athletics?**

### **California's Fair Pay to Play Act**

- In 2019, California became the first state to enact a NIL law, the "*Fair Pay to Play Act*." The "*Fair Pay to Play Act*" sought to give college athletes in California the to right profit from the commercial use of their name, image, and likeness.
- However, the *Act* would not become effective until 2023.
- California caused a domino effect of several other states following suit with similar laws with a 2023 or later effective date.
- It was not until Florida enacted the "*Intercollegiate Athlete Compensation and Rights Act*" that it became imminently clear that NIL rights would be granted to college athletes. Florida's NIL law would become effective on July 1, 2021.
- This led other states to follow suit by enacting NIL laws with the same effective date. This ultimately forced the NCAA to amend its rules to allow college athletes to benefit from the commercial use of their NIL.
- Accordingly, the NCAA adopted an Interim NIL Policy that went into effect on July 1, 2021.

### **The NCAA's Interim NIL Policy**

- The NCAA's policy is very short.
- Per the policy, college athletes can engage in NIL activities that are consistent with the NIL law of the state where the school is located.
- Similarly, college athletes attending a school in a state that has not enacted a NIL law can also engage in NIL activities without violating NCAA rules related to NIL.
- Additionally, college athletes may use a professional service provider for NIL activities. Lastly, the policy allows state laws and schools to establish reporting requirements for college athletes to follow.
- While the NCAA's policy is open-ended, the NCAA made it clear that NIL opportunities may not be used as pay-for-play nor as a recruiting inducement.

### *Alston v. NCAA*

*NCAA v. Alston*, 594 U.S. 1 (2021).

- Just as it was becoming clear that college athletes would be gaining NIL rights, there was a major college athletics case being considered by the United States Supreme Court.
- This case is known as *Alston v. NCAA*.

- Many have mischaracterized this case as a NIL case or the case that gave college athletes the right to profit from their NIL, however that is incorrect.
- The US Supreme Court's opinion in the case was released just ahead of college athletes gaining NIL rights on July 1, 2021. However, this case had nothing to do with NIL.
- This case was about the education related benefits that college athletes could receive.
- In *Alston*, former West Virginia football player, Shawne Alston sued the NCAA alleging that the association's rules limiting the education-related benefits that college athletes could receive violated federal antitrust law.
- During the trial, the plaintiffs argued that the NCAA could accomplish its goal of protecting amateurism in a less restrictive manner. Specifically, the plaintiffs argued that the NCAA could accomplish its goal by no longer limiting the education-related benefits afforded to college athletes, while continuing to limit non-education related benefits.
- Education related benefits include laptops, science equipment, musical instruments, graduate school scholarships, ect.
- The District Court ruled in favor of the plaintiffs finding that the NCAA could no longer restrict education-related benefits, but could still restrict non-education related benefits. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision followed by the United States Supreme Court.
- In the opinion, the Supreme Court did three things of note. First, the Court made it clear that the case only applied to education-related benefits. Second, the Court made it clear that the NCAA's rules are subject to federal antitrust law. Third, the Court made it clear that it would not be granting the NCAA an antitrust exemption.
- While the issue in *Alston* did not involve NIL, the ramifications from the opinion has had a significant impact on the current state of NIL.
- The Supreme Court's decision that the NCAA's rules violate federal antitrust law arguably led the NCAA to enact an open-ended Interim NIL Policy in an effort to avoid future antitrust lawsuits.
- The *Alston* decision has had an effect on the NCAA's ability and willingness to enforce its Interim NIL Policy and other rules.

### The Creation of NIL Collectives

- About 2 months into college athletes having the right to profit from their NIL, the industry saw the creation of entities called NIL Collectives
- NIL Collectives are organizations created by alumni, boosters, or businesses with the purpose of providing NIL opportunities to their school's athletes. NIL Collectives are created independent of any college or university. NIL Collectives provide NIL opportunities for college athletes using a variety of methods.
- The first known NIL Collective created was the Gator Collective. The Gator Collective was created by former University of Florida baseball player Eddie Rojas with the aim of leveling the NIL playing field and increasing NIL opportunities for both current and future University of Florida athletes.
- Since the launch of the Gator Collective, approximately 200 NIL Collectives have been created across several colleges and universities. Ninety-two percent of Power 5 schools have at least one NIL Collective or are in the process of forming one. All fourteen schools in the SEC have at least one NIL Collective.

- Many NIL Collectives serve all college athletes at their respective school. However, several NIL Collectives have a primary focus on a single sport. Most often that sport is football or men's basketball. For example, the Gator Guard Collective has a primary focus on football. Similarly, Arizona Assist Collective has a primary focus on men's basketball.
- These types of NIL Collectives focusing on men's sports create an environment that is ripe for Title IX violations.

## **Current College Athletics Cases**

### **NIL Collective Title IX Case**

#### *Schroeder v. University of Oregon*

*Schroeder v. Univ. of Or.*, No. 6:23-cv-1806 (D. Or. filed Dec. 1, 2023).

- Since we just finished discussing NIL Collectives, let's start with the Title IX case currently against The University of Oregon.
- 32 women's college athletes at The University of Oregon filed a class action discrimination lawsuit against The University of Oregon last December.
- The plaintiffs include 26 members of Oregon's women's beach volleyball team and six club rowers.
- The plaintiffs allege that The University of Oregon is violating federal law by depriving them of equal athletic financial aid and other resources such as the benefits that Oregon's athletes receive through Oregon's associated NIL Collective, Division Street, and Opendorse - Oregon's official NIL marketplace.
- Division Street is a separate entity from The University of Oregon as NIL Collectives are separate entities from the schools they support.
- However, the plaintiffs are attempting to hold The University of Oregon responsible for what they claim are disparate opportunities that Division Street provides males athletes as compared with the female athletes.
- Basically, the plaintiffs are arguing that Division Street provides more opportunities to men's sports which leads to unequal treatment of women.
- Title IX of the Education Amendments of 1972 is a federal civil rights law that prohibits gender discrimination in education programs or activities that receive Federal financial assistance.
- The University of Oregon has denied "any control" or direction over NIL collectives including the NIL Collective, Division Street in their answer to the complaint.
- This case will be an interesting and important one to follow as the relevance of NIL Collectives continues to increase.

### ***Hubbard v. NCAA***

*Hubbard v. Nat'l Collegiate Athletic Ass'n.*, No. 4:23-cv-01593 (N.D. Cal. Filed on Apr. 4, 2023).

- Former Oklahoma State University (OSU) football player, Chubba Hubbard, and former University of Oregon (Oregon) and Auburn University (Auburn) track and

field athlete, Keira McCarrell filed a class action lawsuit against the NCAA and several conferences seeking to recover damages for not being allowed to receive what has become known as Alston awards.

- Soon after the Supreme Court issued its opinion in *Alston*, schools like the [University of Mississippi](#) announced that it would begin allowing its college athletes to receive Alston awards.
- Similarly, Oregon and Auburn instituted programs to provide their athletes with Alston awards. Specifically, over [97 percent](#) of athletes at The University of Oregon received Alston awards during the 2021-2022 academic school year.
- In February of 2022, Auburn began issuing Academic Achievement Awards to its athletes. While [McCarrell](#) did receive an Academic Achievement Award from Auburn once the program began, McCarrell was precluded from being rewarded for her academic success before her respective schools were allowed to make such awards available.
- Accordingly, McCarrell is seeking damages for being precluded from receiving rewards for her academic success during her time at Oregon and during her first two years at Auburn.
- Hubbard and McCarrell seek to recover damages from the NCAA, the Atlantic Coast Conference, the Big Ten Conference, the Big 12 Conference, the Pac-12 Conference and the Southeastern Conference for their illegal agreement that precluded athletes from receiving Academic Achievement Awards
- Hubbard and McCarrell seek to [recover damages](#) for all current and former NCAA athletes who competed on a Division I team and who met the requirements to receive an Academic Achievement Award at any time between April 1, 2019 and the date of class certification.

#### *House v NCAA*

*Grant House v. Nat'l Collegiate Athletic Ass'n*, 545 F. Supp. 3d 804 (N.D. Cal. 2021)

- On June 15, 2020, then Arizona State University Swimmer Grant House and then University of Oregon women's basketball player Sedona Prince sued the NCAA alleging that the NCAA and the Power 5 Conferences were illegally [imposing restrictions](#) on the compensation Division I athletes could receive for the use of their NIL.
- This case was consolidated with *Oliver v. NCAA*, that was filed by former University of Illinois football player Tymir Oliver.
- Since the original complaint was filed, college athletes have been granted the right to profit from their NIL.
- As we discussed, a series of state laws led the NCAA to enact an Interim NIL Policy allowing college athletes to engage in NIL
- Despite the changes regarding college athletes' ability to profit from their NIL, the *House* case is moving forward as the plaintiffs seek back pay for lost NIL wages.
- [Specifically](#), the plaintiffs seek back pay for lost NIL broadcasting revenue, lost NIL videogame revenue, and lost revenues for third party NIL deals.
- The plaintiffs are also challenging the rules prohibiting schools from directly compensating athletes for their NIL.

- The plaintiffs claim that 10 percent of the broadcasting revenue is attributed to college athletes NIL being used in the broadcasts.
- This case stands to be rather costly for the NCAA as the District court judge hearing the case has certified the three damages classes the plaintiffs sought to create. [The three classes](#) are:
  - **Football and Men’s Basketball Class** - This class consist of all current and former college athletes who have received full grant-in-aid scholarships and compete or competed on a men’s college football team or basketball team that is a member of the Power 5 conferences between June 15, 2016 and Nov 3
  - **Women’s basketball class** – This class consist of all current and former college athletes who have received full grant-in-aid scholarships and compete or competed on a women’s college basketball team that is a member of the Power 5 conferences between June 15, 2016 and Nov 3
  - **Additional Sports Classes** - Except for members of the previously mentioned basketball and football classes, all current or former college athletes who competed on a Division I athletic team prior to July 1, 2021, and who received compensation for use of their NIL as a college athlete between July 1, 2021, and Nov. 3.
- This means that more than 6,000 football and men’s basketball players would be entitled to a share of TV rights money and 7,000 athletes in other sports would be eligible for damages related to social media earnings
- Athletes could earn a portion of ticket sales and endorsement revenue as well.
- The damages for these classes are 1.4 billion dollars and could increase to 4.3 billion dollars if treble damages pursuant to the Sherman Act apply
- This case could have significant impacts not only on the NCAA but on the conferences and schools as well. The monetary damages could be passed down to the schools and the conferences possibly putting the schools and the conference in a precarious financial situation.

## **Other Issues in College Athletics**

### *Carter v. NCAA*

*Carter v. Nat’l Collegiate Athletic Ass’n*, No. 23-cv-6325 (N.D. Cal. filed on Dec. 7, 2023).

- Duke Football player Dewayne Carter, Stanford soccer player Nya Harrison, and TCU basketball player Sedona Price sued the NCAA and is seeking an injunction that would prevent the NCAA from enforcing its “pay-for-play” rules and seeks damages for past payments athletes would have received if the rules were not in place.

## **Should and Will College Athletes be Deemed Employees?**

### *NLRB Case (Dartmouth)*

- In March, the men’s basketball team at Dartmouth College voted to unionize.
- After the case was heard by the National Labor Relations Board regional office in Boston, the regional office found that the team met the definition of employees.

- While the school is working to appeal the matter and have made clear that they have no intention to engage in any form of union relations with the team, this case is still significant and could have very important ramifications.
- This case is interesting for a few reasons:
  - Dartmouth College is a private school and is in the Ivy League – this means that the NLRB had jurisdiction
  - The players do not receive athletic scholarships, but the NLRB regional office found that other benefits players receive like apparel to be sufficient compensation
  - The crux of the case came down to control – the NLRB found that the coaches exercise sufficient control over the players by highlighting instances where the coach ask the players not enroll in classes that conflict with the potential practice time window.

#### *NLRB Case USC*

- There is a similar case regarding whether college athletes should be deemed employees being heard by the NLRB's regional office in California
- In February of 2022, the National College Players Association filed unfair labor practice charges with the NLRB against USC, UCLA, the Pac-12 Conference, and the NCAA.
- The charges seek to affirm employment status for Division I Football Bowl Subdivision football players and Division I men's and women's basketball players.
- However, the complaint is only being prosecuted against USC, the Pac-12, and the NCAA because UCLA is a [public school](#) and as such does not fall within the NLRB's jurisdiction.
- However, by alleging the complaint against the Pac-12 and the NCAA as joint employers the athletes are seeking to ensure that the ruling applies to athletes at both public and private schools.
- Again, the focal point of the case is the level of control that USC exercises over its athletes.
- Accordingly, lawyers for USC, the Pac 12, and the NCAA are attempting to paint college athletics as an extra curricula activity.
- Conversely, lawyers for the athletes are attempting to show that the time commitment required of college athletes is akin to that of a full-time job.
- It will be interesting to see if the Dartmouth ruling has any bearing on this case

#### ***Johnson v. NCAA***

*Johnson v. Nat'l Collegiate Athletic Ass'n*, No. 2:19-cv-05230 (E.D. Pa. filed on Nov. 6, 2019).

- This is another case about the employment of college athletes.
- This case is based on the Fair Labor Standards Act.
- The plaintiff argues that college athletes should receive minimum wage and overtime pay, like a work-study student.