THE EQUITABLE FUTURE OF INTERCOLLEGIATE ATHLETICS

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I. THE RISING TIDE

Should college athletes be compensated? If so, how? And, for what? While these questions, and the NCAA's response to them, are presently under immense scrutiny, the discussion around college athlete compensation is hardly new. Over the past decade, individuals and organizations at all levels have recognized the fundamental unfairness in the way college athletes have traditionally been compensated (or rather, uncompensated) despite the economic boon their participation in college sports presents for their universities, the NCAA, the networks, and others. Tellingly, the industry of intercollegiate sports brought in $14 billion in revenue in 2019, more money than any other sports league in the world, except for the NFL.[2] The last decade has incited a sea change in attitudes toward the NCAA and its amateurism policy — specifically in the context of college athlete compensation — with courts, private entities, and now legislators pushing for better treatment, both economically and academically, for these athletes.

The NCAA's cloak of "amateurism" can no longer be used to justify its failure to equitably compensate college athletes for the use of their name, image, and likeness ("NIL"). Nor can it be used to continue denying student athletes comprehensive academic opportunities and other much-needed services. After years of incremental improvements through litigation, legislatures are finally picking up the mantle — recognizing that change through the courts has been too slow, and that college athletes have waited too long. The following article highlights this discussion within the courtroom, identifies and explains the critical turning point, and proposes a framework for how legislatures, including Congress, should approach their efforts to finally achieve an equitable system of intercollegiate athletics.

II. COURTROOM PERSPECTIVES OF AN EVOLVING DISCUSSION

The topic of College athlete compensation has been litigated multiple times before.[3] However, not until the 2009 case, *O'Bannon v. NCAA*, did any courts rule on the NCAA's antitrust liability *vis-à-vis* athlete compensation. In *O'Bannon*, current and former Division I college athletes alleged that the NCAA, its member institutions, and its commercial partners violated federal antitrust laws by unlawfully foreclosing them from receiving any compensation related to the use of their NILs in television broadcasts, rebroadcasts, and videogames. The Northern District of California found the agreement between the NCAA and its member institutions to cap compensation to grant-in-aid, rather than the higher "cost of attendance," constituted a violation of Section 1 of the Sherman Act. The U.S. Court of

2 Chris Murphy, Madness, Inc. How Everyone is Getting Rich Off College Sports—Except the Players 3 (2019).

3 For example, the 2006 case *White v. NCAA*, sought financial aid up to the full cost of attendance, rather than the present structure of grant-in-aid. No. CV 06-999-RGK (MANx), 2006 WL 8066802 (C.D. Cal. Sept. 21, 2006). The case settled for $218 million before trial. *Id.*

Appeals for the Ninth Circuit agreed with the district court and affirmed its finding that the NCAA violated antitrust laws. The practical effect of *O'Bannon* has been that college athletes can now each receive up to $5,000 more every year as part of their scholarship package.[4]

Building on the success of *O'Bannon*, Judge Claudia Wilken of the Northern District of California ruled in *Alston v. NCAA* that the NCAA's scholarship rules are, in part, illegal. Specifically, Judge Wilken ruled that the NCAA cannot bar schools from offering players "compensation and benefits related to education" in excess of their scholarship money and cost-of-attendance payments. Highlighting the limitations of litigated solutions, this ruling still fails to provide any mandatory compensation for college athletes, nor does it address their academic well-being. The decision is also pending appeal by both parties before the Court of Appeals for the Ninth Circuit.[5]

III. CALIFORNIA'S PIONEERING LEGISLATION

Courtroom successes have triggered significant progress for college athletes, as the public discourse evolved from whether college athletes should be compensated for their NIL rights to how they should be compensated and, critically, how their rights as students should be protected. This discussion reached a tipping point in 2019 when California Governor Gavin Newsom made a guest appearance on Lebron James's HBO show *The Shop* and signed Senate Bill 206, the Fair Pay to Play Act ("FPTP"), into law.[6] The FPTP — the first of its kind and, undoubtedly, the first of many to come — has significant implications for the rights of college athletes.

The FPTP, which does not become effective until 2023, prohibits universities and the NCAA from interfering with current or prospective college athletes' rights to receive compensation related to their NILs. It also allows college athletes to obtain professional representation related to their participation in intercollegiate athletics. While representing a significant step forward, the law fails to facilitate any means for negotiating such compensation, such as creating a means for athletes to collectively bargain. Nor does the law provide any protections for the health, safety, and academic success of college athletes. Nevertheless, the law has catalyzed immediate and significant reactions throughout the country at the institutional and legislative levels.[7]

IV. THE NCAA FIGHTS BACK

Throughout a decade of litigation and in light of pressing legislative reform, the NCAA has vigorously opposed any efforts to undo its self-serving interpretation of "amateurism," impeding the economic liberty of college athletes in its wake. When it became clear in mid-2019 that the signing of SB206 into law was imminent, the NCAA recognized that the cloak of amateurism would no longer be sufficient to continue denigrating the rights of college athletes. But not for lack of effort, as the NCAA and its allies spent over $750,000 in 2019 lobbying over any potential reforms.[8] As SB206 picked up speed within the California legislature, and support for the bill grew in the public consciousness, the NCAA emphasized its opposition through a public letter sent to Governor Newsom. In a traditional "sky is falling" alarm, the NCAA warned that, if passed, the bill "would erase the critical distinction between college and professional athletics" and that it "would remove [the] essential element[s] of fairness and equal treatment that [form] the bedrock of college sports." The letter ended by urging Governor Newsom to reconsider the "harmful" and "unconstitutional" bill.[9] However, as the Association has begun to (finally) accept that change is imminent, it has also changed its tune in an attempt to retain its influence on the probable outcomes.

Facing an uphill battle legislatively and in the court of public opinion, the NCAA sought to regain control by announcing the creation of the NCAA Board of Governors Federal and State Legislation Working Group to "examine the NCAA's position on name, image, and likeness benefits and potentially propose rules modifications tethered to education." While the formation of the Working Group seemed like a significant shift in its

4 *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

5 *In Re: NCAA Grant-In-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019).

6 Josh Shrock, *Gavin Newsom Signs 'Fair Pay to Play' Act with Lebron James on 'The Shop*,' NBCSports (Sept. 30, 2019, 9:20 AM), https://www.nbcsports.com/bayarea/ncaa/gavin-newsom-signs-fair-pay-play-act-lebron-james-shop.

7 Cal. Educ. Code § 67457.

8 Ben Nuckols, *NCAA, 2 Conferences Spend $750,000 on Lobbying*, AP News (Feb. 10, 2020), https://apnews.com/c298c08fbaebfdcfa97943bd5c31fa21?utm_medium=AP_Top25&utm_campaign=SocialFlow&utm_source=Twitter&utm_source=Twitter&utm_campaign=SocialFlow&utm_medium=AP_Top25.

9 *NCAA Responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206.

position on compensating college athletes, the NCAA made clear that it "will not consider any concepts that could be construed as payment for participation in college sports."[10]

Eventually, the NCAA announced that its top governing board voted unanimously to permit college athletes the opportunity to *benefit* from their NIL rights, and it "[directed] each of the NCAA's three divisions to immediately *consider* updates to relevant bylaws." Unfortunately, instead of providing insight into what any substantive changes might look like, the NCAA chose to emphasize what these changes will *not* look like, stating that "compensation for athletics performance or participation is impermissible" and that "the [Working] Group's work will *not* result in paying students as employees."[11] Regardless of what change may look like to the NCAA, member schools will not have the opportunity to vote on proposed changes until January 2021. Even as the NCAA begins to recognize that change is imminent, it undoubtedly seeks to use the Working Group (together with its cohort of lobbyists) to delay reform at the state level and regain control and influence over legislative outcomes at the federal level.[12]

V. LEGISLATIVE INITIATIVES

The Fair Pay to Play Act precipitated legislative reform efforts at the state and at the national level. To date, over 30 college athlete compensation bills have been introduced across more than 16 different states, all of them introduced since the California bill was passed. While certain bills propose novel methods for compensating college athletes, such as allocating a portion of ticket sales to them, and others seek to speed up the timeline for implementing change, inspiration from California's FPTP Act is evident as many bills mirror the title and text of the California law. Fearing the detrimental effect on intercollegiate athletics that would be caused by a patchwork of 50 different sets of rules, many stakeholders, including the NCAA, have turned to the federal government. Indeed, the NCAA has recently argued that California's bill is unconstitutional given Ninth Circuit precedent recognizing "that the NCAA must have uniform enforcement procedures in order to accomplish its fundamental goals."[13] Thus far, two bills have been introduced federally, House Bill 5528 (HR5528) and House Bill 1804 (HR1804). The U.S. Senate Committee on Commerce, Science, & Transportation also held a hearing titled *Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation* in early February.

House Representative Donna Shalala introduced HR5528 which proposes the creation of a Congressional Advisory Commission on Intercollegiate Athletics ("CACIA") to "investigate the relationship between institutions of higher education and intercollegiate athletics." The CACIA's broad mission would include investigating current policies for fostering academic success of college athletes, the impact of intercollegiate athletics on academic success and academic integrity, and current policies related the use of college athletes' NIL rights.[14] House Representative Mark Walker's bipartisan bill, HR1804, challenges the *status quo* more directly. The proposed Student-Athlete Equity Act would amend Internal Revenue Code Section 501(j)(2) by modifying the definition of a tax-exempt amateur sports organization to exclude organizations—such as the NCAA—that substantially restrict a college athlete from using, or being reasonably compensated for the third-party use of, the athlete's NIL rights.[15] The implications of the bill are obvious as it would have significant financial impacts on the NCAA should it fail to endorse NIL compensation rights.

Additionally, on February 11, 2020, the Senate Committee on Commerce, Science, & Transportation held a hearing on college athlete NIL rights, receiving testimony from Dr. Mark Emmert, President of the NCAA, Ramogi Huma, Executive Director of the National College Players Association, and others. In addition to legislative fact-finding, the hearing represented general consensus on the need for imminent change but a lack of agreement on how change should occur and who should initiate such reforms. Unsurprisingly, the NCAA was criticized for its inaction

10 Michelle B. Hosick, *NCAA Working Group to Examine Name, Image, and Likeness*, NCAA (May 14, 2019, 2:40 PM), http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness.

11 *Board of Governors Starts Process to Enhance Name, Image, and Likeness Opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities.

12 *Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation Before the Subcomm. on Mfg., Trade, & Consumer Prot. of the S. Comm. on Commerce, Sci., & Transp.*, 116th Cong. (2020).

13 Defendant's Joint Supplemental Brief at 4, *In Re: Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, No. 19-5562 (9th Cir. Feb. 19, 2020) (citing *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090-2091 (2018)).

14 Congressional Advisory Commission on Intercollegiate Athletics Act, H.R. 5528, 116th Cong. (2019).

15 Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

despite the obvious attention legislators across the country are paying to this issue. Expressing the collective sentiment of his colleagues at the hearing, Senator Richard Blumenthal stated: "the system is deeply unfair and marred with inconsistencies" and that the "whole system has to be fundamentally reformed…"[16]

While the federal legislature's ultimate role in solving the NIL question remains unclear, its interest in the matter and sense of urgency are both apparent. Senator Chris Murphy has published a three-part series of reports titled *Madness, Inc.*, criticizing the current model of intercollegiate athletics and calling for significant change; Representative Anthony Gonzalez revealed in the Senate hearing that he has begun drafting NIL-focused federal legislation in the House; additionally, there are at least two bipartisan working groups pushing for more action on the subject. The remainder of this article is devoted to discussing what federal legislation should include to achieve a more equitable system of intercollegiate sports.

VI. AN EQUITABLE FUTURE

Senator Richard Blumenthal's statements that extensive reform is necessary echo the general sentiment that federal legislation is necessary to address the multitude of failures present in the current system. Such legislation should aim to achieve three clear goals: (1) prevent labor disruption in college athletics and avoid strikes, lockouts, or lawsuits; (2) provide college athletes the right to bargain on issues related to their health, safety, and compensation, including but not limited to NIL rights; and (3) ensure college athletes have the same academic opportunities as all other students. The starting point for achieving these goals is reassessing the relationship between the four key stakeholders — the NCAA, universities, conferences, and college athletes — each with unique interests, rights, and responsibilities shaping their respective roles in the ecosystem of intercollegiate sports.

First, all NCAA rules, except those covering the rules of the game, the number of eligible scholarships, and general eligibility rules for team inclusion, should be abolished. The NCAA should have no responsibility for academics or athlete integration into academics, nor should it have rulemaking or enforcement authority regarding university or individual athlete participation infractions. Additionally, the NCAA should have no authority over economic licensing opportunities or rights of former, current, or prospective college athletes, nor should it be allowed to implement any rules prohibiting pay-to-play from junior high school and beyond.

Next, the inherent and fundamental mission of all universities as academic institutions should be revitalized, in the context of college athletes, by ensuring exclusive authority over academics, advancement, and graduation requirements of college athletes is reserved for universities. Additionally, universities should be responsible for providing academic integration of college athletes with full benefits and opportunities enjoyed by any other scholarship student. Universities should also have exclusive responsibility for setting academic qualifications, grades, courses, and scholarships, as well as protecting college athletes so that athletic schedules do not interfere with academic obligations and commitments. Finally, universities and conferences should share joint responsibility for setting college athlete transfer rules.

Aside from shared responsibility for determining transfer rules, conferences should have authority to set and enforce rules regarding violations of conduct by athletes and universities. Conferences should be required to protect the due process rights of college athletes and universities, including the right to representation by counsel, the right to receive notice, and the right to be heard. Finally, individual conferences should be responsible for establishing rules regarding athletic participation, health and safety, and licensing for athletes within their conference. To be clear, conferences should not continue to set these rules for athletes across conferences except where cross-conference multi-unit licensing rights are involved.

Logically, the world of intercollegiate sports would also change significantly for college athletes. Most importantly, college athletes must be granted the right to establish collective associations, either at the university or the conference level, with the authority to negotiate with universities, conferences, and the NCAA as appropriate. This association or associations must have the right to negotiate regarding benefits and compensation from universities and external sources, conditions in matters such as health and safety, and the demarcation between hours committed to athletic and academic activities. Additionally, college athletes should be granted the right to receive compensation for licensing their NIL rights at the individual or group level, whether locally, regionally, or nationally.

16 *Name, Image, and Likeness: The State of Intercollegiate Athlete Compensation Before the Subcomm. on Mfg., Trade, & Consumer Prot. of the S. Comm. on Commerce, Sci., & Transp.*, 116th Cong. (2020).

To enable this structure to work, federal legislation should include additional provisions: an arbitration model similar to that behind MLB's salary arbitration for resolving disputes between college athlete collective associations and the other stakeholders; prohibitions on college athlete lockouts by universities and college athlete strikes or holdouts; and, explicit agreement by all stakeholders that college athletes will *not* be considered employees.

The history of sports reform makes clear that bringing about significant change is a monumental task. From the judicial perspective and in the context of college athlete compensation, *White, O'Bannon, Alston* and others are evidence that any meaningful change is mostly incremental and protracted. From the legislative perspective and in a more general context, the legislative history and processes behind Title IX, the Equity in Athletics Disclosure Act, and the Amateur Sports Act exemplify the snaillike pace at which change is at times achieved. However, these same statutes make clear that change is inescapable. The college athlete compensation discussion has undoubtedly shifted from "should this happen?" to "what is the best way to make this happen?"; the NCAA has publicly accepted that their NIL policies needs to be "modernized"; state and federal legislative bodies are drafting, proposing, and even passing bills on the issue and the broader shortcoming of college sports. So, the question remains, what is next?

The three entities that have the greatest potential to create change are the NCAA, individual states, and Congress. The NCAA would logically prefer to drive the change, rather than have it imposed on them, however, it faces significant pressure from state legislatures that are not slowing the introduction of targeted reform bills, and from Congress, which has expressed dissatisfaction over the NCAA's timeline for and resistance to necessary restructuring.[17] State legislators have made clear that they will not be deterred in their pursuit of such reform. Finally, Congress seems ready to act in the face of the need for a nationally unified approach to having a comprehensive, sensible, and workable framework for all athletes, all universities, and all conferences throughout the nation. What will change and who will bring about this change remains unclear. What is crystal clear, however, is that real change is coming.

17 See Joseph N. Crowley, *The NCAA's First Century in the Arena*, 31-32 (2006).

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