The NCAA Gambled on NIL Revenue Sharing... and Lost

The House v. NCAA settlement proposal seems unlikely to pass judicial muster; moving forward, how can the NCAA continue to restrict the rights of institutional revenue sharing?

Noah Henderson | Oct 3, 2024

Sep 27, 2024; Miami Gardens, Florida, USA; Miami Hurricanes quarterback Cam Ward (1) celebrates with offensive lineman Taylor Broutin (72) after a touchdown against the Virginia Tech Hokies during the third quarter at Hard Rock Stadium. Mandatory Credit: Sam Navarro-Imagn Images / Sam Navarro-Imagn Images

The NCAA is locked in a credibility crisis. To be honest, the NCAA has been there for a long time. For years, the NCAA has faced mounting pressure to reform outdated policies, but now, its authority is on the brink of collapse as the future of college sports hinges on the outcome of a revised House v. NCAA settlement proposal. The NCAA decided to gamble in the United States District Court for the Northern District of

California for a chance to regain control of an unstable college regulatory landscape. Unfortunately for the NCAA, they drew a 16, and the dealer is showing an Ace.

On its face, the House v. NCAA class action lawsuit involves former athletes seeking backpay for the NCAA's denial of their NIL rights. However, backpay concerns have taken a backseat thanks to an incredibly novel and already once-rejected settlement proposal. The focus has instead shifted to the settlement proposal's ambitious request to establish a 22% revenue-sharing regime for athletes taken from institutional media rights — establishing a roughly $22,000,000 annual payroll for athletes at the nation's biggest athletic institutions.

The settlement proposal has caused commotion among athletic administrators and led many athletic departments and conferences to precautionarily find new revenue streams to offset the cost of paying their on-field talent. The University of Tennessee recently levied a 10% "talent fee" on next year's football tickets to generate additional revenue for direct institutional revenue sharing.

If the settlement is approved, the NCAA's longstanding amateurism policy would be radically changed, as athletes would be allowed to receive direct compensation from their respective schools for the first time. The NCAA has agreed to close the backward-facing (NIL backpay) portion of the settlement with a whopping $2,700,000,000 payout to athletes who competed as far back as 2016 for lost NIL earnings. The question is, why?

The answer lies in the incredibly advantageous forward-facing components of the settlement proposal that would instill two significant changes to college sports: 1) The aforementioned 22% revenue-

sharing proposal and 2) regulations to curb the free-market spending of NIL collectives: shell corporations that are legally separate entities from schools used to compensate athletes for their participation on sports teams. Primarily funded by boosters, NIL collectives at the biggest programs pay over $20,000,000 annually in de facto player salaries by disguising athletic payments as endorsement partnerships.

Both forward-facing components of this settlement look to establish de facto antitrust exemptions for the NCAA. While revenue-sharing caps, like the proposed 22% cut for NCAA athletes, exist at the professional level for sports leagues, that is only because they have been collectively bargained for between the league office and the players union, exempting such an arrangement from antitrust scrutiny. In any non-unionized industry, like college athletics, a rev-share cap blatantly violates the Sherman Act.

Restrictions against third-party NIL collectives similarly curb free market principles of payment. Once again, professional leagues can implement rules against third-party payments that could go against the spirit of a salary cap, but only because that has been expressly agreed to in a collective bargaining agreement. This season, the Las Vegas Aces were investigated by the WNBA for team-wide NIL-style payments from a local tourism board that allowed their team to be compensated 82% above the league's salary cap.

However, for NIL collectives in college sports, any NCAA regulations aimed at stopping a similar arrangement to the Ace's deal would violate the Sherman Act. An injunction from a federal judge in Tennessee rooted in antitrust principles has already dampened the NCAA's power to enforce any NIL compensation rules. Through the NCAA's settlement proposal, they have asked the court to exempt them from antitrust

regulation in their pursuit to regulate the vast proliferation of NIL Collective payment, at least partially contradicting the Tennessee injunction.

Through this settlement proposal, the NCAA has signaled that its ***revered tradition of amateurism*** is nothing more than a bargaining chip to maintain sovereignty over college sports. For so long, the NCAA and its affiliates have held firmly that athletes can not be paid for their performance on the field —– but as revenue generation from college sports grew larger, scrutiny from the courts intensified, and society became more conscious of the labor exploitation revenue sport college athletes are subjugated to, the walls have closed in on the NCAA's antiquated amateur model.

The NCAA is willing to sacrifice the amateur tradition that it has staunchly proclaimed is the integral fabric of collegiate competition—and pay a $2,700,000,000 penalty to do so. But here is the catch. The deal goes through if, and only if, the courts allow the anticompetitive rev-share cap and NIL collective regulation to come with it. That is the only way the NCAA can regain its dominion over college sports, which has been slowly eroded since its first significant antitrust loss in 1984 via *Board of Regents of the University of Oklahoma v. NCAA*.

The NCAA has led successful propaganda campaigns to athletes and fans have been told that what makes college sports so unique is that athletes can not receive payment. In the age of NIL, that romanticized notion of college sports is dead. The NCAA has begrudgingly allowed NIL, giving only as many rights to athletes as the courts have mandated. In a unique reversal, the NCAA looks to make proactive changes to its compensation policies, but only if it yields something bigger for them.

When Judge Wilken likely denies the revised settlement proposal, and it becomes clear to all parties involved that the United States District Court for the Northern District of California will not levy an antitrust exemption for unilateral compensation caps, it will be hard for the NCAA to explain to players why they remain opposed to direct player payment. The genie is out of the bottle. The NCAA will be forced to show good cause - that they do not have - for continuing to restrict athlete earnings.

The tradition of amateurism was a tradeable asset to the NCAA levied in a gamble to regain power and authority in the college athletics world. When the cards ultimately fall against the NCAA in court, maintaining institutional payment restrictions only serves to illuminate the blatant hypocrisy of the NCAA. It was never about what was best or equitable for the athletes; it was about maintaining power. Win or lose, the NCAA's hand has been forced; they must implement revenue sharing moving forward.