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Higher Education Alert

September 27, 2023

Federal Court hears oral arguments in college athlete NIL case

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Counsel for the NCAA and current and former college athletes argued on class certification before the US District Court, Northern District of California.



What's the impact?

- The complaint seeks retroactive compensation for athletes who were denied NIL opportunities and broadcast revenue compensation.
- The NCAA cites Title IX as a bar against issuing uneven broadcast revenue to Division I athletes.
- The outcome of this case and other related proceedings will set the requisite regulatory framework for college sports moving forward.

Litigation between former and current Division I athletes and the NCAA took a substantial step last week. On Thursday, September 21, 2023, representatives for the NCAA and the Power Five conferences, and representatives for a potential class of current and former college athletes, argued in front of the US District Court for the Northern District of California. The players' claims are based on name, image, and likeness (NIL) and broadcast revenue compensation. The

arguments on class certification for *In Re College Athlete NIL Litigation* were heard before US District Judge Claudia Wilken, who has presided over high-profile litigation involving the NCAA in the past.

The Complaint filed against the NCAA

The complaint at issue was filed on June 15, 2020, alleging that the NCAA, member institutions, and the Power Five conferences committed antitrust violations by conspiring through NCAA rule-making to deny athletes the right to profit from their NIL. Under NCAA rules, college athletes were prohibited from profiting from their NIL rights until 2021. The NCAA reversed course in 2021 on the heels of decisions in *O'Bannon v. NCAA*, which concerned players' likeness in video games, broadcasts, and other media, and in *NCAA v. Alston*, which focused on compensating college athletes for education-related expenses.¹ Both cases were heard before Judge Wilken at the district court level.

The current case before Judge Wilken is brought by Arizona State University swimmer Grant House, Texas Christian University basketball player Sedona Prince, and University of Illinois football player Tymir Oliver. The complaint proposed three classes seeking retroactive compensation for athletes who were denied NIL opportunities from 2016–2021, and damages for Division I Power Five men's football, men's basketball, and women's basketball players who continue to be denied a share of broadcasting revenue (BNIL). The three proposed classes alleging monetary damages would collectively include more than 14,500 college athletes. On Friday, September 22, 2023, Judge Wilken certified the injunctive relief class seeking to change NCAA rules, which could potentially include 184,000 former, current, and future Division I athletes, according to Judge Wilken's order. The injunctive relief class certification was not opposed by the NCAA or the Power Five conferences.

Class certification arguments

The parties had previously submitted written briefs on the class certification issue for monetary damages, but they emphasized their main points in arguments before Judge Wilken. At this stage, Judge Wilken is tasked with analyzing if the proposed classes would be appropriate for litigation. Factors that are considered to determine class certification are whether there are common questions of law or fact, if the claims brought by House, Prince, and Oliver are typical of other athletes in the class, and whether the individual players would adequately represent the class.

One of the main points the NCAA argues against class certification is that NIL is inherently individualistic. The argument follows that an athlete's NIL compensation depends on a multitude

¹ *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015); *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

of factors such as playing time, the school at which you play, and social media presence. The NCAA points to the NIL landscape from 2021 to present day as proof. According to the NCAA, it would be inconceivable to group all athletes together to put a price tag on the compensation they would have earned prior to 2021. Additionally, the NCAA claims that if players were able to profit from NIL or broadcast revenue starting in 2016, it's impossible to predict the cascading effect that would have occurred. Just because an NIL deal was signed in 2022, doesn't mean the same deal would have been available in 2019. Players may have been more likely to stay in college rather than opting to play professionally, effectively taking a roster spot or NIL opportunities from players behind them. The NCAA argues that this cascading effect causes the class of injured parties to be too speculative.

In response, representatives for the players pointed to professional video game licensing as proof of the group licensing concept. All players in the NFL are granted an equal share of video game money, whether a player is a star or the last player on the bench. They claim the same would be plausible at the collegiate level.

Title IX

A heavily debated aspect at the class certification stage is Title IX. In argument, the NCAA attempted to point to their obligations under Title IX as evidence that broadcast compensation isn't feasible. The NCAA claimed that under the players' theory of broadcast compensation, 96% of revenue would be directed to men, flying in the face of gender equity Title IX obligations. Title IX prohibits disproportionate treatment and distribution of opportunities and benefits to college athletes based on sex. The NCAA argues that the players' claims would force Title IX noncompliance.

The players' stance is that the NCAA and Power Five conferences must abide by Title IX *and* requisite labor and antitrust laws. Complying by one set of laws is not an excuse for noncompliance with another. Furthermore, the players are claiming that conferences, not schools, would be responsible for dishing out broadcast revenue compensation to players. This distinction they claim is crucial under Title IX. Accordingly, conferences do not have to comply with the same Title IX requirements as educational institutions. Finally, representatives for the players stressed the current case is a damages case, so Title IX does not apply. The money issued to players would be remedial, so Title IX should not be a consideration.

Notably, this is not the only ongoing legal proceeding the NCAA is focused on. *Johnson v. NCAA*, currently before the US Court of Appeals for the Third Circuit, is a case in which college athletes are arguing they should be considered employees under the Fair Labor Standards Act. Just a few weeks ago, the Dartmouth men's basketball team filed a petition with the National Labor Relations Board attempting to unionize. The outcome of these proceedings, including *In Re College Athlete NIL Litigation*, will set the requisite regulatory framework for college sports moving forward.

What's next?

Judge Wilken's upcoming damage class certification decision will have a large impact on how the case proceeds and the amount of money at stake. Her decision will impact whether House, Prince, and Oliver can bring these claims on behalf of thousands, or if they have to bring their claims as individuals. The case is currently scheduled for trial beginning on January 27, 2025. We will continue to monitor and report on this case as it progresses.

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