

**PROBLEMS IN NIL: OBTAINING JUSTICE FOR FORMER STUDENT  
ATHLETES IN A POST-ALSTON WORLD**

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I. INTRODUCTION.....	19
II. BACKGROUND.....	19
<i>A. American Antitrust Laws – The Sherman Act</i> .....	19
<i>B. Name, Image, and Likeness</i> .....	20
<i>C. The NCAA</i> .....	21
<i>D. NIL Litigation</i> .....	22
<i>E. Alston’s Fallout</i> .....	24
III. ANALYSIS .....	25
<i>A. House v. NCAA Settlement</i> .....	25
<i>B. Approaches to Mass Compensation</i> .....	27
1. <i>Class Action Lawsuits</i> .....	27
2. <i>Compensation Funds</i> .....	29
<i>C. Applicability of a Compensation Fund to NIL Rights</i> .....	30
IV. CONCLUSION .....	32

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## I. INTRODUCTION

On June 6, 2025, Judge Claudia Wilken approved a settlement proposal for the *House v. NCAA* case in the U.S. District Court for the Northern District of California.<sup>1</sup> Notable for its sweeping reforms in the way college athletics are currently governed, the settlement also contains provisions designed to compensate former student athletes for the illegal use of their Name, Image, and Likeness (NIL) rights. The nearly three billion dollars in backpay for former student athletes represents the culmination of decades of antitrust lawsuits and public discourse related to whether the National Collegiate Athletic Association's (NCAA) rules on amateurism are inherently exploitative.<sup>2</sup> While commendable for its efforts to solve potential injustices involving the usage of former student athletes' NIL rights, the issues created through the recent shifting in the NIL legal landscape are too large to be addressed in this manner. If former student athletes are to be compensated without financially jeopardizing the NCAA and its member institutions, the strategic usage of a compensation fund is a more equitable solution.

## II. BACKGROUND

### A. American Antitrust Laws—The Sherman Act

In 1890, Congress passed the Sherman Antitrust Act in response to societal concerns about the detrimental effects of substantial economic power accumulated in the hands of a few corporations.<sup>3</sup> The widespread corporate utilization of trusts specifically stoked fears that powerful corporations and individuals would conspire to utilize their economic leverage in ways that would have anticompetitive market effects, and would lead to price control and public injury.<sup>4</sup> The Sherman Act, by its terms, made illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States[.]”<sup>5</sup>

Throughout its history, the Sherman Act has served as one of the most important federal checks on monopolistic practices. It has legally evolved into an instrument that applies to two areas of illegal conduct: conduct that is per se illegal,

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<sup>1</sup> *In re Coll. Athlete NIL Litig.*, No. 20-cv-03919, 2025 WL 1675820 (N.D. Cal. Jun. 6, 2025); see also discussion *infra* Section III.A.

<sup>2</sup> *NCAA Amateurism Rules and Certification*, NEXT COLL. STUDENT ATHLETE, <https://www.ncsasports.org/ncaa-eligibility-center/amateurism-rules> [<https://perma.cc/Q6SR-Y534>]; see generally Dalton Clouser, *Amateurism vs. Antitrust: The NCAA's Restriction of Student-Athlete Compensation*, 49 W. ST. L. REV. 97 (2022).

<sup>3</sup> See 54 AM. JUR. 2D *Background and Purpose of Sherman Act* § 1 (2024).

<sup>4</sup> *Id.*

<sup>5</sup> 15 U.S.C. § 1.

and conduct that fails the “rule of reason” test.<sup>6</sup> Conduct that is per se illegal must be shown to be “unreasonably anticompetitive and without any redeeming virtue.”<sup>7</sup> Examples of such conduct include price fixing, bid rigging, territorial allocation among competitors, and resale price maintenance.<sup>8</sup> Conduct that is not per se illegal, but that still produces anticompetitive effects is judged under the rule of reason. Under a rule of reason analysis, a sort of balancing test is performed where anticompetitive intent, the overall impact of the action at issue, and the stated business justification of the action are all considered. The final ruling will depend on whether an action constitutes the least restrictive means to further a legitimate business interest.<sup>9</sup> The Sherman Act is enforced by lawsuits from both the U.S. government<sup>10</sup> and individual citizens through a private right of action.<sup>11</sup>

The Sherman Act has proven to be ubiquitous in its application throughout its existence, and one novel area that it is beginning to take effect in can be found in the name, image, and likeness rights of college athletes.

### *B. Name, Image, and Likeness*

Historically, the right of individuals to exercise control and ownership over the economic rights associated with their name, image, and likeness can be traced to the original privacy torts outlined by Samuel Warren and Louis Brandeis in 1890.<sup>12</sup> While the work of Warren and Brandeis was chiefly concerned with unreasonable intrusions by the press into the private life of individuals, the resulting body of privacy law has come to recognize economic rights as well, primarily through the tort of appropriation of name or likeness. The Second Restatement of Torts provides: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”<sup>13</sup> The Restatement comments make clear that, while still fundamentally a privacy tort, misappropriation protects the economic rights of individuals:

- a. The interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others. Although the protection

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<sup>6</sup> Lynn D. Krauss, *Antitrust Issues and Pitfalls in Distribution Relationships*, 72 MICH. B.J. 538 (1993).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 15 USC § 15(a).

<sup>11</sup> 15 USC § 15.

<sup>12</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>13</sup> Restatement (Second) of Torts § 652C (A.L.I. 1965)

of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.<sup>14</sup>

b. *How invaded.* The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation. It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in some states have, however, limited the liability to commercial uses of the name or likeness.<sup>15</sup>

The legal values born from the appropriation tort have, in recent years, combined with the standards set out in the Sherman Act to form the basis for a new wave of litigation, as current and former student athletes seek to wrest economic control of their image from the NCAA.

### C. *The NCAA*

The NCAA traces its origin to the early 20th century, citing the disorganized and often dangerous nature of early college football as the principal reason for its creation.<sup>16</sup> Over time, it evolved from a football regulatory association of less than sixty-five schools to the preeminent governing body of college athletics in the United States, encompassing more than 1,000 member institutions.<sup>17</sup> Among other responsibilities, the NCAA's primary function is to "oversee all championships, manage programs that benefit student-athletes, and support member committees that make rules and policies for college sports."<sup>18</sup>

As part of its role in fulfilling these functions, the NCAA promulgates and enforces rules meant to ensure fair competition, promote athlete safety, and

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<sup>14</sup> Restatement (Second) of Torts § 652C cmt. a (A.L.I. 1965).

<sup>15</sup> Restatement (Second) of Torts § 652C cmt. b (A.L.I. 1965).

<sup>16</sup> *History*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [<https://perma.cc/D9JH-BM64>] (last visited Nov. 15, 2025).

<sup>17</sup> *Id.*

<sup>18</sup> *Overview*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> [<https://perma.cc/Q55K-9E39>] (last visited Nov. 15, 2025).

maintain academic compliance within its member institutions.<sup>19</sup> A significant portion of these rules are devoted to maintaining the concept of amateurism for student athletes. According to NCAA bylaw 12.01.1, an athlete who “receives direct or indirect payment for athletics participation . . . is considered a professional athlete,” and is ineligible for participation in NCAA programs.<sup>20</sup> The NCAA advances several arguments in favor of this policy, of which its insistence on the prioritization of “student” status for its athletes and distinction from professional leagues stand out as prominent.<sup>21</sup> Perhaps unsurprisingly, these rules and their justifications have come under judicial scrutiny in the preceding decades.

#### *D. NIL Litigation*

The Supreme Court first recognized the applicability of the Sherman Antitrust Act to the NCAA in 1984 in the *NCAA v. Board of Regents* case, when it found an NCAA plan limiting live broadcasting of college football teams to be an illegal restraint of trade.<sup>22</sup> The first significant antitrust based challenge to the NCAA’s restraints on student athletes’ NIL rights would follow in the *O’Bannon v. NCAA* case, decided in 2015.<sup>23</sup> *O’Bannon* had its origin in 2009, when former college basketball player Ed O’Bannon sued the NCAA in response to the inclusion of his likeness in a video game without his compensation, or even consent.<sup>24</sup> After several years of procedural hurdles from class action certification and consolidation with other cases, O’Bannon’s claim came before the Ninth Circuit in 2015. The court found that, although the NCAA’s NIL restrictions in the name of amateurism were not per se illegal under the Sherman Act, the restrictions did fail the rule of reason test, and were thus illegal.<sup>25</sup> Critical to the court’s decision were the findings that:

- (1) [A] cognizable “college education market” exists, wherein colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities;
- (2) that if the NCAA’s compensation rules did not exist, member schools would compete to offer recruits compensation for their NILs; and
- (3) that the compensation rules therefore have a

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<sup>19</sup> *Mission and Priorities*, NCAA, <https://www.ncaa.org/sports/2021/6/28/mission-and-priorities.aspx> [<https://perma.cc/9Q98-CQFS>] (last visited Nov. 15, 2025).

<sup>20</sup> Nat’l Collegiate Athletic Ass’n, 2024-25 NCAA Division I Manual art. 12.01.1 (2025), <https://web3.ncaa.org/lstdbi/search/bylawView?id=11572> [<https://perma.cc/ET98-MSDG>].

<sup>21</sup> See Michael A. McCann, *New Amateurism*, 11 TEX. A&M L. REV. 869 (2024).

<sup>22</sup> *NCAA v. Board of Regents*, 468 U.S. 85 (1984).

<sup>23</sup> *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

<sup>24</sup> *Id.* at 1055.

<sup>25</sup> *Id.* at 1079.

significant anticompetitive effect on the college education market, in that they fix an aspect of the “price” that recruits pay to attend college (or, alternatively, an aspect of the price that schools pay to secure recruits' services).<sup>26</sup>

The court also rejected many of the NCAA's arguments that NIL-based restrictions on student athletes were permissible under the Sherman Act because of their pro-competitive effects (specifically, promoting amateurism, promoting competitive balance between schools, integrating student athletes with their academic community, and increasing output in the college education market).<sup>27</sup> While this case represented a significant landmark in the progression of NIL rules, the court limited its relief in this instance: “[t]he Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more.”<sup>28</sup> The decision to limit the scope of the *O'Bannon* ruling to the cost of attendance would set the stage for further litigation.

The Supreme Court made its most significant ruling on the NCAA's NIL rules in *NCAA v. Alston* in 2021.<sup>29</sup> This case again involved a class action suit by current and former student athletes alleging that the NCAA's restrictions on NIL violated the Sherman Act.<sup>30</sup> Justice Gorsuch held in his majority opinion that the NCAA's rules were subject to the rule of reason, and affirmed the lower court's ruling that caps on education related benefits such as scholarships for graduate school and payments for tutoring for student athletes failed the rule of reason analysis.<sup>31</sup> In so doing, Gorsuch emphasized the lower court's conclusions that, because the NCAA enjoys “near complete dominance of, and exercise[s] monopsony power in, the relevant market,” compensation limits on student athletes serve to produce significant anticompetitive effects such as reductions in competition between schools for recruits.<sup>32</sup> The NCAA raised several arguments in response, notably that its practices should only be subject to an “abbreviated deferential review” under antitrust laws rather than a full rule of reason analysis due to its status as a joint venture.<sup>33</sup> Under an abbreviated deferential review, the actions of certain enterprises (such as joint ventures) can display such clear procompetitive features that a full rule of reason analysis is unnecessary.<sup>34</sup> Gorsuch dismissed this argument on the grounds that joint ventures may still be subject to

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<sup>26</sup> *Id.* at 1070.

<sup>27</sup> *Id.* at 1072.

<sup>28</sup> *Id.* at 1079.

<sup>29</sup> 594 U.S. 69 (2021).

<sup>30</sup> *Id.* at 73–74.

<sup>31</sup> *Id.* at 103.

<sup>32</sup> *Id.* at 81–82.

<sup>33</sup> *Id.* at 87–88.

<sup>34</sup> *Id.* at 88.

rule of reason analyses, and because the NCAA's NIL-based restraints on competition were too complex for such an abbreviated look.<sup>35</sup> Ultimately, the Court upheld the lower court's issue of a permanent injunction against the NCAA's practice of limiting education related benefits for student athletes.<sup>36</sup>

#### *E. Alston's Fallout*

The *Alston* ruling signaled a major shift in the NIL legal landscape, and states almost immediately began passing legislation adding additional protections to the NIL rights of student athletes. Much of this legislation went beyond the scope of the *Alston* ruling, applying not just to education related benefits for student athletes but also to the general rights of students to earn compensation from their name, image, and likeness. A recent statute passed by the Michigan legislature in 2022 provides a representative example:

An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not do either of the following:

- (a) Prevent a student of a postsecondary educational institution from fully participating in intercollegiate athletics based upon the student earning compensation as a result of the student's use of his or her name, image, or likeness rights.
- (b) Prevent a postsecondary educational institution from fully participating in intercollegiate athletics without penalty based upon a student's use of his or her name, image, or likeness rights.<sup>37</sup>

While the *Alston* ruling and the new trend in state legislatures proved cause for celebration for current student athletes, the impact was initially less certain for former athletes who had not been able to earn compensation under the NCAA's now obsolete rules. While the recent settlement in the *House v. NCAA* case may provide the beginnings to a solution,<sup>38</sup> it contains its own litany of issues.<sup>39</sup> In the meantime,

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<sup>35</sup> *Alston*, 594 U.S. at 88–90.

<sup>36</sup> *Id.* at 107.

<sup>37</sup> MICH. COMP. LAWS § 390.1732 (2022).

<sup>38</sup> 545 F. Supp. 3d 804, 808 (N.D. Cal. 2021).

<sup>39</sup> See Nicole Auerbach & Justin Williams, *What to Know About House v. NCAA Settlement and a Historic Day for College Sports*, N.Y. TIMES: THE ATHLETIC (last updated Oct. 7, 2024), <https://www.nytimes.com/athletic/5517461/2024/05/24/ncaa-lawsuit-house-paying-players/> [<https://perma.cc/4MWZ-NNBJ>]; see also Michael McCann & Daniel Libit, *House v. NCAA Settlement Is Illegal, State NIL Lawmakers Say*, SPORTICO, (Dec. 5, 2024),

lawsuits against the NCAA from former student athletes continue to pour in. Major public figures such as former USC running back and Heisman Trophy winner Reggie Bush<sup>40</sup> and former University of Michigan star receiver Braylon Edwards<sup>41</sup> are among those that have sought legal action against the NCAA in the past few months. In addition, the disparity in NIL protection granted to student athletes depending on a specific state's NIL legislation could create future issues in adjudicating the precise amount individual athletes are owed.<sup>42</sup> It is clear that despite the *House* settlement's approval, a more equitable and administrable solution is required in order to more effectively compensate former athletes and to ease the burden on the NCAA and its member institutions.

### III. ANALYSIS

#### A. *House v. NCAA Settlement*

*House v. NCAA* contains a fact pattern that is fairly typical of recent NIL-based antitrust actions against the NCAA: student athletes had filed a class-action lawsuit against the NCAA based on NCAA rules that “prohibit student-athletes from receiving anything of value in exchange for the commercial use of their name, image, and likeness.”<sup>43</sup> This litigation, which initiated in 2020, recently yielded a settlement which attempts to solve the majority of the NCAA's legal issues relating to the NIL rights of student athletes in one broad stroke.<sup>44</sup> The first major component of the settlement is its proposed framework for revenue sharing in college athletics:

Going forward, the settlement allows the A5 conference member institutions (and other DI schools that choose to participate in the

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<https://www.sportico.com/law/analysis/2024/house-ncaa-settlement-illegal-nil-california-nebraska-oregon-1234819133/> [<https://perma.cc/KH74-UQ2X>].

<sup>40</sup> See Stewart Mandel, *Reggie Bush Sues NCAA Citing NIL 'Injustice' in Bid to Recoup Money From College Career*, N.Y. TIMES: THE ATHLETIC (last updated: Sep. 24, 2024), <https://www.nytimes.com/athletic/5789591/2024/09/23/reggie-bush-lawsuit-ncaa-pac-12-nil/> [<https://perma.cc/6GTC-669W>].

<sup>41</sup> See Angelique S. Chengelis, *Four Former Michigan Football Players File Lawsuit Against Big Ten Network, NCAA*, THE DETROIT NEWS (Sep. 10, 2024, 7:52 PM), <https://www.detroitnews.com/story/sports/college/university-michigan/2024/09/10/four-ex-michigan-wolverines-file-lawsuit-against-big-ten-network-ncaa/75156550007/> [<https://perma.cc/ZTM7-E6LR>].

<sup>42</sup> See Michael H. LeRoy, *Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets*, 2023 U. ILL. REV. 53 (2023).

<sup>43</sup> *House v. NCAA*, 545 F. Supp 3d 804, 808 (N.D. Cal. 2021).

<sup>44</sup> See generally, John Wright, *A New Era: Understanding the Historic NCAA v. House Settlement*, AVE MARIA BUS. LAW INST., (Jan. 28, 2025), [https://www.avemarialaw.edu/house-settlement/#\\_edn1](https://www.avemarialaw.edu/house-settlement/#_edn1) [<https://perma.cc/6HHV-RUQP>].

new structure) to provide increased benefits to student-athletes, including for NIL. If approved by the court, this model will allow schools to provide up to 22% of the average Autonomy 5 athletic media, ticket, and sponsorship revenue to student-athletes, starting in the 2025-26 academic year. The future model could result in student-athletes receiving \$1.5 billion to \$2 billion in new benefits annually.<sup>45</sup>

The settlement also proposes a solution for former NCAA athletes who have not been adequately compensated for the usage of their NIL rights. “The settlement calls for total back damages of approximately \$2.78 billion, to be paid over 10 years, equating to approximately \$280 million annually with distribution of back damages as determined by plaintiffs.”<sup>46</sup>

On the surface, the figures provided by the settlement appear to be a significant sum. The reality, however, is that they represent a compromise that will neither ease the financial burden of the NCAA and its member institutions, nor adequately compensate the full claims of every former NCAA athlete. The first factor to note is that the NCAA will pay the \$2.78 billion over a period of ten years, and that it will mainly do so by reducing the distributions it makes to its member institutions.<sup>47</sup> These reductions will be substantial, resulting in losses of \$160 million worth of distributions annually (more than 20% of the typical total), and the settlement as a whole could cost schools around \$30 million annually.<sup>48</sup> The NCAA itself will still suffer tremendous losses, as it will need to reduce operating expenses by as much as \$18 million annually.<sup>49</sup> Such losses will assuredly impose administrative difficulties for the NCAA and its schools. The \$30 million price tag for member institutions is particularly jarring, considering this figure accounts for around 20% of the average total athletic department operating budget for “Power 4” schools each year.<sup>50</sup> Despite this burden, it

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<sup>45</sup> Michelle Brutlag Hosick, *Settlement Documents Filed in College Athletics Class-Action Lawsuits*, NCAA (Jul. 26, 2024, 5:04 PM), <https://www.ncaa.org/news/2024/7/26/media-center-settlement-documents-filed-in-college-athletics-class-action-lawsuits.aspx> [<https://perma.cc/L9FH-VKHE>].

<sup>46</sup> *Id.*

<sup>47</sup> Ross Dellinger, *Docs: NCAA Could face \$20B in Damages, Bankruptcy if Proposed Settlement Offer isn't Agreed Upon*, YAHOO SPORTS, (May 14, 2024), <https://sports.yahoo.com/docs-ncaa-could-face-20b-in-damages-bankruptcy-if-proposed-settlement-offer-isnt-agreed-upon-232315637.html> [<https://perma.cc/X4A7-E8NU>].

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> “Power Four” refers to the Big Ten Conference, the Southeastern Conference, the Big 12 Conference, and the Atlantic Coast Conference. These conferences generally contain schools with

is clear that former student athletes will not be compensated adequately from this settlement. Estimates of a potential figure for damages were the NCAA to lose in court have reached a staggering \$20 billion, a figure that would likely cause the NCAA to enter bankruptcy.<sup>51</sup> The disparity between the settlement figures and the potential court damages makes it clear that former student athletes cannot realistically be paid what they are truly owed by the NCAA without torpedoing the organization financially. The *House v. NCAA* settlement's compromise would result in former athletes being paid a pittance of what they deserve, while still heavily burdening the NCAA and its member institutions. A different solution is necessary, both in terms of justice for former athletes and financial flexibility for the NCAA.

### *B. Approaches to Mass Compensation*

When an event takes place that leads to an expansive group of harmed people (such as shifting legal standards exposing the lost earning potential of a large group of former athletes), two approaches have historically been used in the United States to address the harm. The first of these is found in the class action lawsuit, where one group of named plaintiffs sues on behalf of a similarly situated class of people. This has been the main approach taken by athletes looking to recover on their NIL rights against the NCAA to this point. Another approach is found in the utilization of a mass compensation fund, where a financial reserve is established to compensate certain individuals without the need for a lawsuit. While each have their general advantages and drawbacks, a compensation fund may represent a more effective solution to the NCAA's NIL problem than the continued employ of class action suits and their progeny (i.e., the *House* settlement and other proposed solutions which put the entire financial responsibility on the NCAA and its member institutions).

#### *1. Class Action Lawsuits*

Pursuant to Federal Rules of Civil Procedure 23(a), “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members” if certain representative qualifications are met to constitute a class action.<sup>52</sup> In theory, the ability to consolidate a great number of claims into one legal proceeding is a boon for both judicial economy and plaintiffs’

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very large athletic departments and financial resources. See *NCAA Finances: Revenue and Expenses by School*, USA TODAY, (Mar. 14, 2024), <https://sportsdata.usatoday.com/ncaa/finances> [<https://perma.cc/L4NX-J443>].

<sup>51</sup> Dellinger, *supra* note 47.

<sup>52</sup> FED. R. CIV. P. 23(a).

ability to receive compensation. Antitrust class actions in particular, however, have endured a long history of criticism and have the potential to lead to injustice for both the plaintiff and the defendant.<sup>53</sup> Because American antitrust laws subject the defendant to treble damages, the potential liability a defendant may be subjected to in a suit with a large number of plaintiffs can be massive.<sup>54</sup> For this reason, it is commonly argued that defendants in antitrust class actions are pressured to settle, regardless of their true liability.<sup>55</sup>

Ironically, the potential for massive payouts to a successful plaintiff class in antitrust actions can also lead to exploitation. Professor John C. Coffee has argued that, as the rules surrounding class actions have evolved, the potential for enterprising counsel to push for settlement agreements that include disproportionately high attorney's fees has managed to persist and, in some cases, expand.<sup>56</sup> This concern has also been echoed by courts on a number of occasions.<sup>57</sup> In addition, typical concerns surrounding class actions relating to the ability of absent class members to truly pursue their own interests remain pertinent in NIL-based antitrust class actions. High-profile former athletes with expansive financial resources have the capability to police their own interest in a class action where they have the economic leverage to initiate their own individual lawsuit, if desired.<sup>58</sup> These athletes, however, do not represent the majority of those involved in many of the suits against the NCAA. In the 2022–23 academic year, there were more than 500,000 active NCAA student athletes participating in

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<sup>53</sup> See David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 86 *FORDHAM L. REV.* 1785, 1801 (2018).

<sup>54</sup> 15 U.S.C. § 15; see also Dellinger, *supra* note 47.

<sup>55</sup> Marcus, *supra* note 53, at 1803.

<sup>56</sup> John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 *CORNELL L. REV.* 851 (1995).

<sup>57</sup> See *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220 (5th Cir. 2008) (overruling a lower court's allocation of attorney's fees to ensure counsel did not disproportionately benefit); see also *In re General Motors Corp. Pick-Up Truck Fuel Tanks Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995) (overturning lower court's ruling that a settlement was reasonable); see also *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir. 1975) (emphasizing the need for heightened scrutiny of the settlement to guard against the potential for collusion).

<sup>58</sup> Even athletes that go on to secure high-paying professional positions can encounter financial issues, thus exacerbating the issue of former athletes' potential to litigate further. See Colin F. Camerer, *Financial Literacy for Professional Athletes*, GLOB. FIN. LITERACY EXCELLENCE CTR. (2015), <https://gflec.org/initiatives/bankruptcy-rates-among-nfl-players-short-lived-income-spikes/> [https://perma.cc/45LH-43MG].

sports with professional leagues.<sup>59</sup> Of this number, less than 2% became professional athletes.<sup>60</sup> As a whole, employment and financial outcomes for NCAA student athletes are not significantly different from those of non-athletes.<sup>61</sup> For former athletes that have not managed to find a stable career in a high paying professional sports league, the prospect of individual litigation to protect their NIL rights can demand more time and resources than it is worth.

## 2. Compensation Funds

Unlike the litigation-based solutions contemplated through class actions, compensation funds are typically enacted by legislatures to provide people with financial assistance in response to certain events where litigation may be impractical.<sup>62</sup> Large scale compensation funds are generally financed through government resources, whether from tax revenue or via special allocation.<sup>63</sup> Compensation funds provide several advantages over class action litigation (and over litigation in general) in situations with high numbers of potential victims and claimants, and are used in a variety of scenarios (including to address harms suffered by workers, cover expenses incurred by crime victims, and to help those affected by environmental disasters).<sup>64</sup> The 9/11 Victim's Compensation Fund (VCF), passed by Congress in response to concerns for those who suffered losses related to the 9/11 terror attacks and to shield the airline industry from crippling liability, provides an example of a successful compensation fund that provided awards at a high rate to eligible

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<sup>59</sup> NCAA Recruiting Facts, NCAA, [https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA\\_RecruitingFactSheet.pdf](https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf) [https://perma.cc/NT9B-74AE] (last visited Nov. 15, 2025).

<sup>60</sup> *Id.*

<sup>61</sup> *Understanding Life Outcomes of Former NCAA Student-Athletes*, THE GALLUP-PURDUE INDEX REP. (2016), [https://ncaaorg.s3.amazonaws.com/research/other/2020/2016RES\\_GallupNCAASStudentAthleteReport.pdf](https://ncaaorg.s3.amazonaws.com/research/other/2020/2016RES_GallupNCAASStudentAthleteReport.pdf) [https://perma.cc/ZLP8-F7ZV].

<sup>62</sup> The most common situations that lead to the establishment of compensation funds include national disasters and workplaces with high injury risk. *See, e.g.*, 9/11 Victim Compensation Fund, Pub. L. No. 107-42, 115 Stat. 230 (2001); *see also The September 11th Victim Compensation Fund: FY 2021 Budget & Performance Plan*, U.S. DEP-T OF JUST. (Feb. 2020), <https://oig.justice.gov/reports/plus/a0401/final.pdf> [https://perma.cc/2HDB-Q4JV].

<sup>63</sup> *See, e.g.* 42 U.S.C. § 7384e (establishing the Energy Employees Occupational Illness Compensation Fund and appropriating \$25,000,000 for the purpose).

<sup>64</sup> *See* MICH. COMP. LAWS § 418.101 (1969) (establishing workers compensation fund); MICH. COMP. LAWS § 780.904 (1989) (establishing crime victims compensation fund); 26 U.S.C. § 9509 (establishing oil spill trust fund).

claimants.<sup>65</sup> Like the NCAA's situation with former student athletes, there was a high number of eligible claimants for the VCF, many of which were owed substantial sums.<sup>66</sup> Despite acceptance of fund money being conditioned on forgoing potential rights in litigation, over 97% of claimants eligible to file death claims with the fund did so.<sup>67</sup> Analysts have reasoned that, among other factors, the VCF provided an attractive alternative to litigation for potential claimants due to its efficiency, minimization of risk, and consistency of award distribution.<sup>68</sup>

### *C. Applicability of a Compensation Fund to NIL Rights*

While the situation of former NCAA student athletes who have been deprived of their NIL rights is not a national tragedy to the scale of the 9/11 attacks, the situations share many circumstances. Both are surrounded by liability concerns for an organization or industry, and both feature an expansive class of victims that may be entitled to significant sums of money. Like with the 9/11 VCF, several factors weigh in favor of the establishment of a compensation fund to resolve NIL based concerns for former athletes rather than litigation.

The looming negative financial effects on the NCAA of the *House* settlement (and certainly of additional unfettered litigation) have the potential to do serious harm to the governance of college athletics.<sup>69</sup> The NCAA plays a crucial role in the maintenance of college sports and in the wellbeing of college athletes. Its bylaws require schools to, among other things, provide medical care, mental health services, and adequate housing and meal plans for student athletes.<sup>70</sup> Additionally, while NCAA financial distributions are important for all institutions, the money is vital for the survival of smaller Division I schools and schools that are classified as DII and DIII. For example, Coppin State (a member of the MEAC conference) only generates around \$4 million in revenue from its athletic department

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<sup>65</sup> See Robert M. Ackerman, *The September 11<sup>th</sup> Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOTIATION L. REV. 135 (2005).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* But see Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW AND SOC'Y REV. 648 (2008) (arguing that forcing potential claimants to forgo litigation deprived them of true justice against wrongdoers and closure, and that many claimants felt they did not have a true choice between litigation and the fund).

<sup>69</sup> See Dellinger, *supra* note 47.

<sup>70</sup> 2024–25 NCAA Division I Manual, *supra* note 20; *id.* art. 16.4.1 (medical coverage); *id.* art. 16.4.2 (mental health services); *id.* art. 16.5.1 (housing and meals).

each year.<sup>71</sup> Division II schools generate even less, with the median revenue at roughly \$1 million per year for schools with football programs, and roughly half for schools without.<sup>72</sup> The reduction in distribution money for schools such as Coppin State could lead to a decrease in what the schools can afford to invest in their athletic departments, which would harm student athletes in the long run. Finally, the NCAA's role in organizing college athletics cannot be overlooked. The Supreme Court recognized in *NCAA v. Board of Regents* that the NCAA offers a unique competitive product in the organization of amateur athletics, acknowledging that “most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”<sup>73</sup>

While any sort of liability that has the potential to interfere with the NCAA's functionality would be an undesirable outcome, former student athletes still deserve to be compensated for the illegal usage of their NIL. Fueled through their student athletes, NCAA Division I schools earn approximately \$8.5 billion in annual revenue.<sup>74</sup> This figure has been steadily increasing—from 2008 to 2018, the combined revenue of Power 4 conferences grew by 260%.<sup>75</sup> The individual value of certain athletes can also be extremely high: University of Texas quarterback Arch Manning has an estimated NIL valuation of \$6.5 million; recent University of Michigan quarterback enrollee Bryce Underwood holds an estimated value of \$2.9 million.<sup>76</sup> While it is difficult to estimate the precise amount that former athletes of similar disposition would have been entitled to, current figures indicate that such athletes likely lost out on millions of dollars. Attempting to reach these figures through litigation sets up both athletes themselves and the NCAA for failure.<sup>77</sup>

A federal compensation fund could solve both the problem of NCAA liability and achieve financial justice for former student athletes. The

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<sup>71</sup> *NCAA Finances*, *supra* note 50.

<sup>72</sup> *Division II Athletics Finances: 10-Year Trends from 2014 to 2023*, NCAA, [https://ncaaorg.s3.amazonaws.com/research/Finances/2024D2RES\\_DII-RevExpReport.pdf](https://ncaaorg.s3.amazonaws.com/research/Finances/2024D2RES_DII-RevExpReport.pdf) [<https://perma.cc/MHS4-YZ3U>].

<sup>73</sup> *NCAA v. Board of Regents*, 468 U.S. 85, 119 (1984)

<sup>74</sup> Craig Garthwaite, et al., *Who Profits From Amateurism? Rent-Sharing in Modern College Sports*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Oct. 2020), [https://www.nber.org/system/files/working\\_papers/w27734/w27734.pdf](https://www.nber.org/system/files/working_papers/w27734/w27734.pdf) [<https://perma.cc/6HM3-5TJJ>].

<sup>75</sup> *Id.*

<sup>76</sup> *On3 NIL Valuations*, ON3 (Mar. 2025), <https://www.on3.com/nil/rankings/player/nil-valuations/> [<https://perma.cc/7L28-V3ZQ>].

<sup>77</sup> *See supra* Section III.A.

widespread and varied usage of compensation funds and evidence of their success indicates that a fund could be effectively implemented.<sup>78</sup> Its funding could also come from multiple sources, depending on its organization—compensation funds established in the United States have drawn on federal funds, state level funds, and contributions from private actors (often those responsible for the harm, such as with the Deepwater Horizon oil spill fund).<sup>79</sup> By designing a fund that utilizes all three levels of contributions, the capital that could be distributed to potential claimants could be significantly increased in a way that minimizes the penalty on taxpayers, the government, and the NCAA.

Additionally, with early NIL legislation varying heavily by state, the passage of an act to establish an NIL compensation fund would present the opportunity for Congress to introduce a uniform federal NIL bill that could garner more political support than previous attempts.<sup>80</sup> In this way, the collegiate NIL crisis could become an opportunity to secure the future of college athletics while simultaneously redressing the harms suffered by former student athletes through a compensation fund.

#### IV. CONCLUSION

With the approval of the *House* settlement, college athletics as a whole are positioned to undergo a massive evolution in the upcoming years. The revenue sharing framework contemplated in the settlement will have wide ranging effects that will doubtlessly lead to their own novel problems and sources for litigation. As the new era of administration in amateur athletics dawns, it is vital that the injustices suffered by the athletes that have helped set the foundation for the future are not forgotten. Whether through a compensation fund or an alternative solution, former student athletes deserve to be compensated in a way that does not unduly prejudice their former institutions.

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<sup>78</sup> See Ackerman, *supra* note 65; see also 42 U.S.C. § 7384e.

<sup>79</sup> See 42 U.S.C. § 7384e; *Deepwater Horizon Oil Spill Settlements: Where the Money Went*, NOAA (last updated Apr. 20, 2017), <https://www.noaa.gov/explainers/deepwater-horizon-oil-spill-settlements-where-money-went> [<https://perma.cc/QBP5-NSJ7>].

<sup>80</sup> See Kristi Dosh, *Comparing the 4 New Federal Proposals for NIL*, BUSINESS OF COLLEGE SPORTS (Jul. 2023) <https://businessofcollegesports.com/name-image-likeness/comparing-the-4-new-federal-proposals-for-nil/> [<https://perma.cc/KG2N-J6J8>]; see also *supra* Section II.E.