

## News

# Collective Strength Through Group NIL Rights: A Potential Win-Win Solution to College Sports Chaos

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To say that college athletics is undergoing a major transformation would be a huge understatement. The landscape of college athletics has been upended following the U.S. Supreme Court's unanimous 2021 decision in the NCAA v. Alston case holding that the NCAA's cap on education-related expenses violated the Sherman Antitrust Act. Since that time, school booster-funded collectives have become an integral part of college athletics. At the same time, the NCAA, major athletic conferences and universities have continued to face multiple other antitrust lawsuits and challenges on many other legal fronts, such as whether student athletes should be entitled to retroactive and prospective compensation for their NIL rights and whether they should be treated as employees of their universities with the right to collectively bargain.

On May 23, the NCAA announced that it and the Power Five athletic conferences had voted to approve the terms of a settlement to resolve three of the antitrust lawsuits (House v. NCAA, Hubbard v. NCAA and Carter v. NCAA; collectively, the "House Settlement"). The House Settlement still awaits final approval by the court, but if approved, it would provide for payments of \$2.8 billion to former Division I student athletes, and for an optional revenue-sharing model between the power conference universities (and other schools opting in) and their student athletes.

The House Settlement does not, however, resolve all of the outstanding issues facing the NCAA, conferences and schools. For example, the NCAA is facing challenges under the National Labor Relations Act and Fair Labor Standards Act regarding whether student athletes should be considered employees of their universities for purposes of collective bargaining. Regardless of whether the House Settlement receives final approval, the NCAA, conferences and schools likely will continue to face significant challenges, including whether and the extent to which:

- Student athletes are employees with the right to collectively bargain;
- School booster-funded collectives can be involved in recruiting and player compensation;
- The NCAA and/or conferences can place restrictions on player transfers; and
- The Title IX restrictions will apply to revenue sharing and NIL-related compensation.

We identify below a potential solution that may resolve many of these issues, and outline how such an approach may be viewed as a “win-win” for many stakeholders.

## **Group NIL rights could facilitate needed representation and rebates to student athletes**

Lost in all of the litigation and chaos described above is the lack of attention that has been paid to date on who will negotiate on behalf of the student athletes in crafting the structure for revenue sharing and NIL compensation. While the transformation of college sports is ongoing, it seems clear now that student athletes should have a representative working solely for their best interests. This could take the form of a tax-exempt association or even, if possible, a union. One key hurdle to the creation of a representative organization truly watching out for student athletes is how to fund operations when many student athletes often have limited financial resources. Similar to professional sports unions, one option could be for student athletes to empower a representative to monetize the use of their NIL rights on a group basis.

To date, most of the discussion around NIL has been focused on the how much an “individual” athlete can receive for his or her NIL rights, including from booster-funded collectives. Left out of the discussion is the largely untapped role that group NIL rights could play in the new collegiate sports ecosystem. Put simply, the collective value of all group NIL rights in a specific conference or sport (e.g., all football players in the Big Ten Conference) in the marketplace is significantly higher than the sum of the individual players’ rights.

Essentially, without affecting a high-profile player’s ability to sign individual NIL deals, group NIL rights could be contributed to a representative organization as dues. Such organization could then negotiate the collective value of these group rights as a whole when delivered to a licensee. When this value is monetized by a representative organization, the royalty income can be received on a tax-advantaged basis and used to fund the operations of the organization working solely on behalf of current and future student athletes.

Importantly, the level of this royalty income is likely to in many cases, if not all, to far exceed what the representative organization needs to operate, and the excess can be returned to student athletes as an equal-share rebate of excess dues (i.e., every athlete gets a rebate). Because the rebate of dues would not come from the NCAA, a conference, or any school, these amounts likely would not be subject to the requirements of Title IX. Instead, a model that uses only the group NIL rights of student athletes could be used to create a self-sustaining royalty engine to fund the representative organization’s operations, while also providing a significant rebate to all student athletes every year.

As discussed in more detail below, depending on the form of the representative organization, there are several additional advantages that could create a potential win-win solution.

## **Collegiate players union could be a win-win solution**

While we do not have a crystal ball, we believe there is a strong likelihood that eventually student athletes in many, if not all, sports will have a representative organization working solely in their best interests. To the extent student athletes in the future are treated as “employees” with the right to collectively bargain, there could be significant advantages to all stakeholders, including the NCAA, conferences and schools, not just the student athletes. Beyond the customary role for a union to negotiate for better working conditions and compensation, handle grievances and secure long-term benefits such as retirement, health, and disability benefits, the student athletes’ formation and use of a collegiate sports union likely would provide a solution to many of the unresolved issues identified above, including:

- Full antitrust protection under the Sherman Act;
- The existence of an organization with which to negotiate on revenue sharing and the role of collectives in recruiting;
- The regulation of payments to student athletes across an entire conference and/or sport;

- Enforceable restrictions on the use of the transfer portal; and
- Ultimately, the reduction of other types of litigation against the NCAA, conferences, and schools on these issues.