

# SPORTS PAY FOR PLAY AND UNIONIZATION

## THE NEW FRONTIERS

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**At one time, college students played collegiate sports for the fun of it, for the scholarship, and as a potential step up to a professional sports career. But in July 2021, a new motivation was offered to college athletes: money.**

Under National Collegiate Athletic Association (NCAA) rules, athletes were prohibited from earning any remuneration from their participation in sports while at the same time, college football and basketball generated billions of dollars in revenue for television networks, corporate sponsors of college sports, and for the universities themselves. In addition, it was not uncommon for college coaches to earn seven-figure salaries. An about-face came as a result of a now-famous Supreme Court case brought against the NCAA, and the rest, as they say, is history. We will examine the ramifications of this landmark Supreme Court ruling and what it means for other player rights, including unionization.

## **Narrow Ruling, Unanimous Decision**

On June 21, 2021, the U.S. Supreme Court issued a narrow yet highly transformative ruling in a case brought by college athletes against the NCAA. In writing the opinion, Justice Gorsuch noted that the NCAA sought to be immune from operational antitrust laws, which was neither justified by those laws nor by prior Supreme Court opinions. Justice Kavanaugh was even more strident in his comments, noting that sports traditions could 'not justify the NCAA's decision to build a massive money-raising enterprise on the backs of student-athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate. The NCAA is not above the law.'

Thus, the door was opened for compensation of college athletes in what has been dubbed the 'pay-for-play' ruling, which ended the NCAA's decades-old restraint of competition practices.

## **What it Means in Practice**

Although the Supreme Court's decision was narrowly worded to address only education-related benefits and not broader compensation issues, the

consensus is that the restrictions on college athletes receiving compensation for the use of their names, images and likenesses (N.I.L.) are so unpopular in most states, that the majority of state legislatures are passing laws banning N.I.L. restrictions. In fact, even prior to the July 2021 decision, California had passed legislation back in 2019 allowing college athletes to earn compensation from endorsements, public appearances, autograph signing, and other similar ventures.

In reacting to the new reality, NCAA President Mark Emmert noted that 'even though the decision does not directly address name, image and likeness, the NCAA remains committed to supporting NIL benefits for student-athletes and that the NCAA 'remained committed to working with Congress to chart a path forward, which is a point the Supreme Court expressly stated in its ruling.'

## **Hurdles Continue to Exist**

At the same time as the states are dealing with the issue, Congress is working to make changes at the federal level to ensure that the pecuniary rights of college athletes are protected. But the process is not as simple as one might think. While the National Labor Relations

## **Executive Summary**

### **> The Issue**

How has the June, 2021 Supreme Court decision in the NCAA case impacted collegiate sports?

### **> The Gravamen**

The decision has upended the traditional NCAA position that, as amateur athletes, college athletes were not entitled to the benefit of anti-trust laws.

### **> The Path Forward**

College athletes are now able to rake in real compensation for their NIL, and more changes are on the way.

Board's (NLRB) general counsel has issued a memorandum saying that she views college athletes as employees of their schools, some lawmakers see that as a rather radical interpretation of the Supreme Court's ruling.

The majority in Congress agree that a federal standard is needed regarding athletes' NIL remuneration, but issues related to the health and safety of athletes as well as their right to organize, are presently obscuring the NIL debate, to the extent that even a broadly supported College Athlete Bill of Rights failed to pass.

### Millions in NIL

But while Congress and the NCAA hash out their differences, college athletes are not waiting for a federal green light and are indeed laughing all the way to the bank. College athletes earned a reported \$917 million during the first year of NIL with the average Division 1 athlete earning \$3,711 via NIL, and some star players scoring six-figure deals. In one well-publicized NIL sponsorship contract, LifeWallet announced an \$800,000 sponsorship deal with University of Miami basketball player Nijel Pack. In defending the decision to ink the deal, LifeWallet CEO John Ruiz stated, "I made a business decision to announce the amount of money that he was going to get under this agreement because I thought it was a great marketing move. Every single household in the U.S. that watches college sports, particularly college basketball, is going to be talking about LifeWallet." Clearly, NIL is a win-win situation for both sponsors and athletes.

### One Step Beyond

Aside from the right to earn NIL compensation, other college athlete rights are being examined. Although for a long-time, sports columnists and others have floated the idea of a labor union for college athletes, the notion was relegated to the status of mere sports fantasy—until the Supreme Court decision gave new life to the idea. If, in fact, the NLRB's proposal that college athletes be recognized as employees of their colleges and universities takes hold, then the right to organize will not be far behind. If a college athletes' union emerged that engaged in collective bargaining with schools, conferences, and the NCAA, the same as an autoworkers' union presses for their members' demands, then at that point, the NCAA's vaunted notion of amateurism would be over, and college athletes would be joining the ranks of professional athletes at least in terms of professional standing.

### A Nascent Union

Fueling the drive for a college athletes' union is a former Minnesota professor, Jason Stahl, who organized the College Football Players Association (CFBPA) and met secretly with Penn State players to sign up union members. The association charges modest membership dues to current and former college football players, and promotes reforms in how college athletes are treated. The main focus of the CFBPA according to Mr. Stahl, is in the three 'demands' for independent medical care enforcement by a CFBPA representative, post football health

### Action

- 1 The Ruling:** While the ruling itself was a narrow one, the true economic impact should be considered by those practitioners representing college athletes.
- 2 Representation in Sponsorships:** A whole new field of marketing the college athlete client has been opened up, one which can reap tremendous benefits for both client and lawyer alike.
- 3 Lobbying Level:** As both Congress and state legislatures grapple with how best to codify the new realities created by the Supreme Court's NCAA decision, lawyer-lobbyists from both sides are presented with novel lobbying opportunities.
- 4 Emerging Field of Labor Law:** The next step in expanding college athletes' rights will likely be in the field of unionization, and it will take skillful labor lawyers to wade through the conundrum of how student status and employee status melds.

protections, and a percentage of media rights revenue for the players.

With so many balls in the air right now in the world of collegiate sports remuneration and unionization, it's hard to say just what goals will be scored, but one thing is clear: a fast break appears imminent.

**"THIS IS A VICTORY FOR STUDENTS. THE SUBSTANTIVE DECISION IN THIS CASE WOULD ALLOW A UNIVERSITY OR CONFERENCE TO PROVIDE BENEFITS THAT CANNOT BE CAPPED BY THE NCAA AS LONG AS THEY ARE TETHERED TO EDUCATION."**

**—OLIVER LUCK, FORMER NCAA OFFICIAL AND FORMER NFL PLAYER**





## Further Reading

1. <https://www.forbes.com/sites/leonardarmato/2022/12/16/pay-for-play-is-alive-in-college-sport-and-its-time-to-realize-that-free-agency-has-arrived/?sh=4847a627638e>
2. <https://www.theassemblync.com/culture/sports/pay-for-college-sports/>
3. <https://www.sportico.com/leagues/college-sports/2023/california-ncaa-pay-for-play-bill-chris-holden-1234706713/>
4. <https://www.aspeninstitute.org/events/future-of-college-sports-governments-role-in-athlete-pay/>
5. <https://www.si.com/college/2022/07/28/college-athlete-unionization-tweet-reveals-difficulties>
6. [https://www.supremecourt.gov/opinions/20pdf/20-512\\_gfbh.pdf](https://www.supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf)





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After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions.

Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.



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William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years' experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.



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