Insight

SCORE Act Would Grant NCAA Antitrust Immunity

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Executive Summary

- The Student Compensation and Opportunity through Rights and Endorsements (SCORE) Act, set for a vote in the House of Representatives the week of December 1, is an attempt to tame the recent chaos that has engulfed collegiate sports after athletes gained the right to monetize their name, image, and likeness (NIL).
- For years, the National Collegiate Athletic Association (NCAA) – the governing body of collegiate athletics – limited athlete compensation to the cost of education; but antitrust litigation, Supreme Court decisions, and state legislation paved the way for athletes to receive NIL compensation.
- The SCORE Act would once again allow the NCAA and other collegiate athletic organizations to limit student athlete compensation by preempting state law and granting broad antitrust immunity, leaving athletes with little legal recourse to challenge rules or collusion that suppress their earnings.

Introduction

The Student Compensation and Opportunity through Rights and Endorsements (SCORE) Act, set for a vote in the House of Representatives the week of December 1, is an attempt to tame the recent chaos that has engulfed collegiate sports after athletes gained the right to monetize their name, image, and likeness (NIL).

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The SCORE Act would once again give the NCAA and other collegiate athletic organizations the ability to limit student athlete compensation by preempting state law and granting broad antitrust immunity. This would leave athletes with little legal recourse to challenge rules or collusion that suppress their earnings.

Previous NCAA Litigation

As the acronym suggests, NIL are attributes of an individual, and they often have commercial value, especially among college athletes. The University of Texas quarterback Arch Manning, for example, has reportedly signed contracts worth an estimated $6.8 million.

Historically, the NCAA – the nonprofit governing body of college athletics comprised of nearly 1,100 college and universities and 102 athletic conferences that oversees rules, eligibility, and competition for member institutions – restricted the compensation of college athletes to the "cost of attendance."

A group of current and former athletes filed an antitrust lawsuit challenging these compensation restrictions. This led to the Supreme Court's 2021 ruling in *NCAA v. Alston* that held the NCAA compensation rules violated Section 1 of the Sherman Act, which prohibits contracts or conspiracies in restraint of trade. While this ruling narrowly focused on a subset of NCAA rules restricting education-related compensation, it ushered in an NIL tidal wave.

In the immediate wake of the *Alston* decision, the NCAA acted to allow college athletes to retain their eligibility while monetizing their NIL rights. This decision was not voluntary, but came in response to 27 states that had enacted legislation prohibiting universities from denying the athletes this right. Currently, 32 states have passed NIL legislation, largely modeled on California's "Fair Pay to Play Act."

More recently, the U.S. District Court for the Northern District of California approved a settlement in the *House v. NCAA* class action lawsuit allowing former college athletes who did not have the opportunity to profit from NIL to collect damages. The NCAA and five other defendants – the Southeastern Conference, Big Ten, Atlantic Coast Conference, Big 12, and Pac-12 conferences – were ordered to pay almost $2.8 billion in back damages. They were also required to permit Division I schools to pay their athletes up to $20.5 million from athletic revenues, increasing incrementally over the 10-year settlement period. The College Sports Commission, formed by the five conferences, will implement the settlement.

SCORE Act

At its core, the SCORE Act creates a unified framework for NIL rights for student athletes by outlining deal structures and payments while preempting existing state laws. The legislation also details the role of interstate intercollegiate athletic associations – such as the NCAA, conferences, and the College Sports Commission – in establishing compensation, competition, and eligibility-related rules. The legislation also includes a host of other labor provisions, including a ban on college athletes from being classified as employees.

Section 9 of the SCORE Act, however, would reverse the recent changes that have allowed student athletes to earn compensation based on their NIL. This section of the SCORE Act would make "compliance" with the rules immune from federal antitrust laws. Yet it was antitrust litigation that made NIL possible. In other words, the SCORE Act would reestablish the NCAA's power to restrict athlete earnings.

In his concurring opinion in *Alston,* Justice Brett Kavanaugh noted that while the ruling involved a "narrow subset of the NCAA's compensation rules…those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports." Justice Kavanaugh added that "The NCAA's business model would be flatly illegal in almost any other industry in America," and that "Nowhere else in America can businesses get away with agreeing to not pay their workers a fair market rate… the NCAA is not above the law."

If the SCORE Act in its current form becomes law, the NCAA and its members – including individual colleges, universities and athletic conferences – can be expected to collude to restrict the NIL earnings of athletes. The antitrust exemption – despite Justice Kavanaugh's skepticism over the legality of other NCAA compensation rules – would put them beyond the reach of antitrust law.

Conclusion

The SCORE Act currently advancing through the House of Representatives is an attempt to tame the NIL-related Wild West that has taken over collegiate sports.

Yet just as college athletes gained the right to profit from NIL deals, the SCORE Act threatens to undermine this ability by preempting state law and granting the NCAA a broad exemption from antitrust law.

Shielding the NCAA from antitrust law would leave athletes with little recourse to challenge rules or collusion to cap their earnings.