**NIL in the NCAA: Using A Special Master to Resolve Class Actions**

**By: Daniella Infantino**

Arch Manning, a college football player at the University of Texas who is unlikely to get much playing time this coming year but who is the nephew of two NFL football players, has joined an Name Image and Likeness (“NIL”) deal that will allow him to make $2,900,000.00.[[1]](#footnote-1) Meanwhile, professional NFL players such as Joe Burrow, the Cincinnati Bengals quarterback who has played four seasons in the NFL, is anticipated to make a base salary of just over $1,000,000.00 this season.[[2]](#footnote-2) This can be attributed to the 2021 Supreme Court decision which reshaped the landscape for college athletes all over the world, preventing the NCAA from restricting “compensation and benefits related to education.”[[3]](#footnote-3) In other words, college athletes now have the ability to receive financial compensation for their NIL.

For decades, the National Collegiate Athletic Association (NCAA) has been the governing body overseeing collegiate sports in the United States, championing the principles of amateurism and fair competition.[[4]](#footnote-4) In simple terms, amateurism is the idea that athletes should not receive financial compensation for their athletic abilities or fame beyond scholarships and the cost of attendance at the athlete’s respective institutions.[[5]](#footnote-5) Moreover, under these principles, student-athletes have historically been barred from capitalizing on their own NIL.[[6]](#footnote-6) This means that college athletes have not been able to earn compensation from endorsements, sponsorships, or the use of their NIL even as their performances generated significant revenue for their respective universities and the NCAA itself.

However, the status quo began to change in recent years, spurred by various factors.[[7]](#footnote-7) Legal challenges, public opinion shifts, and a recognition of the changing landscape of sports marketing prompted a reevaluation of the NCAA's longstanding rules.[[8]](#footnote-8) The NCAA’s suspension of its previous NIL policies prohibiting college athletes from financially compensating off of their NIL has sparked significant controversy, with many saying that college athletes should not have the ability to profit off of their NIL for numerous reasons.[[9]](#footnote-9)  It is crucial that an Alternative Dispute Resolution (ADR) system is developed to resolve current controversies such as the Class Action which is currently confronting the NCAA, and to avoid future NIL controversies that may arise in the near future.

This paper aims to provide a comprehensive analysis of the issues surrounding NIL rights and the NCAA, to deal with present class action litigation against the NCAA that was filed by a group of present and former NCAA athletes in 2021. This paper will then focus on Special Master Kenneth Feinberg’s mediation in the September 11th Victim Compensation Fund to construct an ADR method for this dispute. Part I of this paper provides a general overview of NIL, and Part II discusses the landmark Supreme Court decision which shaped the NIL landscape. Part III will elaborate on a class action lawsuit that has been initiated against the NCAA. In Part IV, the paper considers an ADR mechanism aimed at addressing the ongoing NCAA lawsuit, inspired by the negotiation tactics employed by Special Master Kenneth Feinberg. Part V further examines the initial aspect of the ADR approach, focusing on the functions of Special Masters in settlement processes, and transitions into a review of Kenneth Feinberg’s effective strategies post-September 11th. Part VI advocates for the establishment of a federal NIL statute as a preventive measure against prospective legal challenges. Lastly, Part VII offers a brief conclusion highlighting the importance of implementing a process to ensure dispute prevention and avoid future litigation in this area.

1. Name, Image, Likeness Overview

In the ever-evolving landscape of college athletics, the intersection of amateurism and the rights of student-athletes has emerged as a contentious and pivotal battleground.[[10]](#footnote-10) Central to this debate is the concept of NIL rights, which have ignited discussions, legal challenges, and transformative changes within the NCAA and collegiate sports as a whole. NIL policies create opportunities for student-athletes to financially benefit from their NIL through various endorsement deals and sponsorships.[[11]](#footnote-11) This encompasses a wide range of promotional activities, including autograph signings, product endorsements, and social media promotions.[[12]](#footnote-12) In essence, NIL rules allow student-athletes to use their NIL to enter into partnerships with brands and secure deals akin to those entered into by professional athletes with major companies like Adidas, Nike, or Puma.[[13]](#footnote-13) It is essential to understand that while these policies enable athletes to profit from their NIL, direct payment for their on-field performance (also known as “pay-for-play”) and direct payment to induce athletes to join a particular school (also known as “recruiting inducement”) is prohibited, as the NCAA maintains its commitment to preserving the amateur sports status of its athletes.[[14]](#footnote-14)

 Commercialism has always been intertwined with college athletics, and there has been a continuing tension between the commercial aspect of the industry alongside the amateurism promoted within the industry.[[15]](#footnote-15) For that reason, the NCAA was created in 1906 to preserve the notion of amateurism.[[16]](#footnote-16) The NCAA operates primarily as a trade association with an emphasis on enhancing its own profits in relation to college athletics.[[17]](#footnote-17) Under amateurism, student-athletes are prohibited from (1) having written or verbal agreements with agents and (2) receiving financial compensation for their athletic performance.[[18]](#footnote-18) Amateurism only permits student-athletes to receive scholarships and grants that are approved by the NCAA.[[19]](#footnote-19) The NCAA has been historically adamant about preserving amateurism among college athletics because of its notion that amateurism would help promote fair competition and preserve an academic environment in which obtaining an education is the top priority.[[20]](#footnote-20) However, as states have passed legislation granting student-athletes opportunities to profit off their NIL, the NCAA has been forced to re-evaluate its past policies to avoid extensive litigation.[[21]](#footnote-21)

1. The Tumultuous Road to NIL Rights for Student-Athletes

The journey towards securing NIL rights for student-athletes has been extensive and fraught with challenges. Grasping the current landscape of NIL rights requires a retrospective examination of the pivotal legal battles and legislative developments that have shaped the current framework.

The initiation of NIL rights for collegiate athletes was propelled by the landmark case *O’Bannon v. NCAA*.[[22]](#footnote-22) In *O’Bannon*, the Ninth Circuit Court of Appeals considered allegations that the NCAA had breached the Sherman Antitrust Act.[[23]](#footnote-23) UCLA basketball player Ed O’Bannon sued the NCAA, on behalf of himself and other former Division I athletes, claiming that the NCAA violated United States antitrust laws by prohibiting athletes from obtaining a share of the revenues generated from the use of their image in broadcasts and videogames.[[24]](#footnote-24) O’Bannon argued that (1) that he was entitled to financial compensation for the use of his NIL upon graduation, and (2) that the NCAA should not be allowed to restrict student athletes from receiving additional scholarship opportunities to potentially cover the cost of university attendance if the NCAA did not allow student-athletes to profit off of their NIL.[[25]](#footnote-25)

In *O’Bannon,* the NCAA contended that education was the primary reason for preventing students from profiting off their NIL.[[26]](#footnote-26) According to the NCAA, student-athletes’ participation in athletics is not the primary purpose for attending college, and comes secondary to any educational responsibilities.[[27]](#footnote-27) As such, the NCAA argued that the pursuit of NIL deals would distract student-athletes from their educational endeavors.[[28]](#footnote-28) Moreover, the NCAA alleged that its policies were not subject to antitrust law because the policies were “mere eligibility rules, which do not regulate commercial activity.”[[29]](#footnote-29)

The Ninth Circuit rejected the NCAA’s argument, holding that the Commerce Clause is broad enough to cover a transaction involving a student-athlete and NIL rights because both parties in the exchange anticipate economic gain.[[30]](#footnote-30) The Court held that the NCAA rules were within the ambit of the Sherman Antitrust Act and that raising the maximum possible scholarship aid to the full cost of attendance did not interfere with the NCAA’s efforts to preserve amateurism and academic integrity.[[31]](#footnote-31) However, because the protection of amateurism is at the heart of the NCAA’s policies, the Court avoided ruling on the NIL issue specifically without substantial evidence demonstrating how NIL payments to student-athletes would affect amateur status under the NCAA jurisdiction.[[32]](#footnote-32) Nonetheless, *O’Bannon* was still a step in the right direction for the attainment of additional NIL rights for athletes. The NCAA was ordered to pay $44.4 million in attorneys’ fees and an additional $1.5 million in costs to lawyers for the Plaintiffs, and the NCAA was now under close surveillance to ensure compliance with the Sherman Antitrust Act.[[33]](#footnote-33)

In response to the outcome of *O’Bannon*, many states began affording student athletes additional NIL rights. For example, in 2019, California enacted its Fair Pay to Play Act allowing college athletes to profit off of their NIL, which led other states to follow suit in order to ensure that prospective athletes did not flock to California where they could be compensated.[[34]](#footnote-34) States like Florida followed suit, passing a law granting NIL rights to student-athletes as early as June 2020.[[35]](#footnote-35) These laws began to challenge the restrictive NIL policies that the NCAA has long had in place, justified by the NCAA’s assertions that student-athletes’ amateur status prevent them from participating in the free market.[[36]](#footnote-36) The NCAA has long contended that “its actions should be given deference in its attempt to maintain a tradition of amateurism, fair competition, and successful integration of college athletics and academics.”[[37]](#footnote-37)

As states progressively continued taking steps to give athletes additional opportunities to be compensated for their NIL, the NCAA was eventually forced to reevaluate its stance on NIL.[[38]](#footnote-38) The NIL issue which the Court refused to address in *O’Bannon* was again thrust into the spotlight in *NCAA v. Alston*, where the Supreme Court took the opportunity to alter the landscape of NIL within the NCAA.[[39]](#footnote-39) In *Alston*, the Plaintiffs challenged the NCAA’s rules limiting education-related benefits as violating antitrust law.[[40]](#footnote-40) The Plaintiffs alleged that the NCAA's restriction on education-related benefits violated the Sherman Antitrust Act, which outlaws monopolistic business practices.[[41]](#footnote-41)

The Court began by establishing that this case justified heightened scrutiny because of the significant restraint on the college athletics market.[[42]](#footnote-42) Thereafter, the Court stated that the defenses of amateurism and fair competition through financial restriction and market restraint are not adequately justified actions that shield the NCAA from antitrust principles under the heightened scrutiny standard which has been established.[[43]](#footnote-43) The Court reasoned that the NCAA’s restriction on student-athlete compensation does not have a sufficient connection to fair competition and academic success.[[44]](#footnote-44) Thus, the Court concluded that, even though the NCAA has substantial latitude in its maintenance of fair competition, its actions are not protected from federal antitrust scrutiny.[[45]](#footnote-45) It is therefore considered a violation of federal antitrust law for the NCAA to prevent schools from providing education-related benefits.[[46]](#footnote-46) The Court grounded its decision in existing and pending state laws giving student-athletes the ability to receive financial compensation off their NIL.[[47]](#footnote-47)

Although the provision of NIL rights are not specifically considered “education-related benefits” for the sake of the outcome of *Alston*, the concurrence in *Alston* written by Kavanaugh suggests that any NCAA restrictions on compensation provisions related to sports participation may trigger antitrust concerns.[[48]](#footnote-48) As such, the NCAA has backed down from its stance of altogether restricting student-athlete academic compensation in efforts to retain the students’ amateur status.[[49]](#footnote-49) While *Alston* did not specifically rule on the permissibility of NIL opportunities, it established a tightened legal framework to further protect student-athletes and declare certain NIL restrictions unlawful if such a case were to go to court.[[50]](#footnote-50)

In efforts to avoid potential future litigation, the NCAA reversed course and adopted a uniform interim policy on June 30, 2021 suspending its previous NIL prohibitions for all incoming and current student-athletes.[[51]](#footnote-51) The interim policy establishes that athletes can engage in NIL activities that are consistent with the law of the state where the school is located.[[52]](#footnote-52) However, the payments cannot come from the schools themselves, and the NCAA’s restrictions against pay-for-play[[53]](#footnote-53) and recruiting inducements still stand.[[54]](#footnote-54) If the state where the school is located does not contain a specific NIL provision, athletes must abide by the NIL rules as permitted by the NCAA.[[55]](#footnote-55) Moreover, the interim policy suggests that schools in other states should set their own guidelines with minimal restrictions. The NCAA stated that the interim policy shall remain in effect under a federal NIL law or new NCAA rules are adopted to replace it.[[56]](#footnote-56)

1. Class Action Lawsuit Against NCAA

Despite the NCAA’s efforts to avoid litigation, the NCAA is now being faced with a class-action lawsuit, known as *In Re College Athlete NIL Litigation*. *In Re College Athlete NIL Litigation* is a class action lawsuit facing the NCAA accusing it of violating antitrust law by restricting NIL activities and preventing conferences from compensating players for the utilization of their NIL in broadcasting.[[57]](#footnote-57) The lawsuit is being brought by Arizona State swimmer Grant House, TCU basketball player Sedona Prince, and Illinois football player Tymir Oliver, on behalf of themselves and all other athletes similarly situated, which includes football and men’s and women’s basketball players who play, or have played, at a Power Five (Division I) conference school from June 15, 2016 through 2021.[[58]](#footnote-58)

According to recent developments in the class action, this lawsuit could include nearly 6,300 football and men’s basketball players, 850 women’s basketball players, and 7,400 athletes engaged in other Division I sports at Power Five conference schools.[[59]](#footnote-59) In addition, a class of individuals comprised of Division I Power Five men’s football, men’s basketball, and women’s basketball players are also seeking damages for currently being denied a share of broadcasting revenue (BNIL).[[60]](#footnote-60)

The student-athletes in this litigation seek injunctive relief, among other remedies, to permanently repeal every NCAA regulation of NIL activities still in existence.[[61]](#footnote-61) In addition, the student-athletes also seek to hold the NCAA financially accountable for refusing to allow student-athletes to profit from their NIL in the past.[[62]](#footnote-62) As mentioned previously, the NCAA continues to impose restrictions on pay-for-play and recruiting inducements. This lawsuit would effectively remove both of these restrictions by abolishing the NCAA’s rules prohibiting NIL compensation from being “contingent on athletic participation, performance, or enrollment at a particular school.”[[63]](#footnote-63) In addition, the class action lawsuit highlights the fact that, while the NCAA has suspended its NIL rules for the time being, none of the NIL rules have actually been repealed. The lawsuit seeks to fully repeal the policies which the NCAA has suspended.[[64]](#footnote-64)

Moreover, the Plaintiffs in the current class action lawsuit are seeking retroactive compensation for the NCAA’s failure to compensate eligible Division I athletes from 2016-2021. The Plaintiffs in *In Re College Athlete NIL Litigation* recently gained class certification for the lawsuit, allowing them to represent a larger class of individuals[[65]](#footnote-65), and are prepared to bring their case against the NCAA that could reach upward of $1.4 billion.[[66]](#footnote-66) To make matters worse for the NCAA, since this is an antitrust action, the damages could be trebled, meaning that the damages could reach upward of $4 billion.[[67]](#footnote-67) Nonetheless, the NCAA has emphasized that it plans to stay firm in its stance that NIL payments to college athletes should not be used as recruitment leverage or pay-for-play.[[68]](#footnote-68)

1. ADR Resolution for Handling NIL Class Action

Choosing to employ an ADR process for managing the NCAA class action lawsuit is a sensible decision, as it offers a range of benefits when contrasted with the conventional litigation path. While ADR may not entirely resolve all facets of the ongoing lawsuit, it can significantly mitigate some of the downsides associated with litigation.

One of the major drawbacks of litigation in the context of the NCAA class action lawsuit is its protracted nature.[[69]](#footnote-69) Lawsuits can drag on for years, consuming substantial time and resources, both for the plaintiffs and the defendants.[[70]](#footnote-70) In contrast, ADR mechanisms often result in quicker resolutions, thereby reducing the burden on all parties involved.[[71]](#footnote-71) This expeditious process can also minimize the emotional toll and stress that protracted litigation can exert on participants. Moreover, ADR processes generally allow for more flexibility and customization.[[72]](#footnote-72) Parties can tailor the resolution mechanism to their specific needs and concerns, fostering a sense of ownership and control over the outcome. This level of control is often lacking in litigation, where decisions are made by judges and juries.

Litigation is also notoriously expensive. Legal fees, court costs, and related expenses can be financially crippling for both plaintiffs and defendants.[[73]](#footnote-73) ADR processes, although not entirely cost-free, are typically more cost-effective and efficient, making justice more accessible.[[74]](#footnote-74) Furthermore, ADR can foster collaborative solutions that aim for a win-win scenario. In contrast, litigation tends to be adversarial, where parties compete to prove their case.[[75]](#footnote-75) The collaborative approach of ADR can promote better long-term relationships and reduce the risk of future class action lawsuits.

This paper outlines an ADR approach designed to adeptly manage the complexities presented by the NCAA Class Action litigation. It advocates specifically for the introduction of a Special Master—an expert brought in to ensure judicious oversight.[[76]](#footnote-76) Furthermore, this paper recommends a comprehensive and enduring resolution by endorsing the creation of national NIL law, aimed at preventing similar conflicts in the years to come. By addressing both the immediate and underlying issues, the strategy looks to resolve the current legal challenges while setting a precedent that could reduce the occurrence of such litigation down the line. To fully appreciate the significance and potential impact of such a strategy, one must first be acquainted with the role and responsibilities of a Special Master within the legal context, particularly in relation to the ongoing class action lawsuit against the NCAA.

1. Implementation of a Special Master

This paper first proposes the implementation of a Special Master to aid in the resolution of the NCAA Class Action lawsuit. A Special Master is a judicially appointed expert who aids the court in resolving a complex matter, with or without the consent of the parties involved.[[77]](#footnote-77) A Special Master functions similarly to an administrative agency, carrying out the tasks designated to them by a court with the flexibility, expertise, investigative authority, and time, which the court may otherwise lack.[[78]](#footnote-78) There are numerous legal sources that give federal judges the authority to appoint a Special Master to assist in complex matters.[[79]](#footnote-79) The role of a Special Master is explicitly recognized in Rule 53 of the Federal Rules of Civil Procedure.[[80]](#footnote-80) Specifically, Rule 53 provides a broad framework for federal judges to appoint Special Masters in situations where particular matters cannot be effectively handled by a judge or by an available magistrate judge due to time constraints, a lack of judicial resources, a lack of expertise, or some combination thereof.[[81]](#footnote-81) A magistrate judge works within the federal court system alongside other judicial officers or on their own to prepare cases for trial or increase the likelihood of settlement.[[82]](#footnote-82)

Before making an appointment of a Special Master, Rule 53 requires that all parties are provided with notice and an opportunity to be heard, as well as an opportunity to suggest potential qualified candidates to serve as the Special Master.[[83]](#footnote-83) Other sources of legal authority that give judges the power to appoint Special Masters includes the consent of the parties[[84]](#footnote-84) and the court’s inherent powers.[[85]](#footnote-85)

Special Masters are particularly useful to courts because they provide innovative solutions to complex issues by tailoring their proposal based on the unique factors of individual cases, rather than implementing a “one-size-fits-all” solution.[[86]](#footnote-86) Since many judges do not have the requisite knowledge needed to resolve or confront complex issues, the appointment of a Special Master can serve as a tool to increase both the efficiency and effectiveness of the process. Importantly, the court reserves ultimate decision-making authority, having the ability to review any order or recommendation issued by the appointed Special Master.[[87]](#footnote-87) As such, the role as a Special Master can be seen as an effective ADR solution that supplements, but does not supplant, judicial authority.[[88]](#footnote-88)

Numerous state courts have adopted their own versions of Rule 53, with some closely mirroring the federal rule.[[89]](#footnote-89) Since state courts do not enjoy the benefit of Magistrate Judges like the federal courts do, these state rules can prove particularly useful by giving state courts the ability to fill this gap with Special Masters.[[90]](#footnote-90) Moreover, in 2019, the American Bar Association adopted Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation.[[91]](#footnote-91) These guidelines detail the functions which Special Masters may perform, while also advising courts as to effective approaches which they should take in appointing Special Masters for complex cases.[[92]](#footnote-92) These newly implemented guidelines have altered the landscape for Special Masters within the judicial field, now being seen as a retroactive tool to prevent complex issues from worsening, rather than a proactive remedy when situations have already deteriorated.[[93]](#footnote-93)

Having examined the role of a Special Master and the specific functions they tend to perform within the legal context, it is helpful to analyze a noteworthy exemplar in this area. Kenneth Feinberg stands out as a paradigm of success in the role of a Special Master, particularly for his administration of the Victim Compensation Fund after the September 11th attack. Feinberg's achievements in this capacity demonstrate how a Special Master's expertise and approach can significantly influence the outcome of complex cases, providing crucial insights that are particularly relevant when considering the potential impact of a Special Master in the NCAA Class Action lawsuit.

* 1. Exceptional Special Master Kenneth Feinberg – Victim Compensation Fund

Kenneth Feinberg is a prominent attorney and mediator who has gained recognition for his role as a Special Master in developing the regulations governing the administration of the Victim Compensation Fund in the aftermath of the September 11th attacks on the Twin Towers.[[94]](#footnote-94) Kenneth Feinberg played a significant role in mediating the compensation fund for victims of the September 11th terrorist attacks in the United States.[[95]](#footnote-95) In the aftermath of the September 11th attacks, the U.S. Congress established the September 11th Victim Compensation Fund to provide financial assistance to individuals and families who suffered losses because of the attacks.[[96]](#footnote-96) Feinberg had been teaching a law school class on mediation class-action lawsuits on the morning of September 11th and was thereafter tasked by Congress with the immense responsibility of assigning a monetary value to the thousands of lives lost in the attack.[[97]](#footnote-97) Feinberg was subsequently appointed as the Special Master of the Victim Compensation Fund, a role in which he served pro bono.[[98]](#footnote-98) Feinberg largely contributed to the successful administration of the fund which effectively compensated 97% of the families of the deceased victims who might have otherwise pursued lawsuits for years to come.[[99]](#footnote-99)

This paper will next explore the factors that led to the effectiveness of Feinberg’s Victim Compensation Fund, shedding light on elements that may also contribute to a successful outcome for the Special Master in the NCAA Class Action lawsuit. These factors encompass the following: fairness and equity, transparency, urgency, Best Alternative to a Negotiated Agreement (BATNA), and flexibility.

To begin, Feinberg is known for his commitment to ensuring fairness and equity in the distribution of compensation funds.[[100]](#footnote-100) He seeks to treat all victims or claimants consistently, regardless of their background and considers the unique circumstances of each case.[[101]](#footnote-101) As a matter of fairness, Feinberg developed a compensation formula wherein most of the funds were not paid to the highest-income earners, including wealthy brokerage firms.[[102]](#footnote-102) However, Feinberg also ensured that he did not strictly stick to a strict formula, as the circumstances required empathy and consideration based on the circumstances as well.[[103]](#footnote-103) Furthermore, when reflecting on Feinberg’s management of the Victim Compensation Fund, he stressed the importance of “offering due process, giving claimants the opportunity to be heard, making himself available, and reaching out to people.”[[104]](#footnote-104) The fund offered in-person informal meetings and hearings so that claimants could explain the magnitude of their loss and their perspective regarding how the Fund should treat the situation.[[105]](#footnote-105)

In addition, Feinberg placed a strong emphasis on transparency throughout the compensation process.[[106]](#footnote-106) He believes in clear and open communication with victims and their families, explaining the criteria and procedures involved in the fund, even when this clear formula upset the families involved.[[107]](#footnote-107) The Fund took significant steps to ensure that families could obtain detailed information about their likely recovery from the Victim Compensation Fund.[[108]](#footnote-108)

Feinberg also understood the urgency of providing financial relief to victims, especially in cases of natural disasters, mass shootings, or other tragedies.[[109]](#footnote-109) His thought process includes streamlining the application and disbursement processes to ensure timely assistance.[[110]](#footnote-110) In fact, Feinberg ensured that the Victim Compensation Fund was fully administered within a 33-month period which is an extremely speedy turnaround time under Feinberg’s circumstances.[[111]](#footnote-111) The speediness with which Feinberg was able to administer the Fund helped provide the victims’ families with a sense of closure that would not have necessarily been available due to the uncertainty and delay of litigation.[[112]](#footnote-112)

Importantly, Feinberg utilized the concept of BATNA effectively in his role as the Special Master of the September 11th Victim Compensation Fund.[[113]](#footnote-113) He established a fair compensation framework that essentially served as the BATNA in the compensation process.[[114]](#footnote-114) It was a foundation for negotiations, offering claimants a predictable and fair alternative to litigation.[[115]](#footnote-115) Recognizing that victims and their families had the option to pursue litigation, Feinberg structured the compensation process to provide a more attractive alternative.[[116]](#footnote-116) The Victim Compensation Fund offered expedient outcomes, avoiding the uncertainties and potential delays associated with legal battles.[[117]](#footnote-117) Through transparent communication, Feinberg made sure claimants understood the methodology and fairness of the compensation framework, enhancing its attractiveness.[[118]](#footnote-118)

Moreover, Feinberg remained flexible, recognizing that each compensation fund is unique, and his thought process is adaptable to the specific circumstances of each case.[[119]](#footnote-119) Feinberg adjusted the fund's criteria and procedures to best serve the needs of the victims and their families.[[120]](#footnote-120) As mentioned previously, Feinberg developed a formula for distributing funds to various families, but he also ensured that he took consideration of the specific circumstances with which he was dealing.[[121]](#footnote-121) Feinberg met with different families to hear their stories day after day and developed a willingness to adjust the compensation beyond the formula which had initially been created.[[122]](#footnote-122)This approach drastically improved the appeal of the Victim Compensation Fund as an alternative to litigation.

By offering a streamlined process and quick disbursement of funds, Feinberg facilitated swift resolutions, making the Victim Compensation Fund a preferred BATNA for many victims and families looking to avoid the legal complexities, costs, and extended timelines associated with lawsuits.[[123]](#footnote-123) Feinberg's strategic use of BATNA played a pivotal role in providing efficient and fair compensation to the September 11th victims and their families.Lastly, in cases where there may be limited funds available, Feinberg balanced the interests of all claimants and stakeholders to ensure an equitable distribution of compensation.[[124]](#footnote-124) While there were no caps on the available compensation under the Victim Compensation Fund, unlimited funding is not typical.[[125]](#footnote-125) Feinberg emphasized the importance of making critical yet tough decisions as to who is eligible and how to effectively distribute available resources in scenarios where there is limited funding.[[126]](#footnote-126)

* 1. Application of Special Masters to NCAA Class Action Lawsuit

Appointing a Special Master for the resolution of the NCAA Class Action Lawsuit offers a promising and expedient alternative to protracted court proceedings, potentially yielding an innovative resolution to the issues presented. It is essential to draw from the experiences of effective Special Masters, such as Kenneth Feinberg, to guide the appointment and actions of a Special Master in this matter to ensure a successful outcome.

To target the issue of retroactive compensation which the present class action seeks, a Special Master could potentially create a de facto compensation trust fund to compensate the individuals involved in the class action lawsuit in a fair and equitable way.[[127]](#footnote-127) A de facto trust compensation trust fund is essentially an informal trust arrangement created to manage and distribute compensation to a group of individuals.[[128]](#footnote-128) Unlike a formal trust, which is governed through strict legal procedures and is subject to comprehensive regulation and oversight, a de facto trust would function without the rigid formalities and legal constructs typically associated with such trusts.[[129]](#footnote-129) This informal trust arrangement would serve the practical role of managing and disbursing funds, similar to a formal trust, yet it would do so outside the bounds of formal trust law requirements.

In establishing a de facto compensation trust fund, numerous factors would need to be considered to ensure its actualization. To begin, a Special Master would likely have to determine where the compensation for the fund will come from in the first place. The NCAA would need to secure funding for the trust fund, either by allocating existing funds or sourcing additional funds, potentially through revenue sharing from broadcast rights, sponsorships, or other income streams. The Special Master would assist in ensuring that the trust fund would serve as a BATNA, providing a preferable option to litigation with a predictable and equitable compensation framework.[[130]](#footnote-130)

In addition, to facilitate eligible individuals joining the class action and accessing the compensation provided through the fund, a multi-step process should be implemented. All potentially eligible individuals could be notified through a comprehensive outreach campaign utilizing direct communication and widespread public announcements through the NCAA’s platforms. In doing so, it will be imperative to establish clear guidelines as to which athletes are eligible for compensation through the trust fund. It will also be crucial for a Special Master to determine the method of distribution of the money within the trust fund. A Special Master could ensure that an accessible registration system is established for claim submissions, establishing a robust verification process wherein athletes can confirm their eligibility based on participation in NCAA Division I sports during the 2016 through 2021-time frame.[[131]](#footnote-131) A panel or the designated Special Master would then review the verified claims to determine the compensation distribution. An appeals mechanism would be in place for any disputes over eligibility or the compensation awarded. Following approval, a structured and efficient disbursement system would ensure timely fund allocation to the rightful claimants.

Flexibility in the administration of the fund would be paramount, adapting to the unique nuances of each claim.[[132]](#footnote-132) As advised by Special Master Feinberg, it is crucial to make critical yet difficult decisions regarding who is eligible for the fund and how to effectively distribute the limited resources available within the fund.[[133]](#footnote-133) Unlike Feinberg, who did not have a cap on the funding available within the Victim Compensation Fund, the NCAA’s funding will likely be limited to the amount of revenue that it can acquire, either through its existing funds or through the sourcing of additional external funds.[[134]](#footnote-134) This trust fund, built on these principles, would aim to deliver not only financial compensation but also a sense of closure and justice to the athletes involved.

To effectively create what would function as a compensation trust fund, it is essential to form a governing entity tasked with supervising the allocation of funds and enforcing adherence to the established procedures. It would be necessary for a Special Master to implement a framework that ensures the entire process is transparent, equitable, and in strict conformity with the criteria for eligibility and distribution. This would be in line with the methodology employed by Kenneth Feinberg when administering the Victim Compensation Fund post-September 11th.[[135]](#footnote-135) In addition, by emphasizing transparency, the Special Master would ensure that the NCAA provides clear communication about the fund's operations and compensation mechanisms, thus providing athletes with comprehensive understanding and setting clear expectations.[[136]](#footnote-136)

1. Proposed Systemic Change ­– The Implementation of a Federal NIL Law

To mitigate the potential for future legal challenges similar to those currently faced by the NCAA, this paper suggests the adoption of a uniform NIL legislation. Currently, the absence of a centralized NIL policy allows states to enact their own laws, granting varying degrees of NIL rights to student-athletes.[[137]](#footnote-137) This decentralization has resulted in disparities where certain universities, bolstered by more generous NIL laws, can offer better terms to student-athletes, thereby luring the athletes to their programs.[[138]](#footnote-138) Such discrepancies create an unbalanced and disadvantageous competitive landscape where some universities might find themselves at a significant disadvantage.[[139]](#footnote-139) This inequity compels states to reassess their stance on NIL to remain competitive in attracting top-tier athletic talent.[[140]](#footnote-140)

To address the current imbalance in the playing field that has emerged because of inconsistent NIL rights being afforded to student-athletes among states, a standardized federal NIL law is recommended. By establishing uniform NIL rights, student-athletes across different states would have access to the same opportunities, removing the current disparities that can place some universities at a competitive disadvantage.[[141]](#footnote-141) The establishment of a federal NIL law would provide a fair and balanced framework for all parties involved, thereby reducing the likelihood of litigation rooted in varying NIL rights and fostering a more equitable environment for student-athletes to leverage their NIL rights.[[142]](#footnote-142)

1. Conclusion

In conclusion, the journey toward securing NIL rights for student-athletes has been challenging, and the end is not yet in sight. As the NIL rights landscape keeps evolving, the future remains uncertain. However, there are actionable steps that can be implemented to potentially settle the ongoing class action lawsuit against the NCAA and also to avert future legal disputes. The exemplary precedent set by Kenneth Feinberg, especially in his management of the Victim Compensation Fund post-September 11th, indicates that there are achievable routes to success in such complex issues. Feinberg's approach, emphasizing fairness and equity, flexibility, transparency, efficiency, BATNA, and interest-balancing, offers a framework for the effective use of Special Masters in resolving complex cases like the current NCAA class action lawsuit. Implementing these principles and recommending systemic reforms on the federal level could not only resolve the immediate legal hurdles the NCAA faces but also help to prevent potential future litigation as well.

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2. Id. [↑](#footnote-ref-2)
3. NCAA v. Alston, 141 S. Ct. 2141, 2151 (2021). [↑](#footnote-ref-3)
4. National Collegiate Athletic Association, History of the NCAA, NCAA, www.ncaa.org/sports/2021/5/4/history.aspx (last visited Dec. 5, 2023). [↑](#footnote-ref-4)
5. What is Amateurism and Why Does the NCAA Care About It?, Breakout Sports (Jan. 29, 2019), https://breakoutsports.net/2019/01/29/what-is-amateurism-and-why-does-the-ncaa-care-about-it/ (last visited Dec. 5, 2023). [↑](#footnote-ref-5)
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7. NCAA v. Alston and O'Bannon v. NCAA dramatically altered the NIL landscape, with the NCAA reconsidering its stance on NIL issues and subsequently passing a uniform interim policy in 2021 kicking back its NIL restrictions. See Alston, supra note 3; see also O'Bannon v. NCAA, 802 F.3d 1049, 1049 (9th Cir. 2015). [↑](#footnote-ref-7)
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10. The NCAA has long held that allowing student athletes to receive compensation would blur the lines between amateur and professional sports, potentially undermining the educational mission of universities. The NCAA thus advocates for a commitment to amateurism which refers to the idea that student-athletes participate in sports activities without receiving financial compensation off their NIL. The NCAA’s primary argument utilizing the notion of amateurism is that student-athletes should be motivated primary by education and the physical, mental, and social benefits to be derived from same. See Romano, Robert J. Esq. The Concept of Amateurism: How the Term Became Part of the College Sport Vernacular, 1 U.N.H. Sports L. Rev. 29, 33, 39 (2022). [↑](#footnote-ref-10)
11. Taylor Henderson, It's about Time: An Analysis of Name, Image, and Likeness Legislation in the United States, 30 JEFFREY S. MOORAD SPORTS L. J. 61, 61-62 (2023) [↑](#footnote-ref-11)
12. Henderson, supra note 11; see also Michael Poyfair, NCAA v. Alston: The Supreme Court Paves the Way for Name, Image, and Likeness Opportunities among Collegiate Student-Athletes as the NCAA Is Forced to Create an Interim Name, Image, and Likeness Policy to Comply with Antitrust Legislation, 55 CREIGHTON L. REV. 269, 276 (2022) (stating that the NCAA argues that to preserve its services, which is a fair and established association of amateur collegiate institutions, supplemental student-athlete income must remain impermissible). [↑](#footnote-ref-12)
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14. Everything You Need to Know About NIL, Icon Source, https://iconsource.com/everything-about-nil/ (last visited Dec. 1, 2023). [↑](#footnote-ref-14)
15. Chris Murphy, How Everyone is Getting Rich Off College Sports — Except the Players, Madness Inc. (March 27, 2019), www.murphy.senate.gov/download/madness-inc (last visited Oct. 8, 2023). [↑](#footnote-ref-15)
16. Dylan Akers, Federal Legislation Needed to Settle Student-Athlete Name, Image, Likeness Issue, 26 SUFFOLK J. TRIAL & APP. ADVOC. 203, 205 (2020), available at go-gale-com.lp.hscl.ufl.edu/ps/i.do?p=AONE&u=gain40375&id=GALE|A722130698&v=2.1&it=r&sid=bookmark-AONE&asid=73b4f7a3. [↑](#footnote-ref-16)
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19. What is Amateurism and Why Does the NCAA Care About It?, supra note 5. [↑](#footnote-ref-19)
20. Supra note 9; see also Julia Chaffers, The Hypocrisy of the NCAA’s Amateurism Model, Princeton University (Mar. 4, 2020), https://aas.princeton.edu/news/opinion-hypocrisy-ncaas-amateurism-model#:~:text=The%20NCAA%20argues%20that%20%E2%80%9Cmaintaining,%2C%20not%20their%20learning%2C%20first (last visited Dec. 6, 2023). [↑](#footnote-ref-20)
21. See Tim Tucker, NIL Timeline: How We Got Here and What’s Next, The Atlanta Journal Constitution (March 18, 2022), https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/ (last visited Dec. 10, 2023) (stating that Florida passed an NIL law giving college athletes additional rights in June 2020 and Georgia passed an NIL law in May 2021 giving college athletes the right to make money off of endorsements). [↑](#footnote-ref-21)
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30. Id. [↑](#footnote-ref-30)
31. Poyfair, supra note 12, at 281; see also O’Bannon, 802 F.3d at 1075. [↑](#footnote-ref-31)
32. Poyfair, supra note 12, at 285. [↑](#footnote-ref-32)
33. Everything You Need to Know About NIL, supra note 14. [↑](#footnote-ref-33)
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35. Fla. Stat. § 1006.74 (2023); see also Tucker, supra note 34. [↑](#footnote-ref-35)
36. Akers, supra note 16, at 204. [↑](#footnote-ref-36)
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38. Tucker, supra note 34. [↑](#footnote-ref-38)
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43. Poyfair, supra note 12, at 271; see also Alston, 141 S. Ct. at 2166. [↑](#footnote-ref-43)
44. Alston, 141 S. Ct. at 2151. [↑](#footnote-ref-44)
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46. Id. [↑](#footnote-ref-46)
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Policy, NCAA Rules Committee, NCAA (June 30, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx (last visited Dec. 10, 2023). [↑](#footnote-ref-51)
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53. Pay-for-play is used to describe the situation where athletes receive benefits in exchange for their decision to play a sport at a particular university. See Haneman & Weber, supra note 52. Current laws permit boosters to contact agents of athletes to inform the agents what types of NIL opportunities are available to the student-athlete should they choose to commit to their respective school. See Leonard Armato, Pay for Play is Alive in College Sports and Free Agency Has Arrived, Forbes (Dec. 16, 2022), www.forbes.com/sites/leonardarmato/2022/12/16/pay-for-play-is-alive-in-college-sports-and-its-time-to-realize-that-free-agency-has-arrived/?sh=5b3a4189638e (last visited Dec. 9, 2023). [↑](#footnote-ref-53)
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59. Athletes Granted Class-Action Status, supra note 58. [↑](#footnote-ref-59)
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65. Charlie Baker, If NIL Lawsuit is Deemed Class Action, It Could Cost NCAA More than $1 Billion, Forbes (May 5, 2023), www.forbes.com/sites/thomasbaker/2023/05/05/if-nil-lawsuit-is-deemed-class-action-it-could-cost-ncaa-more-than-1-billion/?sh=444b4dfe44b2 (last visited Dec. 9, 2023). [↑](#footnote-ref-65)
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68. Cohen et al., supra note 61. [↑](#footnote-ref-68)
69. Ibapynhun Shisha Mukhim, ADR a Justice Saviour of Courts, 3 JUS CORPUS L.J. 987, 988 (2022) (stating that litigation is a protracted, pricey, and frustrating process) [hereinafter The Pros and Cons of Mediation and Litigation]; see also The Pros and Cons of Mediation and Litigation for Your Case, SBEMP Attorneys (2023), https://sbemp.com/the-pros-and-cons-of-mediation-and-litigation-for-your-case/#:~:text=The%20Cons%20of%20Litigation&text=First%20and%20foremost%2C%20the%20legal,the%20outcome%20of%20the%20case (last visited Dec. 9, 2023). [↑](#footnote-ref-69)
70. Id. [↑](#footnote-ref-70)
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76. David R. Cohen, The Judge, the Special Master, and You, 32 GPSolo 72, 73 (2015). [↑](#footnote-ref-76)
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84. Peter G. McCabe, The Federal Magistrate Act of 1979, 16 HARV. J. ON LEGIS. 343, 374-75 (1979) (stating that appointments of Special Masters made with the parties’ consent should not be subject to the same requirements which apply to appointments made without such consent). [↑](#footnote-ref-84)
85. Courts have the inherent authority to equip themselves with the necessary tools to fulfill their judicial functions. This includes the authority to designate individuals who are not a part of the court, including Special Masters and auditors. The designation of these individuals can be done with or without the consent of parties involved to streamline complex issues. Ex Parte Peterson, 253 U.S. 300, 312-13 (1920); see also Reilly v. United States, 863 F.2d 149, 154 n.4 (1st Cir. 1988). However, the court’s inherent authority to appoint individuals who are not connected to the court are limited by Article III. Stauble v. Warrob, 977 F.2d 690, 695 (1st Cir. 1992); In re Bituminous Coal Operators Ass'n, 949 F.2d 1165, 1168 (D.C. Cir. 1991); see also In re United States, 816 F.2d 1083, 1092 (6th Cir. 1987). [↑](#footnote-ref-85)
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88. Merril Hirsh, A Revolution That Doesn't Offend Anyone: The ABA Guidelines for the Appointment and Use of Special Masters in Civil Litigation, 58 Judges J. 30, 31 (2019). [↑](#footnote-ref-88)
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101. Rosenwald, supra note 97. [↑](#footnote-ref-101)
102. Id. [↑](#footnote-ref-102)
103. Id. [↑](#footnote-ref-103)
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105. Feinberg, supra note 99. [↑](#footnote-ref-105)
106. Rosenwald, supra note 97; Id. at 64. [↑](#footnote-ref-106)
107. Rosenwald, supra note 97. [↑](#footnote-ref-107)
108. Feinberg, supra note 99. [↑](#footnote-ref-108)
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 Id. [↑](#footnote-ref-113)
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135. Kenneth Feinberg fully administered the entire Victim Compensation Fund within a 33-month period. See Feinberg, supra note 99. [↑](#footnote-ref-135)
136. Rosenwald, supra note 97. [↑](#footnote-ref-136)
137. Laura C. Murray, The New Frontier of NIL Legislation, 60 HOUS. L. REV. 757, 757 (2023) (stating that the differing NIL laws passed by states has created in uneven playing field in college athletics). [↑](#footnote-ref-137)
138. Id. [↑](#footnote-ref-138)
139. Id. [↑](#footnote-ref-139)
140. Irwin Kishner et al., Why NIL Needs Federal Legislation: NCAA, Sportico (2023), www.sportico.com/leagues/college-sports/2023/why-nil-needs-federal-legislation-ncaa-1234735926/ (last visited Nov. 29, 2023). [↑](#footnote-ref-140)
141. Murray, supra note 137. [↑](#footnote-ref-141)
142. Murray, supra note 137. [↑](#footnote-ref-142)