

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

INTRODUCTION

Introduction to Special Issue on Collegiate Athletics

Lee Tyner

ARTICLES

The Reverse Logic of College NIL Contracts: A Legal Guide for the Perplexed

Michael LeRoy

Enforcing and Arbitrating Name, Image, and Likeness Fair-Market Value

Josh Lens

Potential Antitrust Issues with NIL Go's Algorithmic Determinations of NIL “Fair Market Value”

Sam C. Ehrlich, Katherine Van Dyck, and Tyler Phillips

NIL and Void: A Legal Analysis of College Athletes’ Broadcast Rights of Publicity as Created by the House Settlement

James Nussbaum

The College Athlete-Employee: FLSA and the End of Amateurism

Scott D. Schneider and Rachel E. Rolf

If Sharing Revenue is the Goal, Title IX Shouldn’t Apply to House NIL Agreements

Darren Gibson



PUBLISHED BY THE NATIONAL
ASSOCIATION OF COLLEGE
AND UNIVERSITY ATTORNEYS



THE NATIONAL ASSOCIATION
OF COLLEGE AND
UNIVERSITY ATTORNEYS

The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 5, 000 attorneys who represent at least 1,650 campuses and over 850 institutions.

The Association’s purpose is to enhance legal assistance to colleges and universities by educating attorneys and administrators as to the nature of campus legal issues. It has an equally important role to play in the continuing legal education of university counsel. In addition, NACUA produces legal resources, offers continuing legal education programming, maintains a listserv (NACUANET) and a variety of member-only web-based resources pages, and operates a clearinghouse through which attorneys on campuses are able to share resources, knowledge, and work products on current legal concerns and interests.

Accredited, non-profit, degree-granting institutions of higher education in the United States and Canada are the primary constituents of NACUA. Each member institution may be represented by several attorneys, any of whom may attend NACUA meetings, perform work on committees, and serve on the Board of Directors.

NACUA’s 2025-2026 Board of Directors

OFFICERS

Chair

Timonthy “Tim” LynchUniversity of Michigan

Chair-Elect

Alexandra Schimmer.....Denison University

Secretary

Lucy France.....University of Montana - Missoula

Treasurer

Darron Farha.....Valparaiso University

Immediate Past Chair

Traevana Byrd.....American University

MEMBERS AT LARGE

2023-2026

Philip ‘Phil’ Catanzano.....Education & Sports Law Group
Priya J. Harjani.....Northwestern University
Anthony Hightower.....Augusta University
Art Lee.....Stony Brook University
Lorena Peñaloza.....University of California Riverside
Steven ‘Steve’ Sandberg.....Brigham Young University

2024-2027

Anne Bilder.....University of Northern Iowa
Youndy Cook.....University of Central Florida
James "Jim" KellerSaul Ewing LLP
Christopher "Chris" Lott.....Duke University
Hope Murphy Tyehimba.....Johns Hopkins University
Jennifer ZimbhoffStanford University

2025-2028

Venus Boston Lincoln University
Mark Brandenburg The Citadel, The Military College
of South Carolina
Guilherme Costa Bentley University
Darryl Lunon, II Vanderbilt University
Lakeisha Marsh Akerman LLP
Abbey Richards The George Washington University

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

NACUA Editor
Barbara A. Lee

Editorial Board
2025-2026

Ellen Babbitt
Husch Blackwell LLP

Jack Bernard
University of Michigan

Leigh Cole
Dinse, Knapp & McAndrew, P.C.

Ona Alston Dosunmu, *ex officio*
NACUA

Steve Dunham
Penn State University (retired)

Peter Harrington
Simmons University

Stacy Hawkins
Rutgers Law School

Neal Hutchens
University of Kentucky

Derek Langhauser
Maine Community College System

Frederick Lawrence
Phi Beta Kappa Society

Barbara Lee, Editor
Rutgers University

Elizabeth Meers
Hogan Lovells US LLP

Laura Rothstein
University of Louisville (retired)
Brandeis Law School

Jacob Rooksby
Gonzaga University School of Law

Joseph Storch
Excelsior University

Bill Thro
University of Kentucky

L. Lee Tyner, Jr.
Texas Christian University

Madelyn Wessel
Hogan Lovells US LLP



THE NATIONAL ASSOCIATION
OF COLLEGE AND
UNIVERSITY ATTORNEYS

The Journal of College and University Law (ISSN 0093-8688)

The Journal of College and University Law is the official publication of the National Association of College and University Attorneys (NACUA). It is published online by the National Association of College and University Attorneys, Suite 620, One Dupont Circle, N.W., Washington, DC 20036 and indexed to Callaghan's Law Review Digest, Contents of Current Legal Periodicals, Contents Pages in Education, Current Index to Journals in Education, Current Index to Legal Periodicals, Current Law Index, Index to Current Periodicals Related to Law, Index to Legal Periodicals, LegalTrac, National Law Review Reporters, Shepard's Citators, and Legal Resource Index on Westlaw.

Copyright © 2026 by National Association of College and University Attorneys

Cite as _ J.C. & U.L. _
Library of Congress Catalog No. 74-642623

ABOUT THE JOURNAL AND ITS EDITORS

The Journal of College and University Law is the only law review entirely devoted to the concerns of higher education in the United States. Contributors include active college and university counsel, attorneys who represent those institutions, and education law specialists in the academic community. The Journal has been published annually since 1973. In addition to scholarly articles on current topics, the Journal of College and University Law regularly publishes case comments, scholarly commentary, book reviews, recent developments, and other features.

In August 2020, NACUA assumed full responsibility for the journal under the editorship of Dr. Barbara A. Lee. From 2016-2020 Rutgers Law School published the Journal. Prior to Rutgers, the Journal was published by Notre Dame Law School from 1986 to 2016, and the West Virginia University College of Law from 1980-1986. Correspondence regarding publication should be sent to the Journal of College and University Law, National Association of College and University Attorneys, Suite 620, One Dupont Circle, N.W., Washington, DC 20036, or by email to barbaraa.lee@gmail.com.

The Journal is a refereed publication. Except as otherwise provided, the Journal of College and University Law grants permission for material in this publication to be copied for use by non-profit educational institutions for scholarly or instructional purposes only, provided that 1) copies are distributed at or below cost, 2) the author and the Journal are identified, and 3) proper notice of the copyright appears on each copy. The views expressed herein are attributed to their authors and not to this publication, or the National Association of College and University Attorneys. The materials appearing in this publication are for information purposes only and should not be considered legal advice or be used as such. For a special legal opinion, readers must confer with their own legal counsel. For a special legal opinion, readers must confer with their own legal counsel.

INSTRUCTIONS FOR AUTHORS

The *Journal of College and University Law* is a publication of the National Association of College and University Attorneys (NACUA). It is a refereed, professional journal specializing in contemporary legal issues and developments important to postsecondary education.

Manuscripts

The *Journal* publishes articles, commentaries (scholarly editorials), and book reviews. Experts in the law of higher education review all manuscripts.

Manuscripts should be submitted electronically via a Microsoft Word document. **Please use this [MSWord template](#) to format your article** (this is an adapted version of the law review template by Eugene Volokh). Footnotes should reflect the format specified in the 22nd edition of *A Uniform System of Citation* (the “Bluebook”). **Note:** The MSWord template will download to the bottom of your browser.

- The author/s should provide the position, the educational background, the address and telephone number of each author in the email transmitting the manuscript.
- Each author is expected to disclose any affiliation or position—past, present, or prospective—that could be perceived to influence the author’s views on matters discussed in the manuscript. This should be included in the author footnote (asterisk not numeral footnote) on the title page. The asterisked footnote should contain the author’s name and institutional affiliation (if any). It may also include the author’s educational background. The editor reserves the right to edit the author footnote.
- Authors must include a short (3-4 sentence) abstract for their manuscript on the first page of the document.
- The second page should include a table of contents with each section heading in the article. The MSWord template linked above has instructions about how to create an automatically generated table of contents from your manuscript’s section headings.
- Please use section headings throughout articles and notes and any other submission longer than 5 pages. Please refer to the table of contents template for formatting of section and subsection titles.
- Please do not include any information for the editors in the manuscript document, instead send any additional information for the editors in an email to barbaraa.lee@gmail.com.

Decisions on publication usually are made within six to ten weeks of a manuscript’s receipt; however, as a peer-reviewed journal, outside reviewers advise the Editor before they make the final publication decision, and this can prolong the process. The Editor makes the final publication decision. The *Journal* submits editorial changes to the author for approval before publication. The Editor reserves the right of final decision concerning all manuscript revisions. When an article is approved for publication, *the Journal* requires a signed License Agreement from its author(s), pursuant to which NACUA must be granted the first right to publish the manuscript in any form, format or medium. The copyright to the article remains with the author, while NACUA retains all rights in each issue of the *Journal* as a compilation.

PLEASE NOTE: As indicated in Bluebook 22nd edition, the author footnote should be an asterisk and not a number. Please be sure that your submission complies with this rule, otherwise your footnote references could be compromised in the editing process. **All authors are responsible for making corrections to their footnotes after the copy editing process.**

Submission Instructions for the Journal of College and University Law:

Authors should use the simple submission instructions indicated herein

After following the author guidelines, please attach your manuscript as a Word document (.doc or .docx) to an email to barbalee@oq.rutgers.edu with the subject “Manuscript Submission.”

- Please be sure to include (in the body of the email and/or in the manuscript itself) a short abstract (3-4 sentences).
- In the body of the email, please disclose if you have been in contact with any of the authors cited in your manuscript about this paper to ensure the integrity of the peer-review process.
- Note: The JCUL editor assumes the person who submitted the manuscript is the corresponding author of the manuscript unless specifically noted in the email. All correspondence will be with the corresponding author.

You should receive acknowledgement of receipt of your manuscript within one week of submission; if you do not, please follow up by replying to your submission email (double check the email address is correct) to ensure it was received.

Student Submissions:

Law or graduate students who submit manuscripts to JCUL should include in their submission a note from a faculty member (who has read their submission) recommending the paper for publication.

Upon deeming the manuscript appropriate for the journal, the student author is paired with a mentor reviewer who is an expert in higher education law. The reviewer will read the manuscript and offer comments and suggestions for improvement. Upon receiving the review, the editorial team will determine whether the note should be accepted for publication (as is or upon the meeting of certain conditions), should be revised and resubmitted for another formal round of expert review, or should be rejected. Some mentors offer to work with students directly on revising and resubmitting or on meeting the conditions for acceptance. The decision is left to the reviewer and the author on whether to work together in this way.

If you have any questions about our process (before or after submission) please feel free to contact the editorial team at barbaraa.lee@gmail.com.

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

Volume 51

2026

Number 1

Introduction to Special Issue on Collegiate Athletics

Lee Tyner

The Reverse Logic of College NIL Contracts: A Legal Guide for the Perplexed

Michael LeRoy

Big Ten Conference (Big Ten) and Southeastern Conference (SEC) and name, image, and likeness (NIL) form contracts replicate the mobility-suppressing features of the National League's uniform player contract from 1880 to 1917 and the National Collegiate Athletic Association's (NCAA's) early rules against pay for play. Professional baseball clubs and NCAA schools drew from athletes who played in both arenas during the 1880s through 1910s. These agreements prohibited the most marketable players from contracting with another club. Likewise, NCAA rules prohibited athletes from being paid to enroll or play and required them to complete one year of study before playing. Like their baseball ancestors, college athletes today are so heavily constrained by adhesive NIL contracts that they cannot capitalize on their true labor market value.

Comparing the Big Ten and SEC NIL contracts to early baseball examples, the similarities in overreach are apparent, when courts found that baseball form contracts lacked mutuality or consideration. These adhesive and unconscionable contracts recontextualize baseball contracts from a century ago. This article serves as a legal guide to remediating or challenging these NIL agreements.

Enforcing and Arbitrating Name, Image, and Likeness Fair-Market Value

Josh Lens

The parties' historic settlement agreement in *In re: College Athlete NIL Litigation*, more commonly known as *House v. NCAA*, has received significant attention from legal scholars, the national media, and college athletics constituents. While those groups focus on settlement outcomes, like universities sharing revenue with their athletes, and its imposition of roster limits, along with potential resulting

Title IX ramifications, they have largely overlooked the creation of a new system for regulating collegiate athletes' receipt of name, image, and likeness (NIL) compensation. Specifically, the settlement agreement's inclusion of both a third-party and arbitration in NIL policy enforcement is drastic for college athletics and warrants examination.

Procedurally, this new process will determine whether collegiate athletes' compensation from many NIL agreements falls within an acceptable range of compensation. When a third-party entity determines NIL compensation exceeds this suitable range, the student-athlete must decide among a few options on how they will proceed. Per the settlement agreement, a student-athlete in this situation may renegotiate or cancel the NIL agreement or proceed with arbitration on an expedited timeline, with the athlete's university possessing the ability to fund the latter proceedings. Should a student-athlete proceed with an unapproved NIL agreement, enforcement actions could include loss of athletics competition eligibility. This article examines these new processes, their significant ramifications for universities and their student-athletes, and potential legal issues with them.

Potential Antitrust Issues with NIL Go's Algorithmic Determinations of NIL "Fair Market Value"

Sam C. Ehrlich, Katherine Van Dyck, and Tyler Phillips

The *House* Settlement introduces a new regulatory architecture for college sports: Universities may now share revenue directly with athletes but only within a capped system accompanied by centralized oversight of third-party name, image, and likeness (NIL) transactions. The newly formed College Sports Commission (CSC), working with Deloitte, has operationalized these rules through NIL Go, a data-driven platform that evaluates whether athlete deals fall within a permissible "reasonable range of compensation." This article situates NIL Go within a broader set of industries turning to algorithmic tools to structure markets, including rental housing and hospitality, where shared pricing systems have recently come under judicial antitrust scrutiny. By comparing the CSC's model to these emerging forms of algorithmic coordination, the article identifies the key questions NIL Go raises for universities implementing the settlement and considers how developments in algorithmic-pricing litigation may shape future governance of athlete compensation.

NIL and Void: A Legal Analysis of College Athletes' Broadcast Rights of Publicity as Created by the House Settlement

James Nussbaum

The landscape of collegiate athletics continues to change. For the first time, colleges and universities are able to compensate athletes directly for their names, images, and likenesses (NILs) including as used in broadcasts. However, the legal justification for payments for such "broadcast NIL" payments is thin and therefore appears to be an attempt to preserve the ill-fated concept of amateurism.

The College Athlete-Employee: FLSA and the End of Amateurism

Scott D. Schneider and Rachel E. Rolf

As the legal and economic premises of National Collegiate Athletic Association (NCAA) amateurism collapse, Division I college athletics has reached an inflection point: At least some scholarship athletes—especially in revenue sports—may be deemed employees. This article uses the Fair Labor Standards Act (FLSA) as the clearest vehicle for assessing what that shift would mean in practice. Antitrust litigation, name, image, and likeness reforms, and the *House v. NCAA* settlement have changed who can pay athletes and how; the unresolved question is whether and to what extent athletic participation will be treated as work under wage and hour laws—how to define compensable time (training, travel, “voluntary” activities), calculate overtime, and design lawful compensation structures.

Drawing on the Third Circuit’s decision in *Johnson v. NCAA*, the article develops a workable framework for (1) determining employee status under the FLSA, (2) identifying the relevant employer(s) in the fragmented governance structure of college sports under joint-employment principles, and (3) operationalizing compliance inside athletic departments that have never been built to run timekeeping and payroll for athletes. It then identifies a major downstream consequence: classifying athletes as employees helps clarify Title IX treatment of direct institutional payments by situating those payments within Title IX’s employment-compensation framework rather than the proportionality rules governing athletic financial aid.

The article concludes that athlete–employee status under the FLSA is not only doctrinally plausible but increasingly difficult to avoid given the commercial realities of modern college sports. While the compliance burdens are substantial, the employment frame offers a more legally defensible—and administrable—structure for athlete compensation at the moment the “student-athlete” construct can no longer do the doctrinal work the industry demands.

If Sharing Revenue is the Goal, Title IX Shouldn’t Apply to House NIL Agreements

Darren Gibson

The Supreme Court’s decision in *National Collegiate Athletic Association v. Alston* marked a shift in the history of intercollegiate athletics, effectively ending the era of the unpaid amateur student-athlete. As Justice Kavanaugh stated in his concurrence, “The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. . . . But the student athletes who generate the revenues, many of whom are African American and from lower-income

backgrounds, end up with little or nothing.” This history appeared to drive the justification and structure of the *House* Settlement. In approving the settlement, Judge Wilken recognized the settlement will “enable NCAA schools to share their athletic revenues with Division I college student-athletes for the first time in the history of the NCAA.” This goal is being accomplished by allowing Division I schools to enter into name, image, and likeness (NIL) agreements directly with their student-athletes up to a cap of \$20.5 million per year across all programs.

An unresolved question is whether the Title IX regulations governing athletic scholarships apply to these NIL agreements. Some argue that schools are required to distribute NIL funds to male and female student-athletes equitably based on their respective participation rates, similar to the rules governing athletic scholarships. However, NIL agreements are commercial and compensatory in nature and fundamentally different from scholarships. Moreover, the vast majority of intercollegiate athletic revenue is generated by football and men’s and women’s basketball. If Title IX were to apply to NIL agreements, the remedial purpose of sharing revenue to address the concerns identified by Judge Kavanaugh in *Alston* would be severely hampered. Instead, the revenue-generating athletes would again be precluded from receiving just compensation for the use of their NIL to generate billions of dollars. Such a result is not required by Title IX, nor should it be. Rather, schools and their student-athletes should be able to enter into NIL agreements that recognize the revenue-generation and market reality of each particular sport by sharing revenue with those student-athletes whose NIL are actually used to generate that revenue.

JCUL SPECIAL ISSUE ON COLLEGIATE ATHLETICS

INTRODUCTION

LEE TYNER

The college athletics landscape has changed radically in the last five years, with more change on the horizon. The role of the law and lawyers in this transformation cannot be overstated. Change has come from every legal direction: state and federal court decisions, state statutes, emerging regulatory and enforcement schemes, executive orders, and actions or threatened actions by the United States Department of Justice and state elected officials.

In the summer of 2025, several of these forces converged in the final resolution of a group of three related antitrust cases. This resolution is commonly known as the *House* settlement. Proponents of the *House* settlement hoped the settlement would lead to a new, durable business model for college athletics while ensuring fairness and competitive equity. Colleges and conferences hoped the settlement in *House* would slow, if not stop, the pace of change and create a level playing field.

The *House* settlement allows, for the first time, colleges to pay student-athletes over and above the cost of attendance without running afoul of the NCAA's amateurism rules ("*House* payments"). As a part of the settlement, however, the court also approved an annual cap on institutional payments.

The settlement allows student-athletes to receive payments from third parties for the legitimate, fair market use of their name, image, and likeness ("*NIL*"). While payments from universities are capped, *NIL* payments from third parties are not, so long as they are for a legitimate business purpose and based on the fair market value of the *NIL* rights conveyed.

The *House* settlement empowers athletics conferences and the NCAA to enforce the cap and police the settlement through a new enforcement body and new rules. To that end, in 2025 the Autonomy 4 conferences formed the Collegiate Sports Commission ("*CSC*").

The *House* settlement and its implementation have raised a host of legal questions. What sorts of legal agreements may institutions enter with student-athletes to reflect their agreement to share revenues? How much difference will there be in agreements from institution to institution or within the same institution? Will these new economic relationships lead to conflicts between institutions or with student-athletes?

Even more fundamentally, will this new economic reality affect the legal analysis under some statutory definitions of “employee,” thereby changing the legal relationship between the athlete and institution? Will the new agreements to share revenue create new legal duties owed by athlete or institution? How will the Fair Pay Act or Title IX apply to *House* payments?

With respect to the newly formed CSC, how will it determine whether a proposed third-party NIL transaction is for a “legitimate business purpose?” How will the CSC evaluate the fair market value of the use of an athlete’s name or image?

Because of this thicket of legal questions and risks, lawyers are now playing an outsized role in college athletics. The six articles in this special issue begin to identify and tackle some of those questions, to untangle the legal thicket.

In the first article, Michael LeRoy looks at the emerging agreements between universities and student-athletes and compares them to the evolution of early professional baseball contracts in his contribution, *The Reverse Logic of College NIL Contracts: A Legal Guide for the Perplexed*.

LeRoy’s piece is followed by a pair of articles considering how the emerging CSC will evaluate the fair market value of third-party NIL agreements. In *Enforcing and Arbitrating Name, Image, and Likeness Compensation Limits*, Josh Lens provides an overview of this aspect of the *House* settlement and examines the new CSC process. Sam C. Ehrlich, Katherine Van Dyck, and Tyler Phillips then consider whether the CSC evaluation and approval process may raise new antitrust issues in their article: *Potential Antitrust Issues with NIL GO’s Algorithmic Determinations of NIL “Fair Market Value.”*

An article by James Nussbaum tackles the conceptual basis for university payments to athletes under the *House* settlement. In *NIL and Void: A Legal Analysis of College Athletes’ Broadcast Rights of Publicity Created by the House Settlement*, Nussbaum writes about the interaction between the *House* settlement, an athlete’s publicity rights, and the right to broadcast.

One of the legal issues looming on the athletics horizon is whether the new economic relationships between schools and athletes will lead to athletes being considered “employees” under one law or another. Scott Schneider and Rachel Rolf consider the implications of this potential change in their contribution, *The College Athlete-Employee: FLSA and the End of Amateuism*.

The final contribution in this special issue looks at how Title IX applies to *House* payments. In Darren Gibson’s article, *If Sharing Revenue Is the Goal, Title IX Should Not Apply to House NIL Agreements*, Gibson argues that Title IX does not require schools to apply the regulations governing athletics scholarships to *House* payments. Gibson contends doing so would defeat the remedial purpose that underpins the *House* settlement.

As editor for this special issue, I want to express my deep gratitude to the authors for contributing their time and expertise to this project, especially the practitioners who do not write academic articles as a part of their day jobs. I also want to thank JCUL editor Barbara Lee for her leadership and patience with this

practitioner, as I struggled to keep this project moving alongside my law practice. Barbara and her work are gifts to all of us practicing higher education law.

Finally, I want to thank my colleagues at Texas Christian University. TCU's Law Fellow, Kate Withers, kept this project on track. We would not have completed this special issue without her diligence and good nature. Thanks also to my boss, Chancellor Daniel Pullin, who allowed me to add this project to my duties. Chancellor Pullin is also a lawyer who is deeply invested in resolving the challenges facing collegiate athletics. Because of his support, TCU co-hosted the online symposium last fall presenting these articles along with JCUL and the National Association of College and University Attorneys.

THE REVERSE LOGIC OF COLLEGE NIL CONTRACTS: A Legal Guide for the Perplexed

MICHAEL H. LEROY*

Abstract

Big Ten Conference (Big Ten) and Southeastern Conference (SEC) and name, image, and likeness (NIL) form contracts replicate the mobility-suppressing features of the National League's uniform player contract from 1880 to 1917 and the National Collegiate Athletic Association's (NCAA's) early rules against pay for play. Professional baseball clubs and NCAA schools drew from athletes who played in both arenas during the 1880s through 1910s. These agreements prohibited the most marketable players from contracting with another club. Likewise, NCAA rules prohibited athletes from being paid to enroll or play and required them to complete one year of study before playing. Like their baseball ancestors, college athletes today are so heavily constrained by adhesive NIL contracts that they cannot capitalize on their true labor market value. Comparing the Big Ten and SEC NIL contracts to early baseball examples, the similarities in overreach are apparent, when courts found that baseball form contracts lacked mutuality or consideration. These adhesive and unconscionable contracts recontextualize baseball contracts from a century ago. This article serves as a legal guide to remediating or challenging these NIL agreements.

* LER Alumni Professor, School of Labor and Employment Relations, and College of Law, University of Illinois at Urbana-Champaign (mhl@illinois.edu).

TABLE OF CONTENTS

INTRODUCTION	7
A. BACKGROUND: UNENFORCEABLE PLAYER CONTRACTS AND UNENFORCED COLLEGE AMATEURISM RULES	7
B. NEW LEGAL PROBLEMS: NIL FORM CONTRACTS IN THE HOUSE SETTLEMENT ERA	9
I. THE UNIFORM PLAYER CONTRACT IN PROFESSIONAL BASEBALL AND NCAA AMATEURISM RULES	12
A. THE FAILED IDEAL OF COLLEGE AMATEURISM	12
B. LABOR MARKET COMPETITION FRAYED THE RESERVE CLAUSE IN PROFESSIONAL BASEBALL, AND THE NCAA’S AMATEURISM RULES	14
1. <i>Emergence of the Reserve Clause in Professional Baseball</i>	14
2. <i>Rise of Professionalism in College Athletics</i>	22
3. <i>Linking the Reserve Clause in Professional Baseball and College Amateurism Rules to College NIL Form Contracts</i>	28
II. THE NEW RESERVE CLAUSE: BIG TEN AND SEC FORM CONTRACTS	33
A. METHODS AND SOURCES FOR ACQUIRING NIL FORM CONTRACTS	33
B. KEY TERMS OF THE BIG TEN AND SEC NIL FORM CONTRACTS	34
III. LEGAL VULNERABILITIES TO ENFORCING THE BIG TEN AND SEC FORM CONTRACT	38
IV. CONCLUSION: THE REVERSE LOGIC OF COLLEGE NIL CONTRACTS—A LEGAL GUIDE TO THE PERPLEXED	52

INTRODUCTION

A. *Background: Unenforceable Player Contracts and Unenforced College Amateurism Rules*

College and professional athletics are separate enterprises. But their early histories tell a different story, one of intertwined athletic labor markets. By 1909, university leaders were concerned about the overlapping demand from professional baseball clubs (as they were called) and collegiate teams for good players.¹ This phenomenon coincided with the emergence of rival professional baseball leagues from the 1880s through the 1910s.² Baseball clubs in new leagues poached good players, primarily from the National League.³ This opened a labor market that was tightly gripped by the National League's reserve clause,⁴ a one-sided contract option that clubs continuously renewed to retain their best players.⁵ Labor market competition boosted salaries during the "baseball wars" between rival leagues.⁶

While elite players benefited from occasional windows of expanded employment opportunities, less talented baseball players found a different labor market—a "summer baseball" labor market that hired some college players who were amateurs while playing for their schools in the spring.⁷ In other words, the labor market for professional baseball players included college students who sought summer employment, likely in semiprofessional leagues. A second labor market opened for college students: an underground economy where players were paid surreptitiously in different sports.⁸ The emergence of two hybrid professional-collegiate labor markets—summer baseball, and secretly paid athletes in the academic year in a variety of sports—led to conflict in the newly formed Intercollegiate Athletic Association of the United States (IAAUS), later renamed the National Collegiate Athletic Association (NCAA).⁹

1 PROCEEDINGS OF THE THIRD ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S. (Jan. 2, 1909), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=96&q1=agitation>. Throughout this article, I refer to professional entities as clubs to reflect historical usage of the term in case citations, and to distinguish these entities from teams in college.

2 See text accompanying *infra* notes 84–107.

3 E.g., *Phila. Ball Club, Ltd.*, and collected cases, *infra* note 48.

4 Ed Edmonds, *Arthur Soden's Legacy: The Origins and Early History of Baseball's Reserve System*, 5 ALBANY GOV'T L. REV. 38.78–79 (2012).

5 Barry Gilbert, *Some Old Problems in a Modern Guise*, 4 CAL. L. REV. 114, 115 (1916).

6 Michael Hauptert, *MLB's Annual Salary Leaders Since 1874*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/research/article/mlbs-annual-salary-leaders-since-1874/> (last visited Dec. 29, 2026).

7 PROCEEDINGS OF THE THIRD ANNUAL CONVENTION 54 (PDF #120) (Prof. Welsh), *supra* note 1.

8 EDWARD MUSSEY HARTWELL, *PHYSICAL TRAINING IN AMERICAN COLLEGES AND UNIVERSITIES* 124 (1885) (PDF #152), <https://babel.hathitrust.org/cgi/pt?id=uc2.ark%3A%2F13960%2Ft9m32rg20&seq=152>.

9 NCAA, *History*, <https://www.ncaa.org/sports/2021/5/4/history.aspx#:~:text=The%20IAAUS%20officially%20was%20constituted,and%20Field%20Championships%20in%201921> (last visited Dec. 29, 2026).

Courts played a large role in the professional baseball wars.¹⁰ When a club from a rival league signed a valuable player, the former club often sued the player for breach of contract.¹¹ The club sought an injunction to compel the player to return and perform on the contract.¹² Universities and colleges faced a different dilemma—(1) keeping outside, professional athletes from their contests¹³ and (2) ensuring that college players were not paid to play for their schools.¹⁴ Overall, these efforts failed.¹⁵ And since that time, an underground labor market for college athletes has coexisted with rigorous amateurism rules.¹⁶

This history is relevant. To begin with, schools and NCAA power conferences incorporate some of baseball's classic adherence terms, highlighted by the reserve clause, in name, image, and likeness (NIL) form contracts.¹⁷ This article enumerates legal defects in these baseball contracts, and suggests that court decisions from the 1880s through 1910s offer useful legal blueprints for college athletes to challenge their NIL contracts.

This article raises a broader institutional concern. The new NIL model is an ingeniously reformulated version of the NCAA's original treatment of athletes in 1906. Then, and now, students cannot be employed as athletes nor paid to play.¹⁸ Then, and now, some students were paid to play in various subterfuges, known to leaders in higher education.¹⁹ This article shows that some leaders sought to address the "professionalism" problem in their midst and the undercurrent of athletic money that threatened to erode the core mission of their schools.²⁰ Their reform efforts failed. More than a century later, the problems they identified have

10 See text accompanying *infra* notes 106 and 108 .

11 *Id.*

12 *E.g.*, *Baltimore Baseball Co. v. Hayden*, 31 Pa. C.C. 500 (Pa. Ct. Comm. Pleas 1905).

13 HARTWELL, *supra* note 8, at 37 ("Questionable means are sometimes employed to enable professionals or semi-professionals to play in college teams.").

14 HOWARD J. SAVAGE ET AL., AMERICAN COLLEGE ATHLETICS IN THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, Bull. No. 23 at 227 (1929), https://cdn.vox-cdn.com/uploads/chorus_asset/file/19252681/American_College_Athletics.pdf.

15 Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021).

16 *Id.* at 76–78. Also see SAVAGE ET AL., *supra* note 14, at 250–51 (Carnegie Foundation's analysis of college athletics found that many athletic departments subsidized the employment of good athletes.). As concerns about professionalized college athletics persisted, the president of the University of North Carolina promoted a reform plan to deemphasize sports on campuses. See Richard Stone, *The Graham Plan of 1935: An Aborted Crusade to De-Emphasize College Athletics*, 64 N.C. HIST. REV. 274, 277–78 (1987). More recently, see Bruce Weber, *Walter Byers, Ex-N.C.A.A. Leader Who Rued Corruption, Dies at 93*, N.Y. TIMES, May 27, 2015, reporting on the death of the NCAA's longtime executive director ("In 1984 Mr. Byers told The A.P. that he believed that 30 percent of big-time college athletic programs were cheating and that he despaired of bringing the problem under control.").

17 See text accompanying *infra* notes 159–63.

18 See text accompanying *supra* notes 164–173. *In re College Athlete NIL Litig.*, 2025 WL 1675820 (N.D. Cal. June 6, 2025).

19 ANDREW ZIMBALIST, UNPAID PROFESSIONALS (1999).

20 PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 1.

grown.²¹ Power conference schools today are turbocharging a highly successful business model for athletics.²² At the same time, their core academic enterprise struggles with severe funding cuts.²³

B. New Legal Problems: NIL Form Contracts in the House Settlement Era

In this introduction, I highlight recent changes that have culminated in a new NIL and revenue-sharing model for college athletic programs, including new terminology that is associated with these changes.²⁴ In the collegiate sphere, athletes did not

21 See *infra* notes 119–21.

22 See Scott Dochterman, *Big Ten Revenue Soared to \$928 Million for 2024 Fiscal Year*, THE ATHLETIC (May 26, 2025) (Big Ten earned \$928 million in 2024, SEC earned \$898.75 million.); and Steve Berkowitz, *NCAA Shows Revenue Increase to \$1.4 Billion and \$166 Million Surplus in 2024 Fiscal Year*, USA TODAY, Feb. 27, 2025.

23 Alan Blinder, *Trump Has Targeted These Universities. Why?* N.Y. TIMES, June 30, 2025 (funding cuts of up to \$9 billion at Harvard; Brown University, \$510 million; Columbia University, about \$400 million; Cornell University, at least \$1 billion; Northwestern, \$790 million; Princeton University, \$210 million; and University of Pennsylvania, \$175 million).

24 General definitions and meanings for “NIL,” “Alston,” “collectives,” “House” and “House settlement,” “MOU,” “long form contracts,” and “revenue sharing” are briefly explained here. NIL stands for name, image, and likeness. The term broadly applies to a person’s publicity rights. For more background that relates to athletics generally, see Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 128 (1993) (italics and footnotes omitted):

Entertainment and sports celebrities are the leading players in our Public Drama. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerisms, their styles, their modes of conversation and of consumption. Whether or not celebrities are ‘the chief agents of moral change in the United States,’ they certainly are widely used—far more than are institutionally anchored elites—to symbolize individual aspirations, group identities, and cultural values.

Alston refers to a Supreme Court antitrust decision, *National Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69 (2021). This decision in 2021 was a major defeat for the NCAA because the Court ruled that this collegiate association was a monopoly that unreasonably restrained athletes’ educational benefits. The case was accompanied by an explosion in NIL endorsement agreements for athletes. Within a short time, collectives were organized as booster-funded organizations that served as indirect funding sources to athletic programs in the recruitment and retention of athletes. “House” and “House settlement” refer to an antitrust lawsuit involving broadcast NIL rights (payments for athletes whose name, image, and likeness are part of a televised contest) filed by a college swimmer named Grant House. *House v. NCAA*, 545 F. Supp. 3d 804 (N.D. Cal. 2021). This lawsuit was consolidated into a class action affecting many past, current, and future college athletes. The House settlement in 2025 provided a detailed plan for schools to pay athletes directly from their revenues. *In re Coll. Athlete NIL Litig.*, Case No. 4:20-cv-03919-CW (N.D. Cal., Jan. 17, 2025, at 3-4). My FOIA requests asked for a school’s blank form contract relating to revenue-sharing agreements and NIL agreements with their athletes. I did not receive any revenue-sharing agreements but received several NIL form contracts. In private conversations I had with NIL agents, they explained that schools seem to be using revenue-sharing and NIL contracts interchangeably, though each agent said they see only a small percentage of these agreements. In other words, some schools might have different contracts for NIL rights and revenue sharing—a practice that this study did not capture. The Big Ten and SEC agreements in this study were called MOUs (memorandum of understanding). They were drafted in anticipation of the House settlement but also contained conditional language to reflect the ongoing litigation. These agreements referred to long-form contracts that an athlete would complete if the judge approved the House settlement. My FOIA searches ended before

mount a successful challenge to college amateurism rules until *O'Bannon v. National Collegiate Athletic Ass'n* in 2014.²⁵ Ed O'Bannon, a former college basketball star, claimed that the NCAA violated the Sherman Act by requiring athletes to forgo compensation while the NCAA sold their NIL rights to a video game producer.²⁶ The case highlighted the NCAA's exploitation of the NCAA's strict amateurism rules.²⁷ By 2019, California enacted the nation's first college NIL law, prohibiting a school or athletic association from penalizing an athlete for making money from an NIL deal.²⁸ By 2021, at least twenty-five states enacted NIL laws.²⁹ The same year, the Supreme Court ruled unanimously that the NCAA was a monopoly that unreasonably restrained competition in providing college athletes with educational benefits.³⁰

None of these disruptions to the amateurism model forced the NCAA to enact major reforms. However, *In re College Athletic NIL Litigation* (commonly referred to as *House v. NCAA*) caused the NCAA and power conferences to adopt a new model where schools provide direct payments to athletes.³¹ *House* was a consolidated class action antitrust lawsuit over the NCAA's restrictions on paying athletes from broadcast revenues that generate billions of dollars annually for the association and

the House settlement (June 6, 2025). Because my FOIA requests were sent before the judge approved the settlement, I have no copies of long-form contracts.

25 *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

26 *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

27 The district court's ruling questioned the NCAA's amateurism ideals:

What's more, there is no evidence to suggest that any schools joined Division I originally because of its amateurism rules. These schools had numerous other options to participate in collegiate sports associations that restrict compensation for student-athletes, including the NCAA's lower divisions and the NAIA... . Thus, while there may be tangible differences between Division I schools and other schools that participate in intercollegiate sports, these differences are financial, not philosophical.

Id. at 981.

28 Alan Blinder, *N.C.A.A. Athletes Could Be Paid Under New California Law*, N.Y. TIMES (June 21, 2021), <https://www.nytimes.com/2019/09/30/sports/college-athletes-paid-california>, (quoting Sen. Nancy Skinner, lead sponsor of the bill: "People are just so aware of the fact that you've got a multibillion-dollar industry that ... basically denies compensation to the very talent, the very work that produces that revenue. Students who love their sport and are committed to continuing their sport in college are handicapped in so many ways, and it's all due to N.C.A.A. rules").

29 See Michael H. LeRoy, *Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets*, 2023 U. ILL. L. REV. 53 (2023) (survey of state law NIL restrictions on athlete pay).

30 *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69 (2021).

31 *Nat'l Collegiate Athletic Ass'n, NCAA Adopts Interim Name, Image and Likeness Policy* (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> ("While opening name, image and likeness opportunities to student-athletes, the policy in all three divisions preserves the commitment to avoid pay-for-play and improper inducements tied to choosing to attend a particular school. Those rules remain in effect."). Also see Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA (Oct. 26, 2022), <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx>, clarifying NIL policies ("Schools also can request donors provide funds to collectives and other NIL entities, provided the schools do not request that those funds be directed to a specific sport or student-athlete.").

power conferences.³² In July 2025, Judge Claudia Wilken approved a settlement to pay \$2.78 billion over the next ten years to eligible athletes from 2016 to 2024.³³ The settlement also allowed schools to share revenue and directly pay for their NIL.³⁴

This article exposes legal problems in the emerging NIL/revenue-sharing model. The power conferences adopted NIL form contracts that impose unreasonable restraints on their players.³⁵ In consideration for pay from a school, athletes grant broad NIL rights to their school and conference, and to their business partners.³⁶ In particular, NIL form contracts for the Big Ten Conference (Big Ten) and Southeastern Conference (SEC) have unconscionable, adhesive, and indefinite terms that replicate baseball contracts that courts refused to enforce.³⁷

For example, the SEC contract prohibits an athlete from entertaining a competitive offer while under contract.³⁸ The Big Ten contract allows a school a continuous right to adjust NIL pay.³⁹ Neither contract guarantees pay for athletes, but athletes can be required to reimburse schools for leaving the institution.⁴⁰ Schools have a right to terminate an NIL contract at their discretion.⁴¹ Athletes have no correlative right to terminate their contract.⁴² A school can extend the term of an NIL contract past the deadline for a player to enter the transfer portal.⁴³ The player receives no independent consideration for portal forbearance.⁴⁴ If the player enters the portal while under contract, the player owes damages to the school.⁴⁵ As form contracts, these agreements leave little or no room for negotiation.⁴⁶ The

32 *In re College Athlete NIL Litig.*, 2023 WL 8372787 (N.D. Cal., Nov. 3, 2023). This antitrust case differed from *O'Bannon* by challenging NCAA rules that barred conferences and schools from sharing their network revenues as well as money from marketing contracts for sports apparel, and other revenue sources that involve athletes' NIL. *Grant House v. NCAA*, 545 F. Supp. 3d 804, 808 (N.D. Cal. 2021). The athletes also alleged that while NCAA rules fixed athlete NIL compensation at zero dollars, schools used these revenues to build extravagant facilities and pay exorbitant coaching salaries. *Id.*

33 Dan Murphy, *Judge OK's \$2.8B Settlement, Paving Way for Colleges to Pay Athletes*, ESPN, June 6, 2025.

34 *Id.*

35 *See infra* text accompanying notes 190–92.

36 *See infra*, Table 1, Row 9.

37 *See infra* Part III and notes 222 and 226.

38 *See infra* note 169.

39 *See infra* Part III, Point 4.

40 *See infra* Table 1, Row 9.

41 *See infra* Part III, Point 6.

42 *Id.*

43 *See infra* Part III, Point 3.

44 *See infra* Table 1, Row 9.

45 *Id.*

46 My study is unable to determine if agents, or athletes acting in their own behalf, negotiate terms that substantially differ from the form the Big Ten and SEC form contracts. An intriguing article, Noah Henderson, *New Florida NIL Legislation Capping Agent Fees Could Hurt Athletes*, NIL DAILY, Feb. 27, 2025 hints at the role that agents play in negotiating for elite athletes: "While the bill

amount of compensation is negotiable—but seemingly, nothing else. And even that amount is subject to a school’s unilateral rights for reducing pay or clawing back expended money.⁴⁷

Lawsuits arising from these take-it-or-leave-it contracts appear to be inevitable. They pose issues related to adhesion, illusory terms, good faith and fair dealing, unjust enrichment, restrictive covenants, unfair business and trade practices, unauthorized exploitation of publicity rights, and more. These problems will likely emerge and fester over the coming years until court rulings establish clear legal boundaries of permissible and illicit contract terms.

This article explains how courts adjudicated contract disputes arising from the reserve clause. The Big Ten and SEC NIL form contracts appear to embed similar miscalculations about their enforceability. This analysis analyzes past contract disputes and court rulings to suggest outcomes in future NIL contract lawsuits. Courts frown on club-imposed contracts because they violate common law doctrines that protect a person’s right to sell his labor in a free market.⁴⁸

I. THE UNIFORM PLAYER CONTRACT IN PROFESSIONAL BASEBALL AND NCAA AMATEURISM RULES

A. *The Failed Ideal of College Amateurism*

The seeds of the NCAA’s current NIL and athlete transfer problems were sown at roughly the same time—from about 1885 to 1890. Intercollegiate athletics started in 1852.⁴⁹ By the 1880s, critics were concerned about “professionalism” in college athletics.⁵⁰ Today, this term refers to pay-to-play.⁵¹ Following eighteen deaths of college football players in one season, President Theodore Roosevelt insisted that schools manage this situation.⁵² College leaders formed the Intercollegiate Athletic

is intended to shield athletes from predatory agent behavior, the result may deviate from its positive intentions. If passed, the fee cap (5% of the NIL deal value) would make it less desirable for agents to represent athletes at some of the nation’s most prominent athletic institutions....” The implication of this reporting is that when an agent’s fee is tied to the value of an NIL deal, they have a shared interest in negotiating top-dollar for athletes. To the extent that this idea is true, another implication is that agents negotiate terms that are not captured in a form agreement or are appended to such an agreement.

47 See Part III, Point 4, *infra*.

48 *Phila. Ball Club, Ltd. v. Hallman*, 8 Pa. C.C. 57, 59 (1890), referencing “*Lumley v. Wagner*, 1 De G. M. & G. 604; 13 Eng. L. & Eq. R. 252, in which Lord Chancellor St. Leonards, one of the greatest of English equity lawyers, enjoined a public singer from singing at the Italian opera... .”

49 JOSEPH N. CROWLEY, *THE NCAA’S FIRST CENTURY IN THE ARENA* 3 (2006), The first intercollegiate baseball game, played in 1859, resulted in Amherst’s 73–32 win over Williams. *Id.* Track and field debuted in 1876, followed by a violent form of football in the 1800s that led to many serious injuries. *Id.*

50 HARTWELL, *supra* note 8.

51 Nat’l Collegiate Athletic Ass’n, *supra* note 31.

52 See Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 489 (1995) (in 1905 there were more than eighteen deaths in intercollegiate football).

Association of the United States (hereafter, National Collegiate Athletic Association, or NCAA).⁵³

The NCAA took up the professionalism problem early in its history.⁵⁴ Addressing the association's convention in 1907, Professor Luther Gulick warned, "The professional in competition with the amateur throws out the amateur."⁵⁵ Professor W. L. Dudley observed that a school's "professional spirit" conflicted with its academic identity: "Alumni and students exhibit the professional spirit by attempting to secure players for their college teams by methods which are in violation of the principles of amateur sport."⁵⁶

Most schools believed that rules could ensure an amateur competition model.⁵⁷ At its first convention, they passed amateurism rules: full-time enrollment of an athlete, loss of eligibility for accepting payment, no possibility to play for another school, and a limit of four years of eligibility.⁵⁸

These rules were not drawn up in a vacuum. College leaders debated the problem of "professionalism" in their baseball games. Good college players played in summer leagues for pay.⁵⁹ Professors debated whether they could still be eligible for college teams.⁶⁰ The debate, assigned to a committee, was never resolved.⁶¹ But the association's newly instituted amateurism rules bore a striking resemblance to the reserve clause in professional baseball.⁶²

The following discussion explores the instability surrounding the uniform player contract and its reserve clause in baseball from the 1880s through the adoption of collective bargaining in the 1970s.⁶³ At its core, the reserve clause was a

53 NCAA, *supra* note 9.

54 PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 1.

55 *Id.* at 43 (PDF # 5), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&seq=55&q1=throws+out> (last visited [Dec. 29, 2025]).

56 *Id.* at 13 (PDF # 79), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&seq=79&q1=professional+spirit> (last visited [Dec. 29, 2025]).

57 Capt. Palmer E. Pierce, *The Intercollegiate Athletic Association of the United States*, 14 AM. PHYSICAL EDUC. REV. 76 (1909).

58 PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES (Dec. 28, 1907), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=144&q1=shall%20represent>.

59 PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 1, at 61 (Prof. Chase) (PDF # 127) ("Is the man who openly receives money for playing summer baseball any more of a professional than who has excessive expense accounts paid, or one who receives \$100 and board per month as a night clerk in a summer hotel and plays on the hotel team for the *fun* of it" (emphasis in original)).

60 . PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 1, at 62 (PDF # 128) (Prof. A. A. Stagg).

61 *Id.* at 37 (PDF # 251), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&seq=251&q1=appoint!> (on motion by Prof. Louis Bevier, Jr.).

62 *See infra* Part I.B.3.

63 *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949), is a notable exception to baseball's antitrust exemption, a ruling that potentially exposed major league baseball to antitrust lawsuits regarding

club option in a uniform player contract.⁶⁴ It prevented good players from offering their services in a competitive labor market.⁶⁵ Players could not bargain over the restrictive clause.⁶⁶

Similarly, the NCAA's amateurism rules tied a player to his institution. The rules made this relationship last through the player's four years of eligibility.⁶⁷ And if he played for pay—apart from the unresolved summer baseball question—he would lose eligibility.⁶⁸ Reports swirled that professional players were added to some college teams.⁶⁹ While the college baseball players were not paid during their school season, some were paid in a summer league.⁷⁰

The historical trendlines for major league baseball and NCAA athletes are remarkably similar. This history shows that the evolution of free agency for certain baseball players—and later for football and basketball players—charts a path for college athletics today. To make these historical lessons clear, the following analysis intersperses recent and current developments in college athletics in the discussion of baseball's early experience with the reserve clause.

B. Labor Market Competition Frayed the Reserve Clause in Professional Baseball, and the NCAA's Amateurism Rules

1. Emergence of the Reserve Clause in Professional Baseball

This section lays a foundation to explain how the new NIL and revenue-sharing system is evolving. As in past disputes involving club contracts that prevent players from marketing their talents, courts will likely free college athletes from the most restrictive and unconscionable terms of their NIL contracts. The section shows that major league baseball and college athletics evolved from purely amateur to professionalized sports. Competitive labor markets affected both enterprises. In

its player contracts. *But see Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), rejecting the player's antitrust action. An unlimited form of the reserve clause remained in place until *Kansas City Royals Baseball Corp. v. Major League Baseball Players*, 532 F.2d 615, 617–18 (8th Cir. 1976). After Andy Messersmith, a star pitcher, played out his option year, he signed with another team. *Id.* at 617. Arbitrator Peter Seitz ruled that he was permitted to do this, and the Eighth Circuit Court of Appeals found no reason to vacate this award. *Id.* at 619 & n.3. These events curtailed the reserve system but did not eliminate it.

64 A limited form of the reserve clause remains in professional athletics. *E.g.*, *Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975). The reserve clause is part of every player's uniform contract. *Id.* at 874.

65 *Id.*, explaining the reserve clause in modern professional athletics: If a player refuses to sign the uniform contract for the next season, his prior agreement allows the club “unilaterally to renew and extend the Uniform Contract for one year on the same terms and conditions including salary.”

66 *Id.* at 893 (“The player draft and perpetual reserve system are readily susceptible to condemnation as group boycotts based on . . . refusal to deal with the players save through these uniform restrictive practices.”).

67 See PROCEEDINGS OF THE SECOND ANNUAL CONVENTION, *supra* note 58 (Rule 4).

68 *Id.* (Rules 2 and 3).

69 ZIMBALIST, *supra* note 19.

70 PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 1 (comments by Prof. Chase).

response, the National League and NCAA, respectively, imposed contract terms and rules for baseball clubs and schools to control player movement.⁷¹ In court cases involving professional players who signed contracts with new clubs, rulings often allowed them to move.⁷²

Baseball started as an amateur sport.⁷³ As the sport professionalized, clubs used a uniform player contract to reserve a player indefinitely.⁷⁴ This idea mimicked exclusive performance contract clauses for theater and opera stars with unique and extraordinary talent.⁷⁵ Johanna Wagner, an opera star, had an exclusive contract to perform for a theater in London but agreed to perform for a rival theater for more pay.⁷⁶ In *Lumley v. Wagner*, an English court enjoined her from performing for the second theater while she was under contract.⁷⁷

American courts adopted the *Lumley* injunction.⁷⁸ In *Daly v. Smith*, a case more visible to baseball owners than the English *Lumley* case, a state court in 1874 enjoined Fanny Morant Smith, a star actress, from performing for another company.⁷⁹ *Daly v. Smith* may have influenced the creation of the reserve clause, a powerful tool

71 See *supra* Part I.B.3.

72 See *infra* text accompanying notes –106–08.

73 Baseball began in 1839 as exhibitions played by amateurs. GEOFFREY C. WARD & KEN BUMS, *BASEBALL: AN ILLUSTRATED HISTORY* 3 (2007). The Cincinnati Red Stockings made the sport a national passion as they toured around the country in 1869, logging a 57–0 record against amateur clubs.

74 E. Woodrow Eckard, *The Origin of the Reserve Clause: Owner Collusion Versus “Public Interest,”* 2 J. SPORTS ECON. 113, 114 (2001). The first league of professional baseball clubs—the National Association of Professional Base Ball Players (called the NA)—was formed in 1871 but lasted only five years. *Id.* at 115. The league was destabilized by player movement from one club to another without limits. *Id.*

Also see Brian McKenna, *Arthur Soden, SOC’Y FOR AM. BASEBALL RECH.*, <https://sabr.org/bioproj/person/arthur-soden/>:

On September 29 the six owners of the National League agreed in a secret meeting in Buffalo to respect each other’s rights to five players. Thus, a reserved player couldn’t sign with or play for another team. Originally called the “five men rule,” the reserve clause was born; it survives in revised form today. Eventually all players would be held in reserve.

75 Edmonds, *supra* note 4, at 78–79.

76 *Lumley v. Wagner*, 1 DeG., M. & G. 604, 619, 42 Eng. Rep. 687 (Ch. 1852), <https://opencasebook.org/casebooks/628-contracts/resources/5.3.1-lumley-v-wagner-42-eng-rep-687-1852/>.

77 *Id.* at 619, where The Lord Chancellor remarked,

Wherever this Court has not proper jurisdiction to enforce specific performance, it operates to bind men’s consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give.

The Lord Chancellor continued: “It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has, bound herself not to do, and thus possibly cause her to fulfill her engagement.” *Id.*

78 Gilbert, *supra* note 5.

79 38 N.Y. Super. Ct. 158, 165 (N.Y. 1874), concluding: “The plaintiff has, therefore, made a case as strong as *Lumley* agt. *Wagner* in all respects, and in some respects even stronger, and he is entitled to his injunction, unless the defendant Fanny Morant Smith establishes an affirmative defense.”

that helped baseball clubs monopolize and control their best players. This much is certain: The reserve clause responded to “revolvers” in the National Association of Professional Base Ball Players—players who moved from one club to another for better contracts, like Johanna Wagner and Fanny Morant Smith.⁸⁰

By 1876, the National League replaced the National Association.⁸¹ The latter suffered from too much player movement from one club to another.⁸² The experience suggested some artificial restraints on player mobility were necessary for a league to maintain a competitive balance. Thus, the groundwork was laid for baseball’s adoption of a buyer’s monopoly.⁸³

The National League began to control labor market competition between their clubs.⁸⁴ Rules protected rosters from player defections by requiring clubs to boycott players who tried to move to another club during the season and by prohibiting clubs from tampering with player contracts.⁸⁵ After the 1879 season, each club could reserve five players.⁸⁶ Relatedly, league rules prohibited them from hiring another club’s reserved player.⁸⁷ The reserve clause, an exclusive option to renew a player’s contract for the next season,⁸⁸ monopolized the labor market for the best players. Within its first year, the reserve clause caused player compensation to fall sharply.⁸⁹

A legal commentator in 1916, looking back on three decades of legal disputes in baseball, incisively remarked that the “so-called ‘reserve’ and ‘release’ clauses of the

80 Edmonds, *supra* note 4, at 41.

81 *Id.* at 43.

82 *Id.*

83 A buyer’s monopoly is called a monopsony. See Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 676 n.3 (1953), explaining that monopsony is “the reverse situation” of a monopoly, where “a single buyer or a number of buyers acting in unison control the entire demand for a service or commodity, or enough of it to augment profits by restricting the amount purchased or by reducing the price paid” (citation omitted). More generally, see ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY: ANTITRUST LAW AND ECONOMICS* 93 (1993), stating that “‘cooperative buying’ may be nothing more than a euphemism for collusive monopsony that drives prices below competitive levels and has negative economic effects on social welfare similar to those caused by price fixing sellers.” Also see *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1158 (5th Cir. 1979), recognizing that “[i]n the monopsony or oligopsony price fixing case ... the seller faces a Hobson’s choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all.”

84 DAVID QUENTIN VOIGT, *AMERICAN BASEBALL (VOL. 1): FROM THE GENTLEMAN’S SPORT TO THE COMMISSIONER SYSTEM* 64 (1983).

85 *Id.*

86 Edmonds, *supra* note 4, at 39–40.

87 *Id.* (Arthur Soden led National League owners in implementing a uniform player contract that allowed each club to protect five players from the market).

88 Harold N. Enten, *Baseball and the Reserve Clause*, 1 N.Y.L. SCH. STUDENT L. REV. 159, 159 (1952).

89 STUART BANNER, *THE BASEBALL TRUST: A HISTORY OF BASEBALL’S ANTITRUST EXEMPTION* 5 (2013). Tommy Bond’s pay fell from \$2,200 in 1879 to \$1,500 in 1880. *Id.* Jack Burdock and Ezra Sutton, Boston’s highest paid players in 1879 at \$1,800 and \$1,500, respectively, were paid were \$1,200 in 1880. *Id.* The reserve clause led to the first year that clubs made money. Eventually, the league allowed clubs to impose reserve clauses on an entire roster by 1887. *Id.*

player's contract ... were inserted with a view of securing a maximum control over the player's services, and of according him the minimum of enforceable rights."⁹⁰ These were classic form contracts, twenty paragraphs, with highly advantageous terms to the club.⁹¹ Paragraph 14 of the standard contract was onerous to players.⁹² The contract established the authority of the club over every aspect of the player's conduct and life during a season.⁹³ Paragraph 18 was highly restrictive, containing a "reserve clause" that allowed clubs to employ their best players indefinitely—and that, notably, had grown to fourteen players on each club.⁹⁴

While the National League imposed a strict reserve clause on its players, clubs from competing leagues signed National League players. Courts favored labor market competition in this period. *Allegheny Baseball Club v. Bennett* may have offered the first glimpse into this phenomenon.⁹⁵ Charles Bennett was under contract to play for the Pittsburgh club in 1883 in the American Association.⁹⁶ After he joined Detroit's

90 Gilbert, *supra* note 5, at 118.

91 Metropolitan Exhibition Co. v. Ward, 24 Abb. N. Cas. 393 (1890), at 396, n.a1, reciting the entire form contract. For example, in paragraph 8, a club was entitled to deduct pay on a pro rata basis for any days that a player should a player "become ill from natural causes at any time during the time herein prescribed."

92 *Id.* at 396, n.a1, paragraph 14, stating,

It is mutually understood and agreed that should the said party of the second part violate any of the material conditions, covenants or agreements on his part in this contract contained, the said party of the first part shall have the right to terminate this contract on reasonable notice, and no further payments shall thereafter be due or payable to said party of the second part, under this contract, or otherwise, except as stated in paragraph 17 of this agreement. And if the said party of the second part shall be expelled by said party of the first part, as herein provided, he shall thereupon forfeit all claim for wages from and after the time of such expulsion.

93 *Id.* at 396, n.a1, paragraph 3, where a player "agrees that he will yield a cheerful obedience to all directions that may be given to him by any officer, manager, or field captain ... and will hold himself subject to their orders at all reasonable times during the entire term of his employment as aforesaid."

94 *Id.* at 396, n.a1, paragraph 18, stating in part,

It is further understood and agreed that the said party of the first part shall have the right to "reserve" the said party of the second part for the season next ensuing the term mentioned in paragraph 2, herein provided, and said right and privilege is hereby accorded the said party of the first part upon the following conditions, which are to be taken and construed as conditions precedent to the exercise of such extraordinary right or privilege, viz.:

I. That the said party of the second part shall not be reserved at a salary less than that mentioned in the 20th paragraph herein except by consent of the party of the second part.

II. That the said party of the second part, if he be reserved by the said party of the first part for the next ensuing season, shall be one of not more than fourteen players then under contract; that is, that the right of reservation be limited to that number of players and no more.

95 *Allegheny Baseball Club v. Bennett*, 14 F. 257 (W.D. Pa. 1882).

96 *Id.*, where the contract stated,

It is hereby agreed, this third day of August, 1882, between the Allegheny Base-ball Club and Charles W. Bennett, that said Charles W. Bennett hereby promises and binds himself that between the fifteenth and thirty-first days of October, 1882, he will sign a regular contract with the Allegheny Base-ball Club, a chartered company belonging to the American Association of Base-ball Clubs, which contract shall bind him to give his services as a base-ball player to said club for the season of 1883, and shall bind said Allegheny Club to pay him

National League club, the Allegheny club lost its lawsuit to compel him to play in Pittsburgh.⁹⁷ The court said that a contract such as this “will not be enforced when it is doubtful whether an agreement has been concluded (citation omitted).”⁹⁸

John Montgomery Ward’s contract dispute offered another early example of litigation over the reserve clause. After the club exercised its reserve clause option to retain him for the 1890 season, Ward implied that he was negotiating with another employer.⁹⁹ The club sued Ward to prevent him from moving. Distinguishing this case from *Wagner* and *Smith*, the court found that the reserve clause failed to make a new contract for the ensuing season.¹⁰⁰

The *Ward* case was typical for the period when clubs in the upstart leagues poached the best National League players. Today, *Ward* is a blueprint for players to successfully challenge NIL form contracts in the new post-*House* settlement. This conclusion is not based, however, on one landmark case. A consistent line of cases ruled in a similar vein, when a club in a rival league poached a player.¹⁰¹

the sum of \$1,700 for an during such season of 1883; and in consideration of this agreement to sign such a contract in October, the sum of \$100 is now paid to said C. W. Bennett, the receipt of which is hereby acknowledged.

97 *Id.* The court said that a contract such as this “will not be enforced when it is doubtful whether an agreement has been concluded.” *Id.* at 259 (citation omitted).

98 *Ward*, 9 N.Y.S. 398.

99 *Id.* at 397–98.

100 *Id.* at 413, stating,

Is there such a definite contract existing between the parties that it can be enforced?

If sufficiently definite, is it entirely conscionable, wanting neither in fairness or mutuality? That a court of equity will not make a contract which the parties themselves have not made, and that it will not enforce an indefinite one, are elementary propositions that need no citation of authorities to support them.

...

What are the terms and conditions of the alleged agreement for the season of 1890 now sought to be enforced?

What does the defendant Ward agree to do?

What salary is to be paid him?

Not only are there no terms and conditions fixed, but I do not think it is entirely clear that Ward agrees to do anything further than to accord the right to reserve him upon terms thereafter to be fixed. He does not covenant to make a contract for 1890 at the same salary, nor upon the same terms and conditions as during the season of 1889.

101 See *Metropolitan Baseball Ass’n v. Simmons*, 1 Pa. C.C. 134, 138 (Ct. Common Pleas Pa. 1885) where “the Metropolitan Club of New York ... (came) into court” ... to “demand that its rights as a member of the association shall not be forfeited without just cause.” For context, National League clubs targeted the American Association for raiding players in 1882; the war extended “to the Union Association in 1884, the Players League in 1890, the American League in 1901–02, and the Federal League in 1914–15.” Richard Hershberger, *The First Baseball War: The American Association and the National League*, 49 *BASEBALL RES. J.* 115, 115 (2020). Hershberger also noted that smaller skirmishes occurred between the American Association and the National League in 1891. *Id.* Hershberger added this important insight:

But the five great wars stand out. The American Association (AA) war was modest

compared with its later counterparts. It should not be discounted because of this. The AA

Interleague competition eroded the National League's price-fixing powers under the reserve clause, causing player salaries to double from 1883 through 1917.¹⁰² This period also marked the emergence of the first player's union, the Brotherhood of Professional Baseball Players, in November 1889.¹⁰³ Players owned the league.¹⁰⁴ Their new league lasted one year.¹⁰⁵ It had a disruptive impact, spurring lawsuits in 1890 and 1891.¹⁰⁶ But its collapse ended labor market competition. The National League clawed back salary gains from good players.¹⁰⁷

war of 1882 set the pattern for future wars, and the settlement bringing it to a conclusion set the pattern for how major league baseball would be organized in the twentieth century.

Id.

102 See Michael Hauptert, *supra* note 6. Hauptert reports salaries from 1874–2019. The following figures correspond to the years spanning the five baseball wars, including two additional years—1916 and 1917—to show that elimination of the Federal League ended the upward trend of player compensation.

1874: \$2,800 [Fergus Malone (Chi. NA)]; 1875: \$2,200 [Rich Higham (Chi. NL)]; 1876: \$4,000 [Al Spalding (Chi. NL)]; 1877: \$2,900 [Al Spalding (Chi. NL)]; 1878: \$3,700 [Bob Ferguson (Chi. NL)]; 1879: \$1,800 [Frank Flint (Chi. NL)]; 1880: \$1,800 [Adrian Anson (Chi. NL)]; 1881: \$2,000 [Jim O'Rourke (Buf. NL)]; 1882: \$2,400 [*Monte Ward (Prov. NL)*]; 1883: \$3,100 [Buck Ewing (NY. NL)]; 1884: \$3,100 [Buck Ewing (NY. NL)]; 1885: \$4,500 [Jim O'Rourke (NY. NL)]; 1886: \$4,500 [Fred Dunlap (StL./Det. NL)]; 1887: \$4,500 [Fred Dunlap (Det. NL), Charles Radbourne (Bos. NL)]; 1888: \$5,000 [Fred Dunlap (Pit. NL) and Buck Ewing (NY. NL)]; 1889: \$5,000 [*Fred Dunlap (Pit. NL) and Buck Ewing (NY. NL)*]; 1890: \$4,000 [Hardy Richardson (Bos. PL)]; 1891: \$2,000 [Paul Cook (Lou./StL. AA)]; 1892: \$2,800 [Joe Gunson (Balt. NL)]; 1893 [no data]; 1894 [no data]; 1895: \$2,400 [Jack Glasscock (Lou./Was. NL)]; 1896 [no data]; 1897 [no data]; 1898 [no data]; 1899: \$1,800 [Victor Willis (Bos. NL)]; 1900 [no data]; 1901 [no data]; 1902 [no data]; 1903 [no data]; 1904: \$5,000 [Joe McGinnity (N.Y. NL)]; 1905 [no data]; 1906: \$8,500 [Nap Lajoie (Cle. AL)]; 1907: \$8,500 [Nap Lajoie (Cle. AL)]; 1908: \$8,500 [Nap Lajoie (Cle. AL)]; 1909: \$9,000 [Nap Lajoie (Cle. AL)]; 1910: \$9,000 [Ty Cobb (Det. AL) and Nap Lajoie (Cle. AL)]; 1911: \$9,000 [Ty Cobb (Det. AL) and Nap Lajoie (Cle. AL)]; 1912: \$10,000 [Roger Bresnahan (StL. NL), Jimmy Callahan (Chi. AL), Hugh Jennings (Det. AL), and Honus Wagner (Pit. NL)]; 1913: \$15,000 [Fred Clarke (Pit. NL)]; 1914: \$15,000 [Ty Cobb (Det. AL) and Tris Speaker (Bos. AL)]; 1915: \$15,050 [(Fred Clarke (Pit. NL))]; 1916: \$20,000 [Ty Cobb (Det. AL)]; and 1917: \$20,000 [Ty Cobb (Det. AL)].

Italics highlight the growth in top-end salaries between 1882 and 1889.

103 HENRY CLAY PALMER ET AL., *ATHLETIC SPORTS IN AMERICA, ENGLAND AND AUSTRALIA* 149 (1889), <https://babel.hathitrust.org/cgi/pt?id=umn.31951002400130k&view=1up&seq=157>. Players earned income from gate receipts. They were given some say in management decisions and acquired part ownership in clubs.

104 *Id.*

105 *Id.*

106 Cases during this brief period included *Columbus Baseball Club v. Reiley*, 1891 WL331 (Oh. Ct. Comm. Pleas 1891); *Metropolitan Exhibition Co., supra* note 91; *Am. Ass'n Club of Kansas City v. Pickett*, 8 Pa. C.C. 232 (1890); *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198 (C.C. S.D.N.Y. 1890); *Metropolitan Exhibition Co. v. Ewing*, 42 F. Supp. 198 (S.D.N.Y. 1890); and *Phila. Ball Club, Ltd. v. Hallman*, 8 Pa. C.C. 57 (1890).

107 *Monopsony in Manpower, supra* note 83 at 605, n. 152, reporting,

Major increases in salary scales have always occurred during baseball price wars. Sometimes, however, salaries tumbled when organized baseball succeeded in restoring its monopsony. The following are salaries of players on the Philadelphia Phillies in 1889, when the club's reservations claims were unchallenged; in 1892, after the cessation of two years of free competition with independent leagues; and in 1893, when the club once more was able to exercise its discretion:

Most courts refused to go along with this organized suppression of labor market competition. In cases from 1902 through 1914 involving players who jumped their contracts for other clubs, courts determined that the uniform player contract either lacked mutuality or the dispute was not suitable for equity.¹⁰⁸ *Brooklyn Baseball Club v. McGuire* reasoned that a contract terminable on ten days' notice by one party against a party who was bound for one year could not be enforced in equity.¹⁰⁹ *American Base Ball & Athletic Exhibition Co. v. Harper* denied injunctive relief to prevent three players from the St. Louis Cardinals players from jumping to the St. Louis Browns.¹¹⁰ *Baltimore Baseball Co. v. Hayden* dissolved a temporary injunction where two players who were under contract for the 1905 season to the Baltimore club accepted offers in June to play for the York club.¹¹¹ Finding no mutuality in a contract that gave a club a right to terminate the agreement with ten day's notice while holding a player to perform for a year, *Cincinnati Exhibition Co. v. Johnson* refused to issue a *Lumley* injunction where a player jumped from a National League club to a Federal League club one week into the 1914 season.¹¹² Similarly, in *American League Club of Chicago*

	1889	1892	1893
Clements	\$2450	\$3000	\$1800
Delahanty	1750	2100	1800
Hallman	1400	3500	1800
Thompson	2500	3000	1800
Allen	—	3000	1800
Hamilton	—	3400	1800
Cross	—	3250	1800
Keefe	—	3500	1800
Weyhing	—	3250	800

The start of the American League in 1901 coincided with internal conflict among clubs in the National League. Jeremy Green, *1901 Winter Meetings: Firsts, Foibles, and Failures*, SOC'Y AM. BASEBALL RES., <https://sabr.org/journal/article/1901-winter-meetings-firsts-foibles-and-failures/>. Four NL clubs moved to the American League. *Id.* To rein in poaching and tampering with player contracts, the two leagues eventually agreed to an enforceable salary cap. *Id.* A commentator noted the "agreement was binding for 10 years and covered salary limits, transfer of players, and rules regulating contract-jumping." *Id.*

108 See *Phila. Ball Club, Ltd. v. Lajoie*, 51 A. 973 (1902); *Brooklyn Baseball Club v. McGuire*, 116 Fed. 782 (E.D. Pa. 1902); and *Am. Base Ball & Athletic Exhibition Co. v. Harper*, 54 Cent. L.J. 449 (C.C. St. Louis 1902).

109 116 Fed. 782, 782 (E.D. Pa. 1902). The court also questioned "whether the services which the defendant contracted to render were so unique and peculiar that they could not be performed, and substantially as well, by others engaged in professional baseball playing, who might easily be obtained to take his place." *Id.* at 783.

110 *Harper*, 54 Cent. L.J. 449.

111 31 Pa. C.C. 500 (Pa. Ct. Comm. Pleas 1905). In this instance, mutuality was not a problem, but the court lacked power to prohibit players from playing for the new club. *Id.* at 502 ("continuance of the injunction would not only not restore the defendant players to the Baltimore Base-ball Company, complainant, but ... could not nullify the contract or contracts entered into with the York Athletic Association").

112 190 Ill. App. 630, 632 (1914):

A negative covenant in a baseball player's contract with a Club not to play or perform for any other than the Club, during the baseball seasons for which he was hired cannot be specifically enforced by an injunction, where there is a want of mutuality of remedy because

v. Chase, a player under contract to an American League club jumped to the Federal League in June.¹¹³ The court refused to continue a temporary injunction because the dominant baseball leagues maintained an oppressive contract system.¹¹⁴

Only two cases over this twelve-year period protected a club from poaching—and in both cases, the court cited the unique and extraordinary talent of the player. *Philadelphia Ball Club, Ltd. v. Lajoie* was an exceptional case.¹¹⁵ Twelve years later, *Cincinnati Exhibition Co. v. Marsans*, rendered a similar ruling.¹¹⁶ Considering how much Marsans was paid in the 1916 contract depicted below in Figure 1 (\$6000), and comparing this pay to top-end salaries of that time, Marsans was not paid as a unique and extraordinary talent.¹¹⁷

of a provision in the contract giving the Club the right to terminate the contract by giving the player ten days' notice.

113 86 Misc. 441 (Sup. Ct. N.Y. 1914).

114 *Id.* at 466, remarking,

The system created by 'organized baseball' in recent years presents the question of the establishment of a scheme by which the personal freedom, the right to contract for their labor wherever they will, of 10,000 skilled laborers, is placed under the dominion of a benevolent despotism through the operation of the monopoly established by the National Agreement. This case does not present the simple question of a laborer who has entered into a fair contract for his personal services.

A court of equity, insisting that 'he who comes into equity must come with clean hands,' will not lend its aid to promote an unconscionable transaction of the character which the plaintiff is endeavoring to maintain and strengthen by its application for this injunction. The court will not assist in enforcing an agreement which is a part of a general plan having for its object the maintenance of a monopoly, interference with the personal liberty of a citizen, and the control of his free right to labor wherever and for whom he pleases....

115 51 A. 973 (1902). According to the court, Lajoie was "well known, and has great reputation among the patrons of the sport, for ability in the position which he filled, and was thus a most attractive drawing card for the public. He may not be the sun in the baseball firmament, but he is certainly a bright particular star." *Id.* at 974. His services were therefore "of such a unique character, and display such a special knowledge, skill, and ability, as renders them of peculiar value to the plaintiff, and so difficult of substitution that their loss will produce irreparable injury (internal quote omitted)." *Id.* Thus, the LaJoie court applied a "Lumley injunction" to prohibit this star baseball player from breaching the uniform player contract to accept employment with another club. *Id.*, stating, "The action of the defendant in violating his contract is a breach of good faith, for which there would be no adequate redress at law, and the case, therefore, properly calls for the aid of equity in negatively enforcing the performance of the contract by enjoining against its breach."

The best reporting on the case is found in C. Paul Rogers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War* *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L.J. 325, 336–37 (2002).

116 216 Fed. 269 (E.D. Mo. 1914). Portions of Marsans' uniform player contract are reproduced here to show the form nature of player contracts. Source: Christies.com, <https://onlineonly.christies.com/s/golden-age-baseball/armando-marsans-signed-contract-114/45619> (last visited Dec. 29, 2025).

117 See Hauptert, *supra* note 6; (in 1912, \$10,000 [Roger Bresnahan (StL. NL), Jimmy Callahan (Chi. AL), Hugh Jennings (Det. AL), and Honus Wagner (Pit. NL)]; in 1913, \$15,000 [Fred Clarke (Pit. NL)]; in 1914, \$15,000 [Ty Cobb (Det. AL) and Tris Speaker (Bos. AL)]; in 1915: \$15,050 [(Fred Clarke (Pit. NL)]; and in 1916, \$20,000 [Ty Cobb (Det. AL)].

2. *Rise of Professionalism in College Athletics*

Professionalism in college athletics resembled baseball's emergence from amateurism in 1869 to a maturing professional model in the 1880s. During this time, college athletics evolved into a hybrid form of amateurism–professionalism. The explosive growth of intercollegiate games and zealous school spirit drove this transformation.¹¹⁸

The NCAA's recent NIL experience has re-created the experience of early National League players with the reserve clause. At least twenty-five states enacted NIL laws from 2019 through 2021 that prohibited the NCAA from penalizing an athlete for earning endorsement pay.¹¹⁹ Also, the Supreme Court questioned college amateurism in *National Collegiate Athletic Ass'n v. Alston*.¹²⁰

The floodgates for NIL deals soon opened.¹²¹ NIL deals began to mirror free agency deals in de facto pay-for-play agreements, akin to player poaching of National League clubs by rivals in the American Association, Players League, and Federal League.¹²² NIL deals grew in value.¹²³ As a result, the NCAA issued an interim

118 A tort case hints at the popularity of college athletics. A spectator at a University of Michigan football game, seated among 5000 others on a stand built for only 3000, was injured when the structure collapsed. *Scott v. Univ. Mich. Athletic Ass'n*, 116 N.W. 624 (1908).

119 See LeRoy, *supra* note 29.

120 594 U.S. 69, 71 (2021), where the Court explained, “The NCAA contends the district court should have deferred to its conception of amateurism instead of ‘impermissibly redefin[ing]’ its ‘product.’ But a party cannot declare a restraint ‘immune from § 1 scrutiny’ by relabeling it a product feature.”

121 Josh Schafter, *NIL: Here's How Much Athletes Earned in the First Year of New NCAA Rules*, YAHOO FINANCE (July 1, 2022), reporting that Opendorse, an Internet platform used by many schools as a third-party booking agent for athletes and sponsors, estimated that athletes earned \$917 million during the first year of NIL payments, starting in July 2021.

122 Madison Pack, *Miami's Isaiah Wong Says He Won't Transfer After Threat Over NIL*, SPORTS ILLUSTRATED (Apr. 30, 2022), <https://www.si.com/college/2022/04/30/miami-isaiah-wong-transfer-portal-statement-threat-nil-deal-lifewallet-nba-draft> (NIL booster paid Miami basketball player in a \$100,000 NIL deal after the player threatened to enter the NCAA transfer portal); and Alex Kirshner, *Everything's on Fire: NIL Collectives Are the Latest Patchwork Solution for College Athlete Pay*, GLOBAL SPORT MATTERS (Jan. 17, 2023), <https://globalsportmatters.com/business/2023/01/17/nil-collectives-latest-patchwork-solution-college-athlete-pay/>

Some collectives bankroll a de facto salary operation for premium athletes. Dave Wilson, *Nebraska's Matt Rhule Prefers Developing Own Players Over Portal*, ESPN, Nov. 29, 2023 (“There are some teams that have \$6 [million] or \$7 million players playing for them,” said Nebraska Head Football Coach, Matt Rhule.”). Collectives, funded by school supporters, paid for these deals. Over 250 collectives enabled boosters to pay athletes to attend their school. Liz Clarke, *Miami's Billionaire Booster Defends His Big-Dollar NIL Deals*, WASH. POST, May 17, 2022:

In the first year of NIL agreements, a steroid-fed version ... has emerged in which several boosters pool money to create school-specific collectives that bankroll deals specifically to land recruits. That, in effect, is thinly veiled “pay for play,” which the NCAA prohibits.

123 See Josh Planos, *The NCAA Doesn't Know How to Stop Boosters from Playing the NIL Game*, FIFTYEIGHT, May 16, 2022, describing Texas's Clark Field Collective, which in 2022 provided \$50,000 to every offensive lineman on scholarship; and Jackson Payne, *Built Brands Enters Name, Image and Likeness Partnership with BYU Football to Pay Walk-on Tuition*, UNIVERSE SPORTS (Aug. 12, 2021), <https://universe.byu.edu/2021/08/12/built-brands-enters-nil-partnership-with-byu-football-to-pay-walk-on-tuition/> (BYU's football program announced an NIL agreement with a Utah

rule that allowed athletes to sign NIL deals, but the rule failed to achieve its stated purpose to restrict pay-for-play transactions.¹²⁴ The futility of the NCAA's interim rule matched the ineffectiveness of the no-poaching truce between the National League and the American Association.¹²⁵

Current NIL developments mirror the labor market churn during the rise of the National League, when clubs tried unsuccessfully to use the reserve clause to stifle player contract jumping. Just as the National League's rules could not contain an exploding labor market,¹²⁶ the NCAA's de facto labor market is on a similar path. In 2024, the NIL market for college athletes was estimated at \$1.7 billion.¹²⁷ A pay-to-play market flourished, disguised as NIL deals and funded by corporations.¹²⁸

company, Built Brands, that would pay tuition for all walk-on players on the roster. Altogether, the deal would compensate all 123 members of the team in a multi-year partnership. *Id.*

More recently, see Christopher Kamrani & Brian Hamilton, *Thanks to NIL, Local Car Dealers Are Out of the Shadows and Landing Star College Athletes*, THE ATHLETIC, June 10, 2024. In stark terms, this report shows how a member of the Ohio State University football coaching staff contacted a local car dealer to close an NIL recruitment deal for Caleb Downs:

“I get a call from someone on the coaching staff and they said, ‘Hey, I’m here with Caleb and his dad now. Are you looking to add somebody else to your team?’” says Rick Ricart, the CEO and owner of Ricart Automotive Group in Columbus. “Would you be willing to do a car deal for him?”

Id. While football players seem to receive most of the luxury car deals, some women also benefit though with less reported frequency. After Angel Reece was offered a Mercedes-Benz, she thanked a local car dealer and LSU's NIL collective, Bayou Traditions. *Id.*

Additional recent reports include Mark Giannotto, *Who Is Bryce Underwood? How Michigan Football Flipped Top QB from LSU*, USA TODAY, (Nov. 22, 2024 (Michigan reportedly offered star high school quarterback \$10.5 million); Caleb Grebewold, “\$10M for Carson Beck?": Former NFL Guard Left in Awe of Miami's Deep Pockets After Travis Hunter's Livestream Outburst, SPORTSKEEDA, Jan. 20, 2025; and Colin Salao, *Darian Mensah's Record \$8M Duke Transfer Shows Rapid Growth of NIL Deals*, FRONT OFFICE SPORTS, Jan. 22, 2025.

124 Nat'l Collegiate Athletic Ass'n, *supra* note 31.

125 Gilbert, *supra* note 5, at 115.

126 Planos, *supra* note 123.

127 Joe Drape & Allison McCann, *In College Sports' Big Money Era, Here's Where the Dollars Go*, N.Y. TIMES (Aug. 31, 2024). The *N.Y. Times* chart reported a technical note: “To be included in the calculations players' earnings must rank in the top 25 at their position. Specialist (\$60,000) and Tight End (\$140,000) positions are not labeled.” For the top-tier football players in power conferences, running backs made, on average, \$340,000; defensive backs, \$410,000; linebackers, \$440,000; defensive linemen, \$470,000; offensive linemen, \$550,000; wide receivers, \$610,000; and quarterbacks, \$820,000. In basketball, top-tier centers averaged \$510,000; guards averaged \$640,000; and forwards averaged \$750,000 on men's teams. *Id.*

128 Albert Samaha et al., *The Hidden NIL Economy of College Sports*, WASH. POST, Oct. 21, 2024, reporting on an underground NIL economy that pays athletes “for brand endorsements, charity work, autograph signings and other services big and small ... while driving exposure and revenue for massive public universities.” The *Washington Post* requested public records from fifty-six public universities in power four conferences and received useable information from fourteen schools. In a main finding, “Athletes earn money from corporate brands paying for their endorsement, from sales of merchandise and signed memorabilia and from booster-led NIL collectives. Collectives often pay de facto salaries in exchange for various services, such as charity work or meet and greets.” *Id.*

Like the National League in 1876,¹²⁹ the NCAA reacted to the rapid expansion of its labor market for college athletes by implementing stricter rules to limit athletes from transferring to another school for a better NIL deal.¹³⁰

An important, second historical lens improves our understanding of the parallels between early professional baseball and current NIL developments. Just as rival baseball leagues and clubs expanded the labor market for professional athletes (see Part I.B.1), intercollegiate athletics operated with a shadow labor market from its inception in the 1870s. Professional and college labor markets for baseball players openly overlapped, evidenced by college athletes who played as amateurs during a school year and as professionals during the summer.¹³¹

Intercollegiate games started in the early 1870s.¹³² Even then, critics noticed that college athletes were being subsidized by “extravagant expenditure.”¹³³ The National Association of Amateur Athletes of America published principles of amateurism in 1879.¹³⁴ Edward Mussey Hartwell’s *Physical Training in American Colleges and*

129 VOIGT, *supra* note 84.

130 Ohio and six other states filed an antitrust lawsuit against the NCAA over its Transfer Eligibility Rule. Complaint for Injunctive Relief, State of Ohio, et al., v. Nat’l Collegiate Athletic Ass’n, 2023 WL 11896895 (N.D. W.Va.) (Trial Pleading), No. 1:23-CV-100, at Point 5. The court granted a preliminary injunction, concluding that college athletes who are “considering a transfer or already searching for a new institution are disadvantaged by the potential of a year of ineligibility under the Transfer Eligibility Rule.”

An antitrust complaint in *State of Tennessee and Commonwealth of Virginia v. Nat’l Collegiate Athletic Ass’n* challenged an NCAA policy that prohibited players from signing an NIL deal before they enrolled. The district court enjoined the NCAA’s NIL policy on grounds that the college athletes in the NIL market would otherwise suffer irreparable harm and injury. *Tennessee v. Nat’l Collegiate Athletic Ass’n*, 718 F. Supp. 3d 756, 765 (E.D. Tenn. 2024), concluding,

Now that the NCAA allows it, it is undeniable that NIL compensation is an important factor for some student-athletes to consider during the recruiting process. It would be difficult, if not impossible, to recreate this negotiating environment after the signing periods close or after a student-athlete begins their college career at a particular school. Each student-athlete’s NIL value is unique.

In late 2024, a quarterback at Vanderbilt University in *Pavia v. NCAA* sued under the Sherman Act to challenge his loss of a year of eligibility due rules that count time at a junior college against an athlete’s NCAA eligibility. See Complaint for Injunctive Relief, Diego Pavia v. Nat’l Collegiate Athletic Ass’n, Case 3:24-cv-01336 Document (Filed Nov. 8, 2024). A district court enjoined the NCAA rule, allowing Pavia an opportunity for an additional year and the possibility of more NIL pay. *Pavia v. Nat’l Collegiate Athletic Ass’n*, 2024 WL 5159888 (M.D. Tenn. 2024), at *9 (“the eligibility bylaws induce potential football players to attend NCAA institutions rather than non-NCAA institutions even when non-NCAA institutions, such as junior colleges, might be in their best interest. Therefore, the rule harms student athletes when they are making decisions on whether to attend a junior college or an NCAA institution.”).

131 HARTWELL *supra* note 8.

132 HENRY D. SHELDON, *STUDENT LIFE AND CUSTOMS* (1901), [https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b264455&seq=80&q1=football](https://babel.hathitrust.org/cgi/pt?id=uc1.$b264455&seq=80&q1=football), at 52 (PDF #80).

133 SAVAGE ET AL., *supra* note 14, at 37.

134 An amateur is any person who has never competed in an open contest, or for a stake, or for public money, or for gate money, or under a false name; or with a professional for a prize, or where gate money is charged; nor has ever at any period of his life taught or pursued athletic exercises as a means of livelihood.

Universities added another voice to reform college athletics, declaring in 1885, “Professionalism has done much within the last five years to bring discredit upon college sports.”¹³⁵ Pointing to the overlapping labor markets in major league and college baseball, Hartwell advocated for amateurism rules: “When college men are willing to travel with professional ball players, and especially under assumed names, it is time for college authorities to recognize and regulate college athletics.”¹³⁶

Thus, when the NCAA convened for the first time, the group embraced academics over athletics and amateurism above professionalism. The group declared that it “discourages commercialism and encourages true amateurism.”¹³⁷ Its first convention set seven rules for player eligibility, emphasizing a player’s standing as an amateur and student.¹³⁸ But many academic leaders were skeptics of the new athletic association.¹³⁹

Id.

135 HARTWELL, *supra* note 8, at 124 (PDF # 152). . He complained, “Questionable means are sometimes employed to enable professionals or semi-professionals to play in college teams.” *Id.* He noted: “When college men are willing to travel with professional ball players, and especially under assumed names, it is time for college authorities to recognize and regulate college athletics.” *Id.*

136 *Id.* Also see ZIMBALIST, *supra* note 19, at 7 (schools “graduate students and paid ringers” on their teams).

137 Pierce, *supra* note 57, at 77–78:

In brief, then, this National Association was formed to organize and perpetuate the work of sane control of collegiate sports, and incidentally to support representative rules committees. It encourages local governing bodies, which shall receive their ideals from the National Association. It studies the question of amateurism and endeavors to spread the knowledge of this important athletic subject. It hopes to make sport for sport’s sake the controlling spirit at all institutions of learning. It discourages commercialism and encourages true amateurism. It believes the use of intercollegiate athletics for advertising purposes should be frowned upon. It strives to coordinate, in their proper relations, athletic and academic work.

138 See PROCEEDINGS OF THE SECOND ANNUAL CONVENTION, *supra* note 58, at 78–79 (PDF # 144).

Rule 1 required a student to take a full schedule of courses. Rule 2 prohibited any student who received, directly or indirectly, money or any other consideration, from participating in athletics. Rule 3 prohibited a student who received compensation or any emolument to enroll or to play from participating in athletics. Rule 4 prohibited a student from competing if he had participated the four previous years. Rule 5 required a student to complete a year of instruction at his school before competing in athletics. Rule 6 required a football player to complete two out of three terms in the prior year. Rule 7 required students to complete a card with information about his previous athletic competitions.

139 PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 1, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=96&q1=agitation>, publishing the address Cap’t. Palmer E. Pierce, at 30 (PDF #96). As president of the body, he appealed for more schools to join but also enumerated their concerns:

- (a) ‘Your Association is accomplishing little or nothing. It has no particular influence.’
- (b) ‘Your eligibility rules are not as advanced as our own. No good, then, could come to us by joining.’
- (c) ‘We prefer to keep independent and believe we can do more good as an independent leader than by joining in a national movement.’
- (d) ‘YOU require the faculties to take control of athletics, while at our institution the faculties have little power.’
- (e) ‘There is too much talk about college athletics. Don’t see the need of this agitation.’
- (f) ‘There are members in your organization so impure athletically we do not care to

Sports would undermine their education mission.¹⁴⁰ Some college leaders worried that professionalism among college athletes would corrupt students.¹⁴¹

A debate held on January 2, 1909, at the annual proceedings foreshadowed the current tensions between pay-for-play and college amateurism.¹⁴² Summer baseball presented a problem.¹⁴³ By then, college baseball had been played for decades.¹⁴⁴ Some college students played for pay in summer leagues. This alarmed some college leaders.¹⁴⁵ They wondered if this should be allowed.¹⁴⁶

One side of this debate was pragmatic. Proponents of a rule to allow pay for summer baseball argued that schools tolerated the situation for years with no harm.¹⁴⁷ They thought that summer baseball did not pose a threat to amateurism

associate with them.'

140 W. Burlette Carter, *Responding to the Perversion of In Loco Parentis: Using a Non-Profit Organization to Support Student-Athletes*, 35. IND. L. REV. 851, 862 (2002), quoting ROBERT STEBBINS, *AMATEURS: ON THE MARGIN BETWEEN WORK AND LEISURE* 20–21 (1979).

141 PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 1, publishing *Debate, Should Any Student in Good Collegiate Standing Be Permitted to Play in Intercollegiate Baseball Contests*, II. Negative, Prof. E.J. Bartlett, at 59 (PDF # 125), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&seq=125&q1=admiration>:

The professional athlete is the admiration of the sensual woman, the coveted prize of the false sport who wants to buy him, the very implement and object of enormous gambling operations, a golden sandwich man to the cigarette maker, a sojourner in strange places where his warmest welcome is in the bar and pool rooms. Naturally, he is always looking for his price. He must win to maintain his popularity.

142 *Id.* at 53 (PDF # 119), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&seq=119&q1=should+any>.

143 PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 12, at 62 (PDF # 128).

144 GEOFFREY C. WARD & KEN BUMS, *supra* note 73) (The first known game of baseball took place at Cooperstown, New York in 1839 in an exhibition played by amateurs.).

145 PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 1, at 62 (PDF # 128) (Prof. A. A. Stagg), summarizing the problems that summer baseball posed for intercollegiate athletics: "It must be acknowledged that the enforcement of the amateur rule for baseball in our colleges has caused our athletic committees more trouble than all the other sports combined." He cited four reasons: first, students and some faculty sympathized with college players who was "working his way through college"; second, "professionalism" was hard to prevent because players used deceptions such as "playing under assumed names, or by playing in remote parts of the country, or by ostensibly filling business positions for which their salaries are supposed to be paid"; third, because some schools failed to enforce rules against payments to athletes, due to "imperfect organization or from gross negligence of the athletic management"; and fourth, because "some of our athletic committees, consisting of students, alumni and members of the faculty, is distinctly unfavorable to the enforcement of such rules as will work hardship to their teams."

146 *Id.* at 8 (PDF # 74), formally stating the question: "Should any student in good collegiate athletic standing be permitted to play intercollegiate baseball contests?" <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&seq=74&q1=should+any+student+in+good+standing>.

147 *Id.* at 54 (PDF # 120) (Prof. Welsh), <https://babel.hathitrust.org/cgi/ssd?id=mdp.39015039707107;page=ssd;view=plaintext;seq=120;num=54#seq120>. Arguing for a rule to allow college students to play summer baseball without being penalized by schools or conferences, Prof. Welsh understood that the college amateurism model was already significantly undercut by cheating, and that this problem was tolerated by institutional hypocrisy. Speaking bluntly but also pragmatically, he stated,

Everybody knows that college baseball teams have been padded with salaried professionals

for other sports.¹⁴⁸ But some faculty foresaw the current state of NIL collegians who move from school to school for more money.¹⁴⁹ College athletics would become commercialized,¹⁵⁰ spreading to other sports.¹⁵¹

Collegiate amateurism never escaped the undertow of professionalism. By 1914, *The Atlantic* exposed sham methods to evade amateurism rules.¹⁵² Soon, reports surfaced of coaches arranging recruiting inducements for prized athletes.¹⁵³ Schools rationalized that “all the others are doing it” and “we are doing very little

under the guise of students. (Now understand, please, this was not true of your college nor of mine, but of somebody else’s college.) This resulted in unfair intercollegiate representation. Colleges that could afford a professional pitcher, or a professional batter, or a professional infield had an unfair advantage in intercollegiate contests.

148 *Id.* at 61 (PDF #127), <https://babel.hathitrust.org/cgi/ssd?id=mdp.39015039707107;page=ssd;view=plaintext;seq=127;num=61#seq127>. Prof. Chase, agreeing with Prof. Welsh, contended that a college student who played summer baseball came by his money openly and honestly, in contrast to more surreptitious forms of paying athletes in other sports.

Is that man who openly receives money for playing summer baseball any more of a professional than the one who has excessive expense accounts paid, or one who receives \$100 and board per month as night clerk in a summer hotel and plays on the hotel team for the fun of it? That men are made liars by the present rule we have unfortunately many, many cases to offer in proof.

149 *Id.*, <https://babel.hathitrust.org/cgi/ssd?id=mdp.39015039707107;page=ssd;view=plaintext;seq=127;num=61#seq127>, where Prof. Stagg said that allowing players to accept pay would degrade college athletics: “The American loves to win and we are willing to pay the price. This creates a wide demand for good baseball players, and a certain type of college player sooner or later gets involved.”

150 *Id.*, <https://babel.hathitrust.org/cgi/ssd?id=mdp.39015039707107;page=ssd;view=plaintext;seq=127;num=61#seq127>, revealing Prof. Stagg’s prescient vision of the current state of NIL in college athletics:

I can even now see the motley bunch knocking at the doors of our colleges, eager for the reputation and the advertising asset to help boost them to higher professional honors. The cry of our educational institutions of recent years has been that athletics have become too prominent, exciting too much interest on the part of the students and taking too much of the players’ time, quite over-balancing the educational interest.

151 *Id.*, <https://babel.hathitrust.org/cgi/ssd?id=mdp.39015039707107;page=ssd;view=plaintext;seq=127;num=61#seq127>.

Prof. Stagg foresaw how creeping professionalism would lead to the present state of college athletics:

Is it supposed that only baseball men will be professionals? Not for a moment!

The very instant that the bars are let down in baseball the clamor will begin for leniency in other sports. Football, basketball and track athletics, all will feel that they are entitled to consideration.

152 C.A. Stewart, *Athletics and the College*, *THE ATLANTIC* 153, 155 (April 1914), <chrome-extension://efaidnbmninnibpcajpcglclefindmkaj/https://cdn.theatlantic.com/media/archives/1914/02/113-2/132218127.pdf>, stating,

As a matter of fact, every man who has lived among college athletes knows that many of them have at some time received money, directly or indirectly, for athletic competition. Actual proof of professionalism in any one case is as difficult as proof of bribe-taking among aldermen.

153 SAVAGE ET AL., *supra* note 14, at 227

of it compared to our competitors.”¹⁵⁴ In 1929, the Carnegie Foundation issued a lengthy analysis of college athletics, noting that many athletic departments “subsidized” the employment of good athletes.¹⁵⁵ Football, in particular, was commercialized in ways that are familiar a century later.¹⁵⁶ Recruitment practices from the 1920s resemble NIL deals today.¹⁵⁷ Publicity for college athletics in the 1920s hinted at the explosion of publicity rights for athletes a century later.¹⁵⁸

3. *Linking the Reserve Clause in Professional Baseball and College Amateurism Rules to College NIL Form Contracts*

Professional baseball and college athletics developed at roughly the same time, from about 1880 through the 1920s. They drew from a supply of athletic talent in labor markets that overlapped to some degree with each other. Uniform player contracts controlled the most marketable players by forbidding them from contracting with another club.¹⁵⁹ Likewise, NCAA rules forbade athletes from

154 *Id.*

155 *Id.* at 250-51, reporting,

Hence, athletes at a number of universities have been subsidized under the guise of salesmen of insurance or bonds (Columbia, Wisconsin), clothing store clerks (California, Drake, Ohio State), agents for business firms (Chicago, Colgate, University of Iowa, Southern Methodist, Wyoming), sporting goods salesmen (Dartmouth, Drake, Texas, University of Washington, Wyoming), advertising solicitors (Michigan, Missouri, Northwestern, Pennsylvania), motion picture employees (Southern California), companions to children (Denver, Harvard), writers (Michigan), and otherwise out of all proportion to service rendered.

These examples are especially noteworthy because “agents for business firms” correspond to current types of NIL paid sponsorships of college athletes, and “advertising solicitors” similarly correspond to NIL deals whereby college athletes promote a product or a service.

156 *Id.* at viii:

[T]he football contest that so astonishes the foreign visitor is not a student’s game, as it once was. It is a highly organized commercial enterprise. The athletes who take part in it have come up through years of training; they are commanded by professional coaches; little if any personal initiative of ordinary play is left to the player. The great matches are highly profitable enterprises. Sometimes the profits go to finance college sports, sometimes to pay the cost of the sports amphitheater, in some cases the college authorities take a slice of the profits for college buildings.

157 *Id.* at 244. A university business manager replied to an alumnus who inquired about helping two promising athletes:

“If you say these two boys can make the team then we sure want to take care of them.”

And again: “If he is an honest-to-goodness athlete, that is, one who can make our teams, we will, of course, do our best to help him with a job.”

158 *Id.* at xvi, remarking,

In no other nation of the world will a college boy find his photograph in the metropolitan paper because he plays on a college team. All this is part of the newspaper effort to reach the advertiser. The situation is regrettable alike for journalism and for the public good. But it exists.

Into this game of publicity, the university of the present day enters eagerly. It desires for itself the publicity that the newspapers can supply. It wants students, it wants popularity, but above all it wants money and always more money. The athlete is the most available publicity material the college has.

159 *Id.*

being paid to enroll or to play and required them to be enrolled for one year before becoming eligible to play.¹⁶⁰

The uniform player contract for Armando Marsans in 1916 (Fig. 1),¹⁶¹ and the rules and regulations for University of Pennsylvania athletes in 1893 (Fig. 2),¹⁶² depict the one-sided nature of these relationships. When selected passages from the Big Ten and SEC NIL contracts are compared to these examples,¹⁶³ the similarities in institutional overreach are apparent.

These examples bear on recent and current developments in NIL for college athletes. As this article demonstrates in Part II.B, NIL contracts in the Big Ten and SEC contain adhesive and unconscionable terms, like early baseball contracts.¹⁶⁴ Earlier courts found that the player contracts lacked mutuality or consideration,¹⁶⁵ or were beyond their equitable powers to prevent the player from moving.¹⁶⁶ The drafters of the Big Ten and SEC form contracts have recontextualized versions of contracts from a century ago by severely limiting an athlete's negotiation rights.¹⁶⁷ These NIL contracts are vulnerable to the same types of lawsuits and outcomes.

As for college athletics, the rules in the 1893 University of Pennsylvania regulations echo today in the Big Ten and SEC contracts. Rule I prohibited pay for play.¹⁶⁸ Like Rule I, NIL contracts bar employment.¹⁶⁹ While the restrictions on professional baseball players and current college athletes differ to a degree, they suppress the operation of a free labor market. Rule II, Section 3, barred an athlete from participating for one year if the individual transferred to another school.¹⁷⁰ While that rule is not repeated verbatim in the SEC contract, the agreement prohibits the athlete and agent from entertaining a competitive offer.¹⁷¹ The individual would need to transfer to another school outside any NIL deal framework—and only after arriving, be free to negotiate, probably with a weaker hand.

160 See PROCEEDINGS OF THE SECOND ANNUAL CONVENTION, *supra* note 58, at 78–79 (PDF # 144).

161 Source:Christies.com, <https://onlineonly.christies.com/s/golden-age-baseball/armando-marsans-signed-contract-114/45619> (request for approval to publish under consideration per email response from Alexander Romera, Bids and Client Services Apprentice, Christie's, June 30, 2025).

162 *Penn Athletics in the 19th Century*, UNIVERSITY OF PENNSYLVANIA ARCHIVES, <https://archives.upenn.edu/exhibits/penn-history/19th-century-athletics/> (This exhibit was created in 2005 by Mary D. McConaghy and by Michael T. Woods, University Archives Summer Research Fellow and an undergraduate at Penn State University.).

163 See *s* Table 1, Row 12.

164 See *infra* Part I.B.3 (Points 5 and 6).

165 See *supra* notes 106 and 108.

166 *Phila. Ball Club, Ltd. v. Hallman*, 8 Pa. C.C. 57, 59 (1890); *Metropolitan Exhibition Co. v. Ward*, 9 N.Y.S. 779 (1890)/

167 See *infra* Table 1, Row 9.

168 *Penn Athletics in the 19th Century*, *supra* note 162.

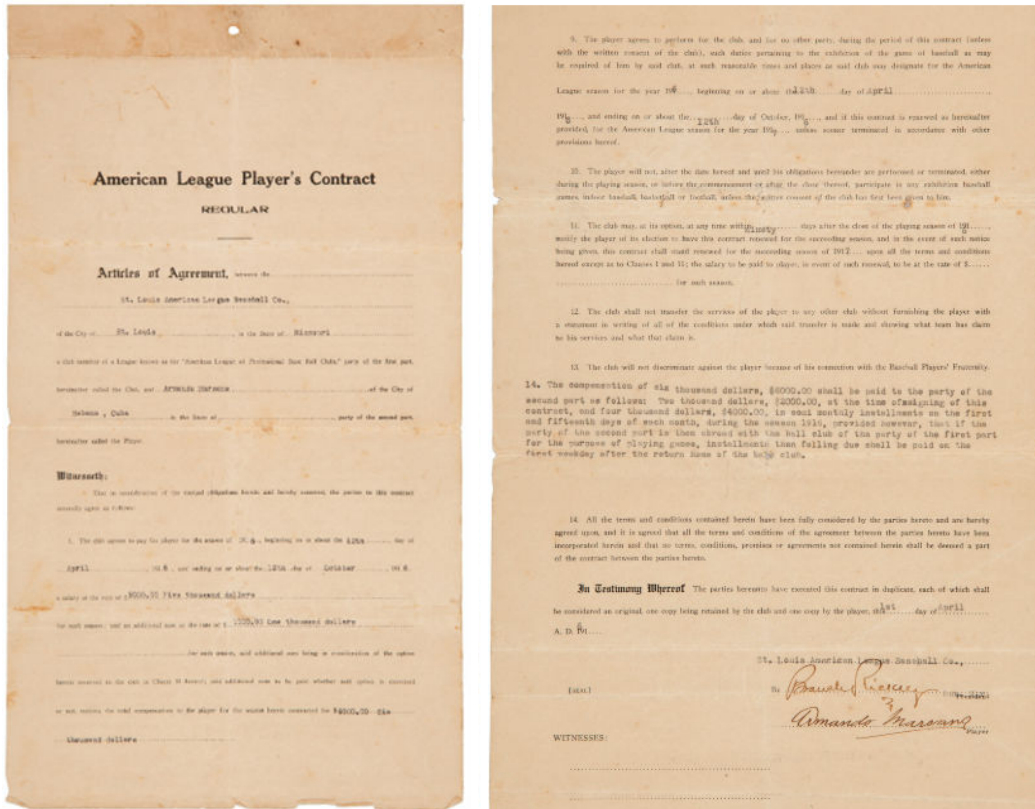
169 See *infra* Table 1, Row 12.

170 *Penn Athletics in the 19th Century*, *supra* note 162.

171 See *infra* Table 1, Row 9.

The Big Ten NIL contract (Fig. 3), with a provision for an exclusive and irrevocable grant of collegiate NIL rights, raises a serious question about whether an athlete has anything else to grant to a school outside the conference.¹⁷² This re-creates the significant obstacle for any athlete who wanted to transfer to a University of Pennsylvania team—loss of a year to compete.¹⁷³ The SEC NIL contract (Fig 4), with severe restrictions placed in athletes for pursuing and receiving interest from other schools, is also similar to the transfer obstacles imposed in 1893 by the University of Pennsylvania. In sum, the Big Ten and SEC have used form contracts—reminiscent of baseball form contracts with a strict, club-friendly reserve clause—to diminish pay for players in the new NIL era. Like their baseball ancestors, college athletes are so heavily constrained by adhesive contract conditions that they have little hope of capitalizing on their true athletic labor market value.

Figure 1: American League Player’s Contract (Regular): Armando Marsans (1916 Season).



172 See *infra* Table 1, Row 1.

173 See PROCEEDINGS OF THE SECOND ANNUAL CONVENTION, *supra* note 58, (Rule 5).

Figure 2: University of Pennsylvania Athletic Association Rules for Student Athletes---

Rules affecting Eligibility to Membership on Athletic Teams at the University of Pennsylvania

Adopted December 19, 1893

RULE I. No student shall be allowed to represent the University of Pennsylvania in a public athletic contest, either individually or as a member of any team, who either before or since entering the University shall have engaged for money in any athletic competition, whether for a stake or a money prize or a share of the entrance fees or admission money, or who shall have taught or engaged in any athletic exercise or sport as a means of livelihood, or who shall at any time have received or taken part in any athletic sport or contest for any pecuniary gain or emolument whatever, direct or indirect, with the single exception that he may have received from the college organization or from any permanent amateur association of which he was at the time a member, the amount by which the expenses necessarily incurred by him in representing this organization in athletic contests exceeded his ordinary expenses.

RULE II. SECTION 1. No student shall be allowed to represent the University of Pennsylvania in any public athletic contest, individually or as a member of any team, unless he is and intends to be throughout the college year, a bona fide member of the University, taking a full year's work.

SECTION 2. A student who is dropped for neglect of his studies into a lower class shall be debarred from taking part in inter-collegiate contests until the end of the next academic year, or until he is permitted by the faculty to rejoin his class.

SECTION 3. No student of the University who is not a student in the college and no student in the college who has ever played in an inter-collegiate contest upon any team of any other college or university shall play upon a University of Pennsylvania team until he has resided one academic year at the University and passed the annual examination upon a full year's work.

RULE III. No student shall represent the University of Pennsylvania in any public athletic contest, either individually or as a member of the team, for more than four years. In reckoning the four years the year of probation mentioned in Rule II shall be excluded, also any year lost to a student by illness.

RULE IV. No student shall be permitted to participate in any athletic contest until he shall have procured a certificate of physical fitness issued by the Director of Physical Culture in conformity with the rules hereafter to be adopted by the Faculty Conference Committee.

RULE V. No student shall be permitted to play on more than one athletic team in a single college year unless he obtains permission so to do from the Faculty Conference Committee.

RULE VI. The election of captains of University teams shall be subject to joint ratification by the Faculty Conference Committee and the Board of Directors of the Athletic Association.

RULE VII. Each captain of a University team shall, at the beginning of his season, submit to the dean of the several departments of the University a schedule or roster of the hours of practice set for his candidates, together with a list of such candidates, and he shall notify the deans from time to time of changes and modifications in said schedule and said list.

RULE VIII. The above rules go into effect at once.

SIMON N. PATTEN,

Chairman of the Faculty Conference Committee.

GEORGE WHARTON PEPPER,

Secretary of the Faculty Conference Committee.

H. LAUSATT GEVELIN,

President of the Athletic Association.

CLIFFORD PEMBERTON, JR.,

Secretary of the Athletic Association.

Figure 3: Big Ten NIL Form Contract for Schools and Athletes [Section 1(a), 1(b), & 1(c)].

1. Name, Image and Likeness License.
 - a. License Grant. During Athlete's Eligibility Period¹, Athlete grants Institution the irrevocable, exclusive (as described in Annex A), royalty-free, fully paid-up, sublicensable (through multiple tiers), transferrable, license to use Athlete's name, nickname, pseudonym, voice, signature, caricature, likeness, image, picture, portrait, quotes, statements, writings, identifiable biographical information, other identifiable features, and any other indicia of personal identity (e.g., jersey number, social media handle, etc.), "rights of publicity"/"personality rights", trademarks and other IP rights (individually and collectively, "NIL") (a) as may appear in any photograph, sound/video recording, clips, highlights, broadcast, live stream, social media post, publication or other depictions (b) with an irrevocable authorization to reproduce, edit, modify, retouch, copy, sell, exhibit, publish or distribute any and all such materials in all forms and in all media (now known or hereafter developed), and (c) as set forth in Annex A ("NIL License"), and waives any moral rights that Athlete may have in such materials. For clarity, and without limiting the rights granted, the NIL License includes a license to use Athlete's NIL both individually and in a group license setting. If Athlete transfers to another college or university, Institution will take reasonable steps not to actively use the Athlete's NIL with the intent of representing that Athlete currently participates in Institution's athletic program during any period where Athlete is on a team roster of the transferee Institution's Intercollegiate Athletics program. Notwithstanding the foregoing, after Athlete transfers, Institution is permitted to sell-off any existing products incorporating Athlete's NIL produced under license prior to the transfer, and use the Athlete's NIL in any way that does not expressly and intentionally represent that the Athlete is still a member of the Institution's athletics program (e.g., archival uses and historical signage are permitted).
 - b. Sublicense Rights. For clarity, the Athlete acknowledges and agrees that the NIL License expressly includes the right to freely sublicense (through multiple tiers) any or all of the Institution's rights under the NIL License (e.g., to authorize third parties to use the Athlete's NIL to promote third-party products or services or to grant third parties the right to grant further sublicenses) to The Big Ten Conference, Inc. ("Big Ten" or "Conference"), the National Collegiate Athletic Association ("NCAA"), and any and all third parties. The Athlete shall not be entitled to any additional consideration, royalties, or any other payments in connection with any sublicenses.
 - c. Rights After Eligibility. After the Athlete's Eligibility Period, the Institution and its sublicensees are not required to discontinue use of the Athlete's NIL (e.g., content). The previous sentence does not permit the Institution to continue to (after the Eligibility Period): (i) sell goods or services incorporating the Athlete's name, image, or likeness; or (ii) use or authorize the use of the Athlete's name, image, or likeness to promote the goods or services of a third party.

Figure 4: SEC Form Contract for Schools and Athletes [Section 4(c), 9(b), and 9(c)].

4 (c) In consideration of the commitments made by Institution herein, Student-Athlete agrees that, during the Term, Student-Athlete shall not, and shall not authorize or permit any of Student-Athlete's Representatives (as defined below) to, directly or indirectly (i) initiate, solicit, entertain, negotiate, accept or discuss any inquiry, proposal or offer from any college or university other than Institution relating to Student-Athlete transferring to or otherwise enrolling at or granting a right or license to use Student-Athlete's Likeness, or any portion thereof (a "Competitive Proposal"), or (ii) provide any information to any third party in connection with or related to a Competitive Proposal. Student-Athlete agrees to immediately notify Institution if Student-Athlete or any of Student-Athlete's Representatives receives any indications of interest or offers in respect of a Competitive Proposal and will communicate to Institution in reasonable detail the terms of any such indication or offer. Immediately upon execution of this Agreement, Student-Athlete shall, and shall cause Student-Athlete's Representatives to, terminate any and all existing discussions, negotiations and information sharing with any third parties regarding a Competitive Proposal.

(b) **Termination by Institution.** Institution may immediately terminate this Agreement if Student-Athlete: (i) materially breaches this Agreement; (ii) fails to enroll (and remain enrolled) at Institution for the first semester/session that Student-Athlete is eligible to enroll or fails to enroll (and remain enrolled) in each subsequent semester/session during the Term; (iii) ceases to be a member of an Institution athletics team; (iv) is charged with, arrested for, found guilty of, or pleads guilty to illegal or criminal conduct or otherwise commits, or is publicly alleged to have committed any act, or becomes involved in any situation which does or could bring Institution into public disrepute, contempt, scandal, or ridicule, or which does or could insult or offend the community or any class or group thereof, or which does or could injure the reputation of Institution or diminish the value of Institution's association with Student-Athlete; (v) violates Association, SEC, Institution, or team rules, regulations or policies; (vi) misrepresents or conceals information on Student-Athlete's admissions application; (vii) misrepresents, conceals, or fails to disclose anything in Student-Athlete's background that does or could diminish the value of Institution's association with Student-Athlete, including, without limitation, criminal history and

medical history; (viii) refuses to participate in Institution or Association drug testing programs; (ix) fails to present adequate medical qualifications (as determined in the sole discretion of Institution's sports medicine staff) for participation in intercollegiate athletics at Institution within 14 days of enrollment at Institution; (x) dies; (xi) neglects academic obligations resulting in excessive unexcused class or tutor absences or repeatedly fails to complete required academic assignments; (xii) fails to satisfy Association, SEC, or Institution eligibility requirements; (xiii) announces an intent to transfer from Institution; or (xiv) neglects team requirements or refuses to participate in required team activities.

(c) **Termination by Student-Athlete.** Student-Athlete may terminate the Agreement if Institution materially breaches the Agreement and fails to cure such breach within 15 days of being provided written notice of such breach.

II. THE NEW RESERVE CLAUSE: BIG TEN AND SEC NIL FORM CONTRACTS

This part presents original research on NIL contracts. The discussion centers on the NIL form contracts for the Big Ten and SEC conferences. Part II.A describes the research methods and sources for acquiring these contracts. This explanation is important because it reveals what is *not* known about these form contracts. Who drafted them? Are schools required to adopt them? Can athletes bargain for different terms? Do the conferences review and approve each school's NIL form contract? Have these contracts—which were self-described as memorandums of understanding—changed with the implementation of the longer contracts referenced in these documents?

While there are many unanswered questions about NIL form contracts, the following discussion could be the first legal analysis of these agreements. Part II.B begins with a chart that extracts key terms from the contracts. Terms are similar but not identical. There are important differences, too. Athletes grant exclusive NIL rights in the Big Ten contract, while SEC athletes grant partial, nonexclusive rights. This difference seems to be advantageous for SEC athletes because they retain some ownership of NIL rights. But the SEC contract, unlike the Big Ten contract, strictly prohibits athletes and their agents from entertaining competitive offers while the NIL contract is in effect. If an NIL contract terminates after a transfer portal period opens and closes for athletes, how do they acquire information about their market value? This appears to be a functional equivalent of the reserve clause in baseball contracts, depriving the athlete of any ability to negotiate a better agreement.

Part II.B identifies seven legal vulnerabilities in these NIL contracts.

A. *Methods and Sources for Acquiring NIL Form Contracts*

I acquired form contracts in a Freedom of Information Act (FOIA) request made to over ninety schools in the Big Ten, SEC, Big 12, ACC, Pac-12 Conference, Conference USA, Mid-American Conference, Ohio Valley Conference, Mountain West Conference, Atlantic 10 Conference, America East Conference, and Big Sky Conference.¹⁷⁴ My request sought NIL and revenue-sharing form contracts, and

174 My FOIA requests were sent in January and February 2025.

agreements for NIL collectives and athlete agents.¹⁷⁵ Most of my requests were unanswered or denied. Some states have enacted NIL shield laws, another factor that may have led to nonresponses.¹⁷⁶

I received NIL contracts from the University of Minnesota, and another Big Ten school that later limited my ability to publicize its disclosure, and Boise State University; an NIL athlete disclosure form from UNLV; NIL collective contracts from Southern Illinois University (Carbondale), and University of California-Davis; and an agent registration form from the University of Toledo. In short, most of my FOIA requests did not yield requested documents.

During my research, an ESPN reporter who was writing on NIL contracts asked for my views on whether these agreements constituted an employment relationship.¹⁷⁷ He shared a form contract from the SEC, and a clause from a Big Ten school's NIL contract that referred to adjustable NIL compensation. Also, during that time, Athletes.org filed NIL contracts to the docket in the *House* case. These contracts came from the University of Minnesota, University of Kansas, and University of Arizona. Due to the emerging dominance of Big Ten and SEC conferences in college athletics, I focused my analysis on their form agreements.

B. Key Terms of the Big Ten and SEC NIL Form Contracts

The complete Big Ten and SEC NIL form contracts have been submitted to this journal to verify their contents. Table 1 summarizes key provisions.

175 My request asked for the following:

Athlete Compensation Contract/Agreement: I request a blank form contract (also called agreement) between your school and its NCAA athletes. This request includes a contract (also called agreement) that relates to: (a) revenue shares and/or NIL pay or deals, and any other compensation, (b) grounds for terminating this contract/agreement, (c) waiver of any right to sue, and (d) arbitration clause.

NIL Agent/Representative Contract/Agreement: I request a blank form contract (also called agreement) between your school and NIL agents/representatives who act on behalf of athletes.

Collective Contract/Agreement: I request a blank form contract (also called agreement) between your school and its NIL collective.

I prefer an email response with a PDF attachment. My email address is mhl@illinois.edu.

I am not a media requester.

Prof. Michael H. LeRoy

176 Perhaps the best recent source of state NIL laws that shield NIL disclosures in FOIA laws, or related educational laws, is Frank D. LoMonte & Rachel Jones, *Blowing the Whistle on NIL Secrecy: College Athlete Endorsement Agreements and State Freedom-of-Information Laws*, 95 TEMP. L. REV. 257, 265–66 (2023) (highlighting Connecticut, Kentucky, Nebraska, and Louisiana). For more recent information, see Richard Johnson et al., *Colleges Withholding Revenue-Sharing Contract Details: How Schools Can Remain Tight-Lipped on Player Payments*, CBS SPORTS (July 11, 2025).

177 Dan Murphy, *NIL Contracts Have Employment and Pay-for-Play All Over Them, Experts Say*, ESPN (Mar. 5, 2025).

TABLE 1		
College Athlete Grant of NIL Rights in Big Ten and SEC Form Contract		
	Big Ten Form Contract	SEC Form Contract
1. Grant of Rights	Irrevocable, exclusive, royalty-free, fully-paid-up, sublicensable, transferable, right to use athlete's NIL to reproduce, edit, modify, retouch, copy, sell, exhibit photo, sound/video, recording, clips, highlights, live stream, social media posts, publications, other depictions	Worldwide, royalty-free, sublicensable and transferable license to use athlete's NIL and sublicense to third parties, including right to use, publish, reproduce, transmit, broadcast, distribute, make derivative works, and publicly display athlete's NIL
2. Sublicense Rights	Athlete grants sublicense rights to the Big Ten, NCAA, and third parties	Athlete grants sublicense rights to third parties (including any multimedia rights partner)
3. Assignee	School, Big Ten Conference, Licensee, Sublicensee (multiple tiers)	School, the SEC, the NCAA, or any promotor or organizer of any collegiate athletic games or competitive events in which institution may participate
4. Commercial Scope	No limitation on the type of commercial use by the institution, conference, or licensees relating to "rights of publicity," "personality rights," trademarks, other intellectual property rights	Use granted for advertising, marketing, publicity and other activities that promote, or identify athlete with the school, SEC, NCAA, or any promotion ... of college athletic games or competitive events in which the school may participate (Esports, video games, virtual competitions, nonfungible tokens (NFTs), and similar digital items)
5. NIL Scope	Name, nickname, pseudonym, voice, signature, caricature, likeness, image, picture, portrait, quotes, statements, writings, biographical information, other identifiable features, other identifiable features, and other indicia of personal identity (jersey number, social media handle). Also "rights of publicity," "personality rights," trademarks, other intellectual property rights	Name, image, likeness, signature, initials, GIFs, visible tattoo artwork, image (actual, drawn, virtual, computer generated), hologram, avatar, caricature, voice, quotes, statements, biographical and statistical information, performance, social media handles, trademarks, service marks, trade dress, copyright, rights of publicity, and other intellectual property rights
6. Future Use by School and Assignees	Permitted by conference and sublicensees after athlete's eligibility, but ends for school's and sublicensees' use of NIL to sell or promote goods and services	School retains right to use all work product, materials, and other content created during the Term, and the school's derivative works featuring the Athlete's NIL, to promote the SEC or school's academic or athletic programs. Grant is in perpetuity without any royalties or additional payment

7. Exclusivity	Exclusive grant without limitations	Athlete grant of rights is “nonexclusive,” except for athlete publicity rights related to promoting or marketing products, services, or brands that are competitive or in conflict with those of school or its sponsors
8. Revocability	Irrevocable without limitation	Limited irrevocable right, title, and interest in “work product,” e.g., “tweets, texts, photographs, videos, music, audio/sound recordings, artwork, hashtags and other material, information or works of authorship”
9. Athlete Transfer	School’s payment obligations terminate when athlete enters portal or transfers. Athlete to reimburse school in prorated amount for consideration paid forward. (No term provides pay for not entering the portal.)	Neither athlete, nor agent, shall initiate, solicit, entertain, negotiate, accept, or discuss any inquiry, proposal, or offer from any other college or university concerning transferring or enrolling or granting a publicity right or license, or consider a “competitive proposal”, and will immediately notify schools if athlete or agent receives communication of interest or offers
10. Eligibility	Finite period as defined by the NCAA, typically five years	Agreement cannot extend beyond the eligibility of the student-athlete to participate in NCAA sports
11. Post-eligibility	Institution and its sublicensees are not required to discontinue use of NIL content	Institution shall not obtain ownership rights, other than the license granted in this agreement
12. Employee/ Independent Contractor	Athlete is not an “employee or servant” of NIL licensees, nor does the agreement create a joint venture or partner	Student’s relationship with institution is that of an independent contractor, and nothing in this agreement is intended to, or should be construed to, create a partnership, joint venture or employment relationship
13. Dispute Resolution	Athlete must use school’s dispute resolution process	Schools are free to incorporate their own dispute resolution procedures
14. Release	“Limitation of liability” provides complete immunity from liability for all parties affiliated with the school, conference, and business partners	Athlete grants complete and absolute liability release, and promise not sue school. Athlete waives any right to, enjoin, restrain, or interfere with use of student-athlete’s likeness or the exploitation of any of institution’s rights as provided in the agreement.

Table 1 shows that an individual athlete grants NIL publicity rights to the school in exchange for payment. The athlete and school can use a blank grid in the contract to specify the amount and schedule of payments. In the Big Ten, the athlete’s grant of rights is “irrevocable” (Row 1) and “exclusive ... without limitation” (Row 7). This grant lasts for the athlete’s eligibility under NCAA rules, typically five years (Footnote 1 of the Big Ten form contract, and Footnote 8 in the SEC contract). Athletes in the SEC grant more limited NIL rights. The grant is “nonexclusive,” except for rights related to the school’s “products, services, or brands” (Row 7).

Both contracts prohibit the athlete's revocation. The Big Ten agreement states that the athlete's grant of rights is "irrevocable without limitation" (Row 8), while the SEC athlete grants the conference an irrevocable right to "title, and interest in 'work product,' including 'tweets, texts, photographs, videos, music, audio/sound recordings, artwork, hashtags and other material, information or works of authorship" (Row 8).

Athletes agree to broad sublicensing and assignment of their NIL rights. The Big Ten athlete grants sublicensing rights to the conference, NCAA, and third parties (Row 2), while the grant in the SEC contract is to third parties, including multimedia entities (Row 2). Relatedly, the assignee of athlete rights in the Big Ten is the school, Big Ten Conference, licensee, and sublicensee in multiple tiers (Row 3). The SEC provides a more limited definition of assignee, restricted to the athlete's collegiate activities—the school, SEC, NCAA, or promotor or organizer of collegiate games or competitive events in which the school participates (Row 3).

The scope of NIL rights in both conference agreements is expansive (Row 5). The Big Ten's NIL contract broadly applies to the athlete's "rights of publicity," "personality rights," trademarks, other intellectual property rights. While the SEC definition is similar, it contains personal attributes such as visible tattoo artwork, and computer-generated extensions, including virtual, computer generated, hologram, avatar, and caricature representations of the individual.

Consistent with the breadth of these assigned publicity rights, the contracts broadly define their commercial scope. The Big Ten contract has "no limitation on the type of commercial use by the institution, conference, or licensees" (Row 4). The SEC contract is narrower, limited to "advertising, marketing, publicity and other activities that promote, or identify student-athlete with the institution, the SEC, the association, or any promotion ... of college athletic games or competitive events in which the Institution may participate" (Row 4). But this scope broadens to include "Esports, video games, virtual competitions, and nonfungible tokens [NFTs], and similar digital items" (Row 4).

The NIL agreements impose significant costs and barriers when the athlete transfers to another school. A Big Ten school's payment obligations terminate when athlete enters the portal or transfers. Also, the athlete must reimburse school in pr-rated amounts for consideration paid forward (Row 9). The SEC agreement imposes more restrictions on the athlete, stating that neither the athlete nor agent shall initiate, solicit, entertain, negotiate, accept, or discuss any inquiry, proposal, or offer from any other college or university concerning transferring or enrolling or granting a publicity right or license, or consider a competitive proposal. In addition, the athlete or agent must immediately notify the school when they receive a communication of interest or an offer (Row 9).

Both conferences own the athlete's NIL rights after the individual's eligibility ends. The Big Ten contract says that the school and sublicensees are not required to discontinue use of the athlete's NIL content (Row 11). The SEC is more limited, stating that the school shall not obtain ownership rights, other than the license granted in this agreement (Row 11).

The Big Ten agreement explicitly states that the athlete is not an "employee or servant," nor does the Agreement create a joint venture or partnership (Row 12). The

SEC contract has a similar limitation, stating that the athlete's relationship with the school is that of an independent contractor. The contract also states that nothing in this agreement is intended, or should be construed, to create a partnership, joint venture or employment relationship (Row 12).

Under the Big Ten agreement, the athlete must use the school's dispute resolution process (Row 14). The SEC agreement similarly states that schools are free to incorporate their own dispute resolution procedures (Row 14). Both NIL agreements contain universal waivers of school liability. The Big Ten's "limitation of liability" provides complete immunity from liability for all parties affiliated with the school, conference, and business partners. The SEC's release is more limited, stating that the athlete grants a complete and absolute liability release, and promises not to sue the school. While this is limited to the school, the athlete more broadly waives any right to enjoin, restrain or interfere with use of their NIL or the exploitation of the school's rights as provided in the agreement.

In sum, the Big Ten and SEC contracts transfer ownership and distribution of athlete publicity rights in exchange for compensation. To the extent they define a postcontract negotiation process, their terms favor schools, not athletes. This lopsided arrangement extends to every other part of the agreements—a dispute resolution process determined by the school, liability waivers that apply to schools and downstream users of athlete NIL, and waiver of an athlete's potential right to be an employee or business partner with the school. Payment is the only clear benefit to the athlete. However, the contracts entail such extensive stripping of athlete rights related to future negotiation and resolution of disputes that these procedural inequities appear likely to affect the amount of pay that an athlete receives by the end of the contract.

III. LEGAL VULNERABILITIES TO ENFORCING THE BIG TEN AND SEC FORM CONTRACTS

This article demonstrates that NIL form contracts replicate the mobility suppressing features of both the uniform player contract from 1880 to 1917, and the NCAA's long-standing rules against pay for play. A recent court opinion, *MLB Players Inc. v. DraftKings, Inc.*,¹⁷⁸ helps to reveal the adhesive and unconscionable vulnerabilities in the Big Ten and SEC contracts.

MLB Players, Inc. (MLBPI) is a subsidiary of the Major League Baseball Players Association, the union that negotiates and administers a collective bargaining agreement with Major League Baseball (MLB).¹⁷⁹ Players assign their NIL group rights to the Players Association.¹⁸⁰ MLBPI is the exclusive group licensing agent for active players.¹⁸¹ This entity "possesses the exclusive right to use, license, and sublicense those players' [NILs] for any commercial marketing, promotional activity,

¹⁷⁸ 771 F. Supp. 3d 513, 520 (E.D. Pa. 2025).

¹⁷⁹ *Id.* at 519.

¹⁸⁰ *Id.* at 519–20.

¹⁸¹ *Id.* at 520.

or product in which MLB players' group licensing rights are implicated."¹⁸²

In 2024, MLBPI sued two gambling companies, DraftKings, Inc. and bet365, alleging unauthorized use of players' NIL in images on their online and mobile sportsbook platforms.¹⁸³ MLBPI alleged violations of Pennsylvania's name or likeness statute,¹⁸⁴ common law rights relating to misappropriation of publicity,¹⁸⁵ and misappropriation of identity.¹⁸⁶ Its lawsuit also asserted a claim for unjust enrichment.¹⁸⁷ MLBPI defeated the companies' motions to dismiss on its claims for enforcing players' rights of publicity. The court also found that MLBPI sufficiently alleged the commercial value element of its statutory claim, common law right-of-publicity, third-party use player NILs for a commercial purpose, and unjust enrichment.¹⁸⁸

MLB Players, Inc. offers a litigation backdrop for conceptualizing how athlete NIL rights in the Big Ten and SEC suffer by comparison.¹⁸⁹ This contrast shows that college athletes have little or no legal protection once they sign an NIL agreement.

1. Athletes are denied the right to bargain collectively to convey group NIL rights.
2. Athletes sign one-sided dispute resolution clauses in their NIL contracts.
3. Athletes experience impairment of NIL rights when they transfer.
4. Athletes experience significant NIL devaluation by NIL agreements that allow a school to adjust pay without negotiation.
5. Athletes are subjected to adhesion contracts.
6. Athletes agree to contracts that lack mutuality.
7. Athletes waive remedies for NIL violations.

182 *Id.*

183 *Id.* at 520–22.

184 *Id.* at 523.

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.* at 535 (related to the statutory claim under 42 PA. CONS. STAT. § 8316(e)(i)–(iii)).

189 There is an important caveat to my thesis that NIL form contracts significantly limit athletes' share in publicity rights that are assigned to the school, conference, NCAA, and all the business partners of these entities. At the outset of the new NIL period, there has been widespread confusion about what constitutes a "valid business purpose" that the newly created College Sports Commission requires to approve NIL deals above \$600. Assoc. Press, *College Sports Commission Rejecting Some Athlete NIL Deals*, ESPN (July 10, 2025), reporting that "many deals could not be cleared because they did not conform to an NCAA rule that sets a 'valid business purpose' standard for deals to be approved," but among some of the 1500 deals approved in the first few days, more than 1500 deals were approved "ranging in value from three figures to seven figures." [Sense? "some of the 1500 deals ... more than 1500 deals?] A seven-figure NIL deal suggests little or no impairment of an athlete's NIL rights. Nonetheless, the term "valid business purpose" remains opaque, even after the disclosure that twelve factors are used to make this determination. See Lilah Wylde & Alison Silveira, *Deloitte's NIL Clearinghouse: The 12-Factor FMV Review*, Seyfarth (May 22, 2025), <https://www.laborandemploymentlawcounsel.com/2025/05/inside-the-house-v-ncaa-settlements-new-nil-oversight-regime-12-steps-power-conferences-and-a-compliance-balancing-act/>.

1. *Athletes Are Denied the Right to Bargain Collectively to Convey Group NIL Rights.* *MLB Players Inc.* reveals the inequality of negotiating power between professional and college athletes in the context of owning and conveying NIL rights. To begin with, the Big Ten and SEC NIL contracts, respectively below, deny employment rights for athletes.

Big Ten NIL Form Contract

11. **No Employment (Waiver).** This MOU does not create a fiduciary relationship between the Parties, and nothing in this MOU is intended to make or makes either Party an agent, legal representative, subsidiary, joint venture, partner, employee or servant of the other for any purpose whatsoever (unless otherwise agreed between the Parties). The Athlete further acknowledges and agrees that notwithstanding any other provision of law or agreement to the contrary, the Athlete is not, and shall not claim to be, an employee of the Institution. *The Athlete hereby irrevocably releases, waives, forever discharges, and covenants not to sue the Institution, NCAA, Conference, its and their affiliates, governing boards, directors, employees, representatives, agents or otherwise, from, and forever waives, any and all claims to the fullest extent permitted by law, against the Institution, NCAA, Conference, its and their affiliates, governing boards, directors, employees, representatives, agents or otherwise resulting from any claim that the Athlete is an employee of the Institution, including, but not limited to, as a result of this MOU or Institution serving as a marketing agent as set forth in Annex A.*

SEC NIL Form Contract

- ▲ 8. **Relationship of Parties.** Student-Athlete's relationship with Institution is that of an independent contractor, and nothing in this Agreement is intended to, or should be construed to, create a partnership, joint venture or employment relationship.

This status designation impedes players from forming a player's union for the purpose of collective bargaining. Because the National Labor Relations Act (NLRA) applies to private-sector employers,¹⁹⁰ private schools in the Big Ten and SEC are covered by this law (e.g., University of Southern California, Northwestern, and Vanderbilt). Some Big Ten schools are in states that allow public employees to unionize outside the NLRA.¹⁹¹

Professional player unions negotiate with leagues over the ownership of group licensing rights for players (called group licensing agreements, or GLAs).¹⁹² In this representative capacity, a player's union enters into a separate publicity rights agreement with the marketing arm of the league to generate income for players.¹⁹³

190 Section 2(2) of the NLRA provides, "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof... ." 29 U.S.C. § 152(2).

191 E.g., Illinois Educational Labor Relations Act (IELRA), 115 ILL. COMP. STAT. ANN. 5/1-5/21 (LexisNexis 1983). The IELRA defines an "employee" broadly to include "any individual, excluding supervisors, managerial, confidential, short-term employees, student, and part-time academic employees of community colleges employed full or part time by an educational employer." *Id.* at 5/2(b) (including exceptions for managerial and confidential employees). Also see New Jersey Employer-Employee Relations Act, N.J. REV. STAT. § 34:13A-1 et seq. (2024), at *id.* § 34:13A-3(c) (law applies to "public employers" and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State... ." Also see Rick Pluta, *House Bill Would Allow College Athletes to Join Labor Unions*, WEMU, July 9, 2025.

192 *Bohanon v. Nat'l Basketball Players Ass'n*, 1996 WL 34402549, Point 4 (Cal. Super. Ct. 1996) ("National Basketball Players Association (the 'NBPA') assigned the same rights that Plaintiff now claims as her own to NBA Properties in 1986.").

193 *CBS Interactive Inc. v. National Football League Players Ass'n, Inc.*, 259 F.R.D. 398 (S.D.N.Y. 2009), at

Some professional players earn millions of dollars a year from GLAs.¹⁹⁴

A player's union can sue for infringement of the players' group publicity rights.¹⁹⁵ Big Ten and SEC athletes have no rights to sue to protect their publicity rights from infringement and other unlawful uses. In contrast to athletes in the Big Ten and SEC NIL agreements, a player's union retains group licensing rights for active players, and "owns all federal and common law rights in certain trademarks, including a federal trademark registration for the corporate mark" of the union.¹⁹⁶ By assigning to their union an exclusive right use of "their names, signatures, images and /or likenesses, on a group basis, in connection with licensing programs," MLB players generate revenue and royalties that inure to their benefit.¹⁹⁷ Unions also enter into agreements with emerging technology platforms to generate new sources of income.¹⁹⁸

2. *Athletes Sign One-Sided Dispute Resolution Clauses in Their NIL Contracts.* Mandatory dispute resolution clauses in NIL agreements magnify the disadvantage to college athletes in lacking collective bargaining power. The Big Ten contract requires the athlete to use the school's dispute resolution process.¹⁹⁹

Big Ten NIL Form Contract

21. Dispute Resolution. If a dispute between the Parties related to this MOU arises, Athlete and Institution will utilize Institution's Student-Athlete Hearings process.

Similarly, SEC schools may incorporate language for the laws of their state (see footnote 15 in the form contract) and insert their own dispute resolution procedures (see footnote 16 in the form contract), avoiding negotiation with the athlete or athlete's agent over this process.

SEC NIL Form Contract (Including Footnote)

416, reciting this grant of rights from the player's association to the league:

The NFLPA hereby grants to [Players Inc.] and [Players Inc.] hereby accepts the exclusive worldwide right, license, and privilege of utilizing the [publicity rights], including the right to grant sublicenses of one or more such [publicity rights] ... full discretion as to the manner in which the [publicity rights] are to be used, [as well as the right to] commence or prosecute ... any claims or suits in its own name or in the name of NFLPA or join NFLPA as a party thereto.

194 Kurt Badenhausen, *J.J. McCarthy, Travis Kelce Top NFLPA Pay Chart for 2024 Season*, SPORTICO, June 17, 2025 (J.J. McCarthy earned \$4 million from the NFLPA in 2024, followed by Travis Kelce (\$3.25 million), Justin Herbert (\$2.55 million), Josh Allen (\$2.1 million), Christian McCaffrey (\$2 million), and Justin Jefferson (\$1.7 million).

195 *Id.* ("Players Inc.'s right under its agreement with NFLPA to maintain actions for infringement of the publicity rights does not preclude NFLPA from bringing its own infringement actions.").

196 *Nat'l Football League Players Ass'n v. Nat'l Football League Props., Inc.*, (S.D.N.Y. 1991), 1991 WL 79325, at *1.

197 *Id.*

198 Tom Nightengale, *DraftKings and NFLPA Agree to Settle Reignmaker Lawsuit*, SBCAMERICAS (Jan. 27, 2025), <https://sbcamericas.com/2025/01/27/draftkings-nflpa-agree-settle-lawsuit/> (union had negotiated agreement for betting company to promote player images in an online NFT marketplace).

199 See *infra* Table 1, Row 13, and excerpt.

12. **Governing Law; [Dispute Resolution].** This Agreement will be construed in accordance with the laws of [_____].¹⁵ [Dispute Resolution].¹⁶

¹⁵ Note: Insert appropriate governing law.

¹⁶ Note: If desired, insert any preferred dispute resolution terms.

Compared to professional players, who can use a negotiated arbitration process instead of one imposed by MLB,²⁰⁰ or file a lawsuit to protect their NIL rights,²⁰¹ college athletes must use the dispute resolution process of the party with whom they have a dispute. Athletes at public schools at both conferences have due process property rights.

Shannon v. Board of Trustees the University of Illinois demonstrates why the Big Ten and SEC dispute resolution provisions are unconstitutional.²⁰² Terrence Shannon Jr., then a likely first-round draft pick in the NBA, faced criminal charges during the season.²⁰³ Once he was indicted, his university suspended him from participating in games.²⁰⁴ He exercised his right, granted by the school, to challenge the suspension before a three-person panel created by the university.²⁰⁵ After the panel denied his challenge, he claimed in a lawsuit that the school violated his due process property rights. A federal judge ruled that the school's dispute resolution process was unconstitutional.²⁰⁶

This internal dispute resolution process raises additional legal concerns. Shannon was initially deprived of access to his university's regular disciplinary procedures.²⁰⁷ But the case of an athlete with a dispute under the Big Ten NIL contract has no disciplinary component. At the University of Illinois, Urbana-Champaign, students have access to a "Student Complaint Process."²⁰⁸ This general description refers to the Code of Federal Regulations, Academic Concerns, Campus Conduct Concerns, Sex-Based Misconduct Support, Response, and Prevention Procedures, and related conduct matters.²⁰⁹ There is no apparent process for grieving, much less adjudicating, a financial contract dispute over the Big Ten NIL contract. To this point, the *Shannon* court said, "Plaintiff's suspension can and will impact his career opportunities, current income from his NIL contract, and anticipated future income. In the collegiate athletic context, a suspension can significantly inhibit a student-athlete's career prospects and earning potential that cannot be recovered through any adequate remedies at law."²¹⁰

200 *Id.*

201 2022–2026 Basic Agreement, (art. VI.E, Salary Arbitration and art. XI, Grievance Procedure), https://www.mlbplayers.com/files/ugd/4d23dc_d6dfc2344d2042de973e37de62484da5.pdf.

202 2024 WL 218103 (C.D. Ill. Jan. 19, 2024).

203 *Id.* at *1.

204 *Id.*

205 *Id.*

206 *Id.* at *17.

207 *Id.* at *4.

208 Univ. Ill. Urbana Champaign, Office of the Provost, *Student Complaint Process*, <https://provost.illinois.edu/student-consumer-information/student-complaint-process/> (last visited Dec. 29, 2025).

209 *Id.*

210 *Id.* at *13.

In sum, a school's specialized dispute resolution processes are not currently designed to adjudicate NIL publicity rights contract dispute between students and their schools. For state schools, all of which are subject to the Due Process Clause of the Fourteenth Amendment, property that inheres in an athlete's NIL agreement cannot be taken without procedural and substantive protections that likely require a specialized forum.

Even if public schools develop such processes, they seem to lack the neutrality features provided by judges who can adjudicate due process property rights claims without a stake in the matter. Private schools, while not subject to the Fourteenth Amendment Due Process Clause, are vulnerable to other challenges relating to the possibility of bias in their NIL dispute resolution processes. And for public and private schools are unlikely to have robust discovery processes and expertise to make informed decisions about impairment of NIL rights.

3. *Athletes Experience Impairment of NIL Rights When They Transfer.* When an athlete transfers, their original NIL contract impairs their ability to enter into a second agreement with a new school.

Big Ten athletes who sign the NIL form contract appear to be limited, if not completely prevented, from transferring to another conference. These excerpts from Points 1(a) and 1(c) in the Big Ten contract support this conclusion.

Big Ten NIL Form Contract

1. Name, Image and Likeness License.

a. License Grant. During Athlete's Eligibility Period¹, Athlete grants Institution the irrevocable, exclusive (as described in Annex A), royalty-free, fully paid-up, sublicensable (through multiple tiers), transferrable, license to use Athlete's name, nickname, pseudonym, voice, signature, caricature, likeness, image, picture, portrait, quotes, statements, writings, identifiable biographical information, other identifiable features, and any other indicia of personal identity (e.g., jersey number, social media handle, etc.), "rights of publicity"/"personality rights", trademarks and other IP rights (individually and collectively, "NIL") (a) as may appear in any photograph, sound/video recording, clips, highlights, broadcast, live stream, social media post, publication or other depictions (b) with an irrevocable authorization to reproduce, edit, modify, retouch, copy, sell, exhibit, publish or distribute any and all such materials in all forms and in all media (now known or hereafter developed), and (c) as set forth in Annex A ("NIL License"), and waives any moral rights that Athlete may have in such materials. For clarity, and without limiting the rights granted.

c. Rights After Eligibility. After the Athlete's Eligibility Period, the Institution and its sublicensees are not required to discontinue use of the Athlete's NIL (e.g., content). The previous sentence does not permit the Institution to continue to (after the Eligibility Period): (i) sell goods or services incorporating the Athlete's name, image, or likeness; or (ii) use or authorize the use of the Athlete's name, image, or likeness to promote the goods or services of a third party.

¹ "Eligibility Period" means the finite time span as determined by the NCAA, typically five academic years, during which a student-athlete may compete in competition in a particular sport in an Intercollegiate Athletics Program, as may be updated by the NCAA from time to time

In Point 1(a) of the contract, the athlete grants the school "irrevocable" and "exclusive" NIL rights. Footnote 1 (in "Eligibility Period") explains that the grant of rights is for the athlete's NCAA eligibility—the individual's college career—not eligibility at the school. The first sentence in "Rights after Eligibility" (Point 1(c), above) reinforces this concern: "After the Athlete's Eligibility Period, the Institution and its sub-licensees are not required to discontinue use of the Athlete's NIL (e.g., content)."

This functions like the reserve clause that most courts refused to enforce during the baseball wars, when contract jumping occurred.²¹¹ This contracting arrangement also puts athletes in a similar position as the baseball players in *Haelan Laboratories v. Topps Chewing Gum Co.*²¹² Professional baseball players signed a publicity rights agreement with a chewing gum company, Haelan Laboratories, authorizing commercial use of their photograph.²¹³ Topps Chewing Gum, a rival company, signed the same players to contracts authorizing this company to use the players' photograph for its commercial purposes.²¹⁴ The players were caught in the middle of this lawsuit by the first company, which alleged that the players were fraudulently induced by the second company to interfere with its contract.²¹⁵ The Second Circuit Court of Appeals ruled that Haelan Laboratories, as the first grantee of an exclusive limited duration right to use the players' photographs, could maintain a fraudulent inducement action if Topps Chewing Company used its photographs while the first contract was in effect.²¹⁶ In reaching this ruling, the court rejected Topps Chewing Company's argument that the players' first contract was not an assignment of publicity rights, but a release against a claim for a violation of privacy.²¹⁷

If Big Ten athletes grant their NIL rights irrevocably and exclusively—a grant that lasts for the duration of athletes' NCAA eligibility—how do they sell those rights again to another school, especially outside the Big Ten conference? Complicating matters, this grant of rights reaches multiple subtiers of rights holders to the athlete's NIL. The Big Ten contract appears to grant downstream users the same irrevocable and exclusive right to the athlete's NIL.

SEC NIL Form Contract

- 4 14. **Miscellaneous.** Waiver by either party of a breach of any provision of this Agreement will not be construed as a waiver of any subsequent breach of the same or any other provision, nor will any delay or omission on the part of such party to avail itself of any right, power or privilege that it has or may have hereunder operate as a waiver of any right, power or privilege. If any provision of this Agreement is determined to be invalid by a court of competent jurisdiction, such determination shall in no way affect the validity or enforceability of any other provision herein. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, e.g., www.docusign.com) or other transmission method and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes. This [Agreement](#), together with the [Aid Agreement](#), sets forth the entire agreement of the parties with respect to the subject matter hereof and supersedes any, and all prior agreements between the parties whether written or oral. **Student-Athlete may not assign or otherwise transfer any of Student-Athlete's rights**, or delegate, subcontract, or otherwise transfer any of Student-Athlete's obligations or performance, under this Agreement, and any such attempt to assign, delegate, or transfer is void *ab initio*. Institution may freely assign or otherwise transfer all or any of its rights, or delegate or otherwise transfer all or any of its obligations or performance, under this Agreement. This Agreement is binding upon and inures to the benefit of the parties and their respective permitted successors and assigns. Each of the SEC and the Association will be deemed to be third party beneficiaries of this [Agreement](#), and will have the right to enforce this Agreement directly to the extent they may deem necessary or advisable to protect its or the rights of Institution hereunder.

211 Bennett, *supra* note 95.

212 202 F.2d 866 (2d Cir. 1953).

213 *Id.* at 867.

214 *Id.*

215 *Id.* at 869.

216 *Id.*

217 *Id.*

In Section 14 of the SEC contract, titled “miscellaneous,” an athlete faces a prospect of being trapped like a transferring Big Ten athlete from signing a new NIL agreement because of a term that states, “Student–Athlete may not assign or otherwise transfer any of Student–Athlete’s rights, or delegate, subcontract, or otherwise transfer any of Student–Athlete’s obligations or performance, under this Agreement, and any such attempt to assign, delegate, or transfer is void ab initio.” However, the SEC and its third-party beneficiaries retain full rights to transfer rights under the NIL agreement.

Transferring Big Ten and SEC athletes could be enmeshed in a dispute between two competing owners of their NIL rights, like the situation in *Haelan Laboratories, Inc.* This, in turn, suggests litigation could occur between schools or conferences that assert competing rights to the athlete’s NIL—or two businesses that own sublicenses to this NIL. Litigation could require judicial fact findings that parallel *Haelan Laboratories*.²¹⁸

4. *Athletes Experience Significant NIL Devaluation by NIL Agreements that Allow a School to Adjust Pay Without Negotiation.* An audacious provision in the Big Ten NIL contract states: “The Consideration may be subject to regular review and assessment at Institution’s discretion.”

Big Ten NIL Form Contract

2. Consideration. During the Term, and subject to the terms and conditions in this MOU, and conditioned upon the Athlete being in Good Standing², Institution shall pay the Athlete the amounts as set forth in Annex A (“Consideration”) in consideration of the NIL License. The Consideration may be subject to regular review and assessment at Institution’s discretion. The Institution may elect to have one or more third parties administer the payment of the Consideration, or any portion thereof, to the Athlete on the Institution’s behalf. The third-party administrator(s) may, on the Institution’s behalf, withhold taxes, whether federal, state, local, or otherwise owed, and may prepare or file any tax-related documents on behalf of the Institution as reasonably required by law.

² “**Good Standing**” means the Athlete meets all of the following criteria: (i) is enrolled in the Institution, (ii) is compliant with the terms of this MOU, (iii) complies with all Institution rules, NCAA rules, Conference rules, and academic standards, and other standards, requirements and regulations set forth by the NCAA, the Conference, and the Institution, thereby being authorized to participate in collegiate-level athletic competitions sanctioned by the NCAA, Conference, and Institution, (iv) is academically and athletically eligible to compete during the sport’s designated NCAA competition season(s), and (v) is on the active roster of the Team.

This provision suffers from similar legal infirmities as the *Hallman* court found in 1890, when it concluded that a player could not be prohibited from signing with another club simply because he had agreed a year earlier to be bound by a reserve clause.²¹⁹

Metropolitan Exhibition Co. v. Ward also suggests that the Big Ten NIL contract is unenforceable due to its adjustable consideration clause.²²⁰ The *Ward* court refused

218 *Haelan*, 202 F.2d 866, 869, stating, “But plaintiff, in its capacity as exclusive grantee of player’s ‘right of publicity,’ has a valid claim against defendant if defendant used that player’s photograph during the term of plaintiff’s grant and with knowledge of it....”

219 *Phila. Ball Club, Ltd. v. Hallman*, 8 Pa. C.C. 57, 61–62 (1890).

220 *Supra* note 91, at 394 (1890). The only other provision bearing on this subject is that contained in the supplementary agreement dated April 23, 1889, which reads as follows: “The New York Base Ball Club agrees that John M. Ward, who this day signs a contract to play with it for the season of 1889, shall not be held by the New York Club for the season of 1890, at a salary of less than \$3,000. This supplemental contract is hereby made a part of the main contract.”

to enforce the reserve clause for lack of definiteness, or lack of mutuality and fairness, noting,

The failure in the existing contract to expressly provide the terms and conditions of the contract to be made for 1890, either renders the latter indefinite and uncertain, or we must infer that the same terms and conditions are to be incorporated in the one to be now enforced, which necessarily includes the reserve clause, for no good reason can be suggested, if all the others are to be included, why this should be omitted. Upon the latter assumption the want of fairness and of mutuality, which are fatal to its enforcement in equity, are apparent...²²¹

5. *Athletes Are Subjected to Adhesion Contracts.* The Big Ten and SEC NIL contracts incorporate the *House* settlement agreement, as shown respectively.

Big Ten NIL Form Contract

12. Conditions Precedent. All of Institution's obligations in this MOU, including the obligation to provide Athlete with the Consideration, are conditioned on each of the following: (a) approval of that certain Stipulation and Settlement Agreement, dated as of October 7, 2024, resolving the litigation captioned *In re: College Athlete NIL Litigation*, Case No. 4:20-CV-03919 (N.D. Cal) (the "Settlement Agreement"), (b) Athlete maintaining enrollment at Institution as a full-time student attending classes, and (c) the Athlete being in Good Standing (collectively, "Conditions Precedent").

SEC NIL Form Contract

Institution shall have no obligation to use Student-Athlete's Likeness in any way. For clarity and the avoidance of doubt, this grant and license shall not and does not authorize use of Student-Athlete's Likeness in any manner, respect, or medium to the extent that such authorization would violate the terms of the Stipulation and Settlement Agreement in *In re College Athlete NIL Litigation*, No. 4:20-CV-03919 (N.D. Cal.) (commonly referred to as *House v. NCAA*) (such agreement, the "Settlement Agreement").

As a result of the *House* settlement agreement, the NCAA has implemented rules that require all college athletes to submit NIL deals of \$600 or more for approval by a third-party clearinghouse.²²² This ensures that NIL payments conform to the *House* settlement strictures against pay to play. Twelve factors, mostly opaque,

....

Do these provisions constitute a definite contract between the parties, or do they do more than reserve the services of defendant, subject to the making of a contract thereafter with definite terms and conditions?

It must be noticed that these provisions standing alone fail to disclose what are to be the terms and conditions of the agreement between the parties in the event that plaintiff shall exercise its option, which is accorded, to reserve defendant for the ball season of 1890....

Not only are there no terms and conditions fixed, but I do not think it is entirely clear that Ward agrees to do anything further than to accord the right to reserve him upon terms thereafter to be fixed.

221 *Id.*

222 Michael McCann, *Clearinghouse Denial of NIL Deals to Be Limited by Arbitration*, SPORTICO (June 8, 2025), <https://www.sportico.com/law/analysis/2025/arbitration-nil-clearinghouse-lawsuits-1234855588/>, ("Deloitte, in partnership with the new College Sports Commission, will oversee NIL Go. The clearinghouse will use a fair market algorithm to assess if an NIL deal has a plausible relationship to the value of the athlete's right of publicity in the context of a proposed deal.).

determine the propriety of an NIL deal.²²³

The College Sports Commission (or CSC) has implemented arbitration procedures that conform to terms of the *House* settlement.²²⁴ The procedures are detailed and comprehensive.²²⁵ However, they appear to raise unconscionability issues.²²⁶

223 PR Newswire, *Lawmakers Question Fairness in NIL Contract Approvals; Jack Easterby Weighs In* (June 10, 2025), <https://finance.yahoo.com/news/lawmakers-fairness-nil-contract-approvals-120200960.html>:

Deloitte's new NIL Go platform evaluates each qualifying NIL deal using a confidential 12-factor fair market value (FMV) rubric, with the authority to approve or deny deals based on undisclosed criteria.... (C)ritics argue the process merely rebuilds the same "black box" system that previously plagued NCAA compliance—where stakeholders can't see how decisions are made.

Also see Lilah Wylde & Alison Silveira, *Deloitte's NIL Clearinghouse: The 12-Factor FMV Review*, Seyfarth (May 22, 2025), <https://www.laborandemploymentlawcounsel.com/2025/05/inside-the-house-v-ncaa-settlements-new-nil-oversight-regime-12-steps-power-conferences-and-a-compliance-balancing-act/>. Factors include the following:

- Athlete's individual marketability and social media reach
 - Athletic performance and public profile
 - Type and scope of deliverables (appearances, content, etc.)
 - Geographic market size and demand
 - Deal duration
 - Exclusivity clauses
 - Renewability or extension terms
 - Comparable market benchmarks
 - Involvement of donors or booster entities
 - Timing of the deal (relative to recruiting, transfers, etc.)
 - Quality and completeness of documentation
 - Red flags suggesting illegitimacy or inducement
- Each deal will be reviewed to assess whether the compensation reasonably aligns with what the athlete could command in an open and competitive market.

A graphical explanation of the new NIL deal structure is reported in Michael Goldman, *House Settlement: Detailed Breakdown*, KEATING MUETHING & KLEKAMP PLL, https://www.kmklaw.com/media/publication/445_House%20Settlement%20Detailed%20Breakdown%20-%20Michael%20Goldman.pdf.

224 Coll. Sports Comm'n, *Enforcement*, <https://www.collegesportscommission.org/enforcement> (last visited Dec. 29, 2025).

225 Coll. Sports Comm'n, *Arbitration Rules and Procedures for Disputes with Student Athletes Concerning CSC Determinations* (July 28, 2025), at 1, n.1 referencing the terms of this arbitration process with the House settlement. These procedures have some even-handed elements, for example, the athlete may elect to have a remote hearing (*id.*, Point 1(b), at 1), and the athlete does not bear the cost of his or her complaint is dismissed (*id.*, Points 13(a) and (b)).

226 The time limit to file an appeal of an adverse ruling by CSC—fourteen days—is short, potentially onerous, and possibly unconscionable. *Id.* at Point 2(b). This aspect of the agreement may generate successful legal challenges, either by athletes or schools. See *Huskins v. Mungo Homes, LLC*, 444 S.C. 592 (2024) (South Carolina supreme court ruled that an arbitration clause shortening the statute of limitations to ninety days was void and illegal); *Jenkins v. Dermatology Mgmt., LLC*, 107 Cal. App. 5th 633 (2024) (a California appellate court ruled that an arbitration agreement imposing a one-year statute of limitations was substantively unconscionable under the state's Unfair Competition Law, which has a four year limit); *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 Wash. 2013) (Washington supreme court ruled that an arbitration contract that

An arbitration system was found to be procedurally and substantively unconscionable in *Bakersfield College v. California Community College Athletic Ass'n*.²²⁷ An intercollegiate athletic association sanctioned a college for providing its football team with prohibited meals and other benefits.²²⁸ The school sued to challenge the binding arbitration process imposed by the association.²²⁹ After a trial court denied its motion for relief, the college appealed.²³⁰ A state appellate court found that the arbitration provision was procedurally and substantively unconscionable.²³¹ Furthermore, because the arbitration clause was permeated with unconscionability, the entire provision was unconscionable.²³²

6. *Athletes Agree to Contracts that Lack Mutuality*. The SEC contract lacks mutuality by providing fourteen separate grounds for a school to terminate an NIL contract, while failing to provide an athlete a single basis for terminating this agreement.

shortened the statute of limitations from four years to thirty days was unconscionable under the Consumer Protection Act); and *Zaborowski v. MHN Gov't Servs., Inc.*, 936 F. Supp. 2d 1145 (N.D. Cal. 2013) (shortened limitations period in arbitration agreement was substantively unconscionable). These cases were identified by using Westlaw's Co-Counsel AI assisted research on September 3, 2025.

227 254 Cal.Rptr.3d 470 (Cal. App. 3d 2019).

228 *Id.* at 476. After the association administered sanctions, the college and its president bypassed the arbitration process and filed a civil lawsuit, contending that they were not bound by an unconscionable arbitration process. *Id.* at 477.

229 *Id.*

230 *Id.*

231 In a passage relevant to athletes under the Big Ten and SEC contracts, the court found that the arbitration agreement was procedurally unconscionable.

The uncontroverted evidence supports a finding of procedural unconscionability. This is especially true given the superior bargaining strength of the Athletic Association. As the trial court explained, the College had to accept the Athletic Association's terms if it wanted to participate in intercollegiate athletics. The ability to participate in intercollegiate athletic competitions is of substantial importance to both educational institutions and their students. (Citation omitted.) To provide this opportunity to its students, the College had no other alternative—it had to be a member of the Athletic Association.

Id. at 479.

The arbitration agreement was also substantively unconscionable because only schools were subject to its provisions—not the association that imposed these terms:

When only the weaker party's claims are subject to arbitration, and there is no reasonable justification for that lack of symmetry, the agreement lacks the requisite degree of mutuality. As our [Supreme Court] recognized ... an arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences. (Quotes and citations omitted.)

Id. at 481.

232 *Id.* at 484–85:

An agreement to arbitrate is considered permeated by unconscionability where it contains more than one unconscionable provision. Such multiple defects indicate a systematic effort to impose arbitration on [the nondrafting party] not simply as an alternative to litigation, but as an inferior forum that works to the [drafting party's] advantage.

SEC NIL Form Contract

(b) **Termination by Institution.** Institution may immediately terminate this Agreement if Student-Athlete: (i) materially breaches this Agreement; (ii) fails to enroll (and remain enrolled) at Institution for the first semester/session that Student-Athlete is eligible to enroll or fails to enroll (and remain enrolled) in each subsequent semester/session during the Term; (iii) ceases to be a member of an Institution athletics team; (iv) is charged with, arrested for, found guilty of, or pleads guilty to illegal or criminal conduct or otherwise commits, or is publicly alleged to have committed any act, or becomes involved in any situation which does or could bring Institution into public disrepute, contempt, scandal, or ridicule, or which does or could insult or offend the community or any class or group thereof, or which does or could injure the reputation of Institution or diminish the value of Institution's association with Student-Athlete; (v) violates Association, SEC, Institution, or team rules, regulations or policies; (vi) misrepresents or conceals information on Student-Athlete's admissions application; (vii) misrepresents, conceals, or fails to disclose anything in Student-Athlete's background that does or could diminish the value of Institution's association with Student-Athlete, including, without limitation, criminal history and medical history; (viii) refuses to participate in Institution or Association drug testing programs; (ix) fails to present adequate medical qualifications (as determined in the sole discretion of Institution's sports medicine staff) for participation in intercollegiate athletics at Institution within 14 days of enrollment at Institution; (x) dies; (xi) neglects academic obligations resulting in excessive unexcused class or tutor absences or repeatedly fails to complete required academic assignments; (xii) fails to satisfy Association, SEC, or Institution eligibility requirements; (xiii) announces an intent to transfer from Institution; or (xiv) neglects team requirements or refuses to participate in required team activities.

(c) **Termination by Student-Athlete.** Student-Athlete may terminate the Agreement if Institution materially breaches the Agreement and fails to cure such breach within 15 days of being provided written notice of such breach.

The *Ward* court in 1890 was presented with a similarly one-sided contract between a club and player.²³³ In denying an injunction to the baseball club that sought to restrain this player from signing with another club, the court found the contract lacked mutuality.²³⁴ Several courts also found that the uniform baseball contract lacked mutuality.²³⁵

233 *Metropolitan Exhibition Co.*, *supra* note 91, at 415 (1890), remarking,

On the other hand, this contract, after having provided, at paragraph 15, that the club might terminate the contract at any time because of a violation of the agreement by the player, it further provides at paragraph 17, that the club may 'at any time, by giving the party of the second part ten days' notice of its option and its intention so to do, end and determine all its liabilities and obligations under this contract, in which event, upon the expiration of said ten days, all liabilities and obligations undertaken by said party of the first part to this contract shall at once cease and determine, and said party of the second part shall thereupon be also free from his obligation thereunder, and shall have no claim for wages for any period after said ten days.' So that the club may at any time, at the beginning, in the middle or at the end of the playing season, when the player is in New York or San Francisco or anywhere else, and without the assignment of any cause whatever, 'determine all its liabilities and obligations under said contract,' leaving the player to make his way home as best he can.

234 *Id.* at 414–15, explaining,

Every player who signs such a contract is bound for the current playing season and also for the ensuing playing season, and is obliged at the close of the first season to make another contract with the same terms and conditions binding him as before for the then approaching season, and reserving him for the second season, and so on as long as plaintiff elects, the player being always bound one year in advance.

In thus considering the obligations which, under the plaintiff's construction of the contract each has assumed, we have the spectacle presented of a contract which binds one party for a series of years and the other party for ten days, and of the party who is itself bound for ten days coming into a court of equity to enforce its claims against the party bound for years.

235 *Phila. Base-Ball Club, Ltd., v. Lajoie et al.*, 10 Pa. D. 309 (Del. Ct. Common Pleas 1901) (reciting from an unreported case, *Harrisburg Base-Ball Club v. Athletic Ass'n*, 8 Pa. C.C. Repts. 337):

7. *Athletes Waive Remedies for NIL Violations.* The Big Ten NIL contract requires athletes to sign a global release of liability.

Big Ten NIL Form Contract

22. Limitation of Liability. IN NO EVENT SHALL NCAA, INSTITUTION, CONFERENCE, OR ANY OF ITS OR THEIR AFFILIATES OR ANY OF THEIR GOVERNING BOARDS, OFFICERS, DIRECTORS, SHAREHOLDERS, MEMBERS, EMPLOYEES, INDEPENDENT CONTRACTORS, AGENTS OR OTHER REPRESENTATIVES BE LIABLE FOR ANY DIRECT OR INDIRECT DAMAGES OF ANY KIND, INCLUDING, WITHOUT LIMITATION, ANY DAMAGES FOR LOSS OF PROFITS, GOODWILL OR OTHER CONSEQUENTIAL OR INCIDENTAL DAMAGES ARISING OUT OF THIS MOU, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

General releases are not valid when they fail, like the Big Ten agreement, to describe specifically the nature of intellectual property rights that are conveyed.²³⁶ A concrete illustration involves an athlete's face—the very essence of NIL, which is mentioned in the Big Ten's expansive grant of rights.

[T]he contract provided: "It is further agreed between the parties hereto that the party of the second part (the plaintiff) reserves the right to abrogate this agreement at any time, when, to it, it appears that the said party of the first part is not fulfilling his contract to the best of his ability." Simonton, P. J., among other reasons for refusing an injunction, said that the contract lacked mutuality.

Id. at 316.

See also PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 1, at 455–56 (Prof. Chase):

The defendant is bound to many obligations under the remarkable provisions of the National Agreement. The Player's Contract executed in accordance with its terms, binds him, not only for the playing season of six months from April 14th to October 14th, but also for another season, if the plaintiff chooses to exercise its option, and if it insists upon the requirement of an option clause in each succeeding contract, the defendant can be held for a term of years. His only alternative is to abandon his vocation. Can it fairly be claimed that there is mutuality in such a contract? The absolute lack of mutuality, both of obligation and of remedy, in this contract, would prevent a court of equity from making it the basis of equitable relief by injunction or otherwise. The negative covenant, under such circumstances, is without a consideration to support it, and is unenforceable by injunction.

See also *Weegham v. Killefer*, 215 F. 168, 170–71 (W.D. Mich. 1914):

The leading authorities, with possibly one exception, are agreed that executory contracts of this nature can neither be enforced in equity nor form the basis of an action at law to recover damages for their breach. The reasons for the decisions are that such contracts are lacking in the necessary qualities of definiteness, certainty, and mutuality. The 1913 contract between these defendants, relative to the reservation of the defendant Killefer for the season of 1914, is lacking in all of these essential elements. . . . Although it is founded upon sufficient consideration, it lacks mutuality, because the Philadelphia Club may terminate it at any time upon 10 days' notice while the other party has no such option and is bound during the entire contract period.

More recently, see *Spencer v. Milton*, 159 Misc. 793 (N.Y. Sup. Ct. 1936) (vacating an injunction, not on grounds of lack of mutuality but because the player was not proven to possess unique and extraordinary talent).

²³⁶ *E.g.*, *Valve Corp. v. Sierra Ent., Inc.*, 431 F. Supp. 2d 1091 (2004); and *Fair Isaac Corp. v. Fed. Ins. Co.* (a limitation of liability clause did not limit damages for violations of intellectual property rights).

Big Ten NIL Form Contract

1. Name, Image and Likeness License.

a. License Grant. During Athlete's Eligibility Period¹, Athlete grants Institution the irrevocable, exclusive (as described in Annex A), royalty-free, fully paid-up, sublicensable (through multiple tiers), transferrable, license to use Athlete's name, nickname, pseudonym, voice, signature, caricature, likeness, image, picture, portrait, quotes, statements, writings, identifiable biographical information, other identifiable features, and any other indicia of personal identity (e.g., jersey number, social media handle, etc.), "rights of publicity"/"personality rights", trademarks and other IP rights (individually and collectively, "NIL") (a) as may appear in any photograph, sound/video recording, clips, highlights, broadcast, live stream, social media post, publication or other depictions (b) with an irrevocable authorization to reproduce, edit, modify, retouch, copy, sell, exhibit, publish or distribute any and all such materials in all forms and in all media (now known or hereafter developed), and (c) as set forth in Annex A ("NIL License"), and waives any moral rights that Athlete may have in such materials. For clarity, and without limiting the rights granted, the NIL License includes a license to use Athlete's NIL both individually and in a group license setting. If Athlete transfers to another college or university, Institution will take reasonable steps not to actively use the Athlete's NIL with the intent of representing that Athlete currently participates in Institution's athletic program during any period where Athlete is on a team roster of the transferee Institution's Intercollegiate Athletics program. Notwithstanding the foregoing, after Athlete transfers, Institution is permitted to sell-off any existing products incorporating Athlete's NIL produced under license prior to the transfer, and use the Athlete's NIL in any way that does not expressly and intentionally represent that the Athlete is still a member of the Institution's athletics program (e.g., archival uses and historical signage are permitted).

Illinois's Biometric Information Privacy Act (BIPA)²³⁷ applies to the Big Ten Conference, which maintains headquarters and a broadcast studio in Illinois. That state's BIPA has broadly stated purposes, including that "the public are deterred from partaking in biometric identifier-facilitated transactions."²³⁸ The law broadly defines "biometric identifier,"²³⁹ "biometric information,"²⁴⁰ "confidential and sensitive information,"²⁴¹ and "private entity."²⁴² A "written release" is defined broadly.²⁴³ Many employers in Illinois have faced litigation over their use of a basic timekeeping system that uses biometric identifiers to track employee working hours. If these athletes can prove bad faith or fraud in the Big Ten's failure to comply with BIPA, the release in the NIL contract would not be enforceable in Illinois.²⁴⁴

237 740 ILL. COMP. STAT. 14/1 et seq. (2008).

238 740 ILL. COMP. STAT. 14/5(e) et seq. (2008).

239 A "biometric identifier" is "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." 740 ILL. COMP. STAT. 14/10 (2008). For a further explanation of geometry, see *Monroy v. Shutterfly, Inc.*, 2017 WL 4099846 (N.D. Ill. Sept. 15, 2017) ("When a user uploads a photo, Shutterfly's facial recognition software scans the image, locates each of the faces in the image, and extracts a highly detailed 'map' or 'template' for each face based on its unique points and contours.").

240 "Biometric identifier" is "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." 740 ILL. COMP. STAT. 14/10 (2008).

241 "Confidential and sensitive documents" are generally defined as "personal information that can be used to uniquely identify an individual or an individual's account or property." *Id.*

242 A "private entity" is "any individual, partnership, corporation, limited liability company, association, or other group, however organized." *Id.*

243 A "written release" refers to "informed written consent or, in the context of employment, a release executed by an employee as a condition of employment." *Id.*

244 *See, e.g., Valve Corp. v. Sierra Ent., Inc.*, 431 F. Supp. 2d 1091, 1101 (W.D. Wash. 2004) ("A limitation of liability clause may not apply where the party relying on the clause acted in 'bad faith.'"); *Colonial Life Ins. Co. of Am. v. Elec. Data Sys. Corp.*, 817 F. Supp. 235, 242-43 (D.N.H.1993) ("[A] contractual limitation of liability is not enforceable ... if plaintiff's claim of fraud, bad faith and/or 'total and fundamental' breach is proven at trial."); *Long Island Lighting Co. v. Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 646 F. Supp. 1442, 1458 (S.D.N.Y. 1986) ("A defendant may be estopped from asserting a contractual limitation of consequential damages if the defendant has acted in bad faith."); *City of Dillingham v. CH2M Hill Nw., Inc.*, 873 P.2d 1271, 1275 (Alaska 1994) ("Liability for 'knowing,' or 'bad faith' breaches can never be limited.");

Apart from athletes selling publicity rights to their face, they also sell social media posts via the Big Ten NIL contract. TikTok, a global social media platform, settled a class action lawsuit under BIPA and privacy laws in other states in *In re TikTok, Inc., Consumer Privacy Litigation*.²⁴⁵ Plaintiffs in *In re TikTok, Inc.* claimed that the social media platform violated BIPA by harvesting users' facial scans without obtaining their consent, transferring and selling users' biometric information to third parties, and violating BIPA's disclosure and retention requirements.²⁴⁶ BIPA requires any user of biometric data to "inform the subject or 'the subject's legally authorized representative' in writing about several things, such as the purpose of collecting the data and how long they will be kept, and obtain the consent of the subject or authorized representative."²⁴⁷

In sum, Part III distills seven legal vulnerabilities in the Big Ten and SEC NIL form contracts. This analysis builds from Part II.B's enumeration of contract terms that connotes a one-sided bargain that tilts negotiation, enforcement, and substantive rights in favor of schools, conferences, and their business partners. The two contracts are asset-stripping vehicles to sell off an athlete's NIL rights without ensuring that athletes have access to neutral enforcement processes or arm's-length negotiation procedures for the next season. These provisions appear to be adhesive and unconscionable. The contractual infirmities in the Big Ten and SEC form contracts are essentially the same problems that courts identified from 1885 to 1917 in baseball player contract disputes. Most of those cases resulted in rulings that allowed players to break their contracts and accept better offers from other clubs. The same future may be in store for athletes who seek judicial relief to participate in a free market for their labor.

IV. CONCLUSION: THE REVERSE LOGIC OF COLLEGE NIL CONTRACTS—A LEGAL GUIDE FOR THE PERPLEXED

University leaders have succeeded in transforming a devastating antitrust lawsuit into a promising new model to turbocharge an already hypercommercialized enterprise. Today, more than ever, the NCAA's fraught history of concealing athletic professionalism is relevant in understanding the new NIL model. For more than a

Jewish Hosp. of St. Louis v. Boatmen's Nat'l Bank of Belleville, 633 N.E.2d 1267, 1280 (1994) ("Although exculpatory provisions such as this are not given special favor in the law, they are generally held effective except as to reckless or intentional breaches or those committed in bad faith."); *Corinno Civetta Constr. Corp. v. City of New York*, 493 N.E.2d 905, 910 (1986) (clause limiting liability for delay in construction contract not enforceable if delay caused by bad faith); and *J.A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540, 545 (Del. Super. Ct.1977) ("Even if a contract purports to give a general exoneration from 'damages,' it will not protect a party from a claim involving its own fraud or bad faith.").

²⁴⁵ 617 F. Supp. 3d 904 (N.D. Ill. 2022).

²⁴⁶ *Id.* at 917. For example, a summary allegation stated,

Defendants have used automated software, proprietary algorithms, AI, facial recognition, and other technologies to commercially profit from Plaintiffs' and Class Members' identities, unique identifying information, biometric data and information, images, video and digital recordings...

²⁴⁷ *Miller v. Sw. Airlines Co.*, 926 F.3d 898, 900 (7th Cir. 2019) (quoting 740 ILL. COMP. STAT. § 14/15(b) (2008)).

century, the NCAA and its schools have mastered the tension between academics and athletics by a series of ingenious reverse logic arrangements that tolerated or acquiesced to pay for play for athletes.²⁴⁸

To reach this point, the NCAA and power conferences have agreed to pay athletes directly while avoiding an employment relationship.²⁴⁹ While this enigma seems perplexing, it makes reverse-logical sense when seen through the historical lens of the NCAA's deceptive characterization of amateur athletics since 1906. The *House* settlement goes beyond employment by prohibiting pay for play.²⁵⁰ Where else, but in college athletics, are people who earn billions of dollars annually for their organizations deprived not only of a right to employment but a right to be paid for performance? The third-party clearinghouse for future NIL deals rejected some NIL deals within its first few days of operation because the agreements do not conform to "valid business purpose" requirement under the *House* settlement.²⁵¹ That, too, is a reverse logical system that settles a market-rigging antitrust violation with a new market-rigging process.

The new NIL era is merely a reprise of the NCAA's first convention, when the association passed rules to ensure amateurism—full-time enrollment of an athlete, loss of eligibility for accepting payment, no possibility to play for another school without sitting out for a year, and a limit of four years of eligibility. By

248 Daniel Libit, *NCAA's Longest-Serving Official, Defender of Amateurism, to Retire*, SPORTICO, (July 2, 2025), at <https://www.sportico.com/leagues/college-sports/2025/ncaa-kevin-lennon-retirement-1234858993/>, reporting on the retirement of a senior NCAA officer, Kevin Lennon, whose reverse-logic testimony regarding the NCAA's Rule 30(b)(6) in *NCAA v. Alston* opened the floodgates to the Supreme Court's 9-0 rejection of the college amateurism model ("In consolidated cases challenging NCAA rules limiting how colleges cover athletes' education-related expenses, the athlete plaintiffs pointed to admissions and apparent contradictions in Lennon's testimony to argue that the association manipulated its compensation policies to sustain a flexible, self-serving definition of 'amateurism.'").

249 *In re Coll. Athlete NIL Litig.*, Fourth Amended Stipulation and Settlement Agreement, No. 4:20-CV-03919 (N.D. Cal., May 7, 2025), stating,

(I)f some or all student-athletes are characterized as and/or definitively determined to have employee status under state or federal law and any Defendant or Releasee is required to pay any monies/provide any benefits to student-athletes, or student-athletes otherwise receive benefits as a result, beyond the monies and benefits provided in this Injunctive Relief Settlement, the Defendants shall have the option, but not the obligation, to seek to terminate or modify the injunction contemplated by this Injunctive Relief Settlement or the terms of this Injunctive Relief Settlement.

250 *Id.*

A. Definitions....

(rr) "Related Injunctive Relief NCAA & Conference Rules" means:

1. NCAA and conference rules prohibiting NIL payments by Associated Entities or Individuals (individually or collectively) to current or prospective student-athletes unless the license/payment is for a valid business purpose related to the promotion or endorsement of goods or services provided to the general public for profit, with compensation at rates and terms commensurate with compensation paid to similarly situated individuals with comparable NIL value who are not current or prospective student-athletes at the Member Institution....

251 Eddie Pels, *The New College Sports Agency Is Rejecting Some Athlete NIL Deals with Donor-Backed Collectives*, ASSOC. PRESS, July 10, 2025.

its third annual convention, the NCAA confronted the professionalism issue in a debate—an inconclusive debate that was referred to a committee. In 2025, a judge’s approval of the *House* settlement implicitly settled that lingering debate, even as she strongly suggested that athletes in nonrevenue sports were being shortchanged.²⁵² The settlement is another triumph for the reverse logic world of college athletics, which prizes corporate engagement over athlete education and double-talk over truth-telling.

The reverse logic world on NIL contracts is also revealed by ongoing efforts by universities to seek legislation that would codify the *House* settlement.²⁵³ This only makes sense when the curtain is pulled back on recent state laws that prohibit any athletic association or school from limiting NIL income.²⁵⁴ In a strange twist, these laws intend to let the marketplace decide the value of athletes, not faceless administrators whose NIL valuation metrics mimic a centrally planned economy.

These reverse logic realities explain why litigation over the reserve clause in professional baseball’s early history offers a potent model for lawsuits to challenge NIL contracts. The NCAA’s earliest amateurism rules resembled the reserve clause in major league baseball. Today, the Big Ten and SEC NIL form contracts replicate the mobility-suppressing features of the National League’s uniform player contract from 1880 to 1917. Like their baseball ancestors, college athletes are so heavily constrained by adhesive NIL contracts that they cannot capitalize on their true labor market value.

On this point, it is fair to ask, What precedential value do baseball cases from the late 1880s through early 1900s have to possible NIL lawsuits by college athletes? On the one hand, most of the cases cited in this study have few or no citations. But this citation check misses a more discomfiting possibility for schools, conferences, and the NCAA. A few of these older baseball cases have been cited in the modern era, with the effect that some players have been granted freedom to enter into new contracts with other teams or a new league.²⁵⁵ And while other modern era cases

252 Michael McCann, *Legal Scenarios That Could Follow Judge’s House Settlement Order*, SPORTICO, Apr. 23, 2025 (Judge Wilken’s order stated that she would not approve a settlement unless the loss of roster spots to current athletes was mitigated).

253 Daniel Libit, *Offsides: The Two House Dems Who Make GOP’s SCORE Act ‘Bipartisan,’* SPORTICO, July 21, 2025 (reporting on the Student Compensation and Opportunity through Rights and Endorsements (SCORE) Act).

254 Maddy Hudak, *Tennessee ‘Athlete-Friendly’ NIL Law Takes Shot at House Settlement*, NIL DAILY, May 18, 2025, reporting on the signing of SB 536. The new law states that the NCAA shall not “‘establish, adopt, promulgate, implement, or enforce any rule, standard, procedure, policy, or guideline that violates an applicable state or federal antitrust law,” and it should make sure it is “‘legally exempt from applicable antitrust laws” before doing so.”

255 *Cincinnati Bengals, Inc. v. Bergey*, 453 F. Supp. 129 (S.D. Ohio 1974), at 139, n.1 (citing *Cincinnati Exhibition Club v. Marsans*, 216 Fed. 269 (E.D. Mo. 1914); *Brooklyn Baseball Club v. McGuire*, 116 Fed. 782 (E. D. Pa. 1902); PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 59 (comments by Prof. Chase); *Metropolitan Exhibition Co. v. Ward*, 9 N.Y.S. 779 (1890); and *Phila. Ball Club, Ltd. v. Hallman*, 8 Pa. C.C. 57,59 (1890 at 49 (“As far as the action against Bergey is concerned and the conclusion (No. 1) that Bergey has not breached his contract, the Court should add that not only has no promise been broken but there has been no anticipatory breach”); *Detroit Football Co. v. Robinson*, 186 F. Supp. 933, 935 (E.D. La. 1960) (“We must conclude, as have others, interpreting

have denied players this freedom, these courts have found that the athlete had a unique or irreplaceable skill.²⁵⁶ For lawyers who represent college athletes in NIL contract challenges, there are enough favorable cases to bring the past current to the present. And the most disquieting point for schools and conferences is that they cannot claim that most, or even many, college athletes who sign NIL contracts have unique and irreplaceable talents. Indeed, the fact that NIL contracts strictly prohibit employment moots cases where an injunction was issued to prevent a baseball player with a unique talent from breaching his *employment* contract.

College athlete lawsuits arising from these take-it-or-leave-it contracts appear to be inevitable. These contracts raise issues related to adhesion, illusory terms, good faith and fair dealing, unjust enrichment, restrictive covenants, unfair business and trade practices, unauthorized exploitation of publicity rights, and more. These problems will likely fester until court rulings establish clear legal boundaries of permissible and illicit contract terms.

The future of college athletics is foretold in Lewis Carroll's *Through the Looking Glass and What Alice Found There*. This fantasy story re-created a child's reverse logic thinking. The story's continuing popularity may owe to the fact that adults re-create an exaggerated reality for others in the imperious way that Humpty Dumpty lectured a skeptical and precocious Alice in Wonderland:

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. 'Of course you don't—till I tell you.... When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'"

"The question is," said Alice, "whether you *can* make words mean so many different things."²⁵⁷

While college leaders alternate between boastful claims about the commercial future of college athletics in the NIL age,²⁵⁸ and their contradictory quest for

the same clause, that all Robinson executed was an offer which had not yet been unconditionally accepted by the Detroit Football Company when he withdrew it on December 29"); and *Los Angeles Rams Football Club v. Cannon*, 185 F. Supp. 717, 727 (S.D. Cal. 1960) ("there did not come into existence a valid written contract or contracts binding upon plaintiff and defendant"). *Also see* *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 517–18 (E.D. Pa. 1972):

Even if the player reserve system embodied in Paragraph 17 of the Standard Player's Contract is held to be not a perpetual option, but instead is merely a prohibition for three years precluding any player ... from freely negotiating for his services not only within the NHL but also outside that league, such three-year restraint following the expiration of a current contract is unreasonable.

256 *E.g.*, *Nassau Sports v. Peters*, 352 F. Supp. 870 (E.D.N.Y. 1972); *Winnipeg Rugby Football Club v. Freeman*, 140 F. Supp. 365 (N.D. Ohio, 1955); *Dallas Cowboys' Football Club v. Harris*, 348 S.W.2d 37 (Tex. Civ. App. 1961); and *Central New York Basketball, Inc. v. Barnett*, 181 N.E.2d 506 (Ct. Comm. Pleas 1961).

257 LEWIS CARROLL [PSEUDONYM], *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* (187), at 102 (PDF #108), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015066623441&seq=108&q1=by+glory> (*italics* in original). (The year of publication is not reflected in the book or online index).

258 *Athletics Director Addresses Changes in College Athletics at Ohio State* (July 2, 2025), <https://news.osu.edu/athletics-director-addresses-changes-in-college-athletics-at-ohio-state/>, publishing Athletic

legislation from Congress,²⁵⁹ they should be mindful that they cannot completely bar a college athlete's right to sue over a contract.²⁶⁰ Nor should the NCAA, power conference commissioners and athletic directors ignore the immortal limerick that relates to the sudden demise of the insufferable authority on the infinite elasticity of words.

Humpty Dumpty sat on a wall,
Humpty Dumpty had a great fall;
All the king's horses and all the king's men
Couldn't put Humpty together again.²⁶¹

Director Ross Bjork's letter to the Ohio State community: "Looking ahead to 2025–26, the excitement is real. We're building momentum across every program, making smart investments in facilities, expanding support for student-athlete development, and working to ensure that Buckeye fans have a first-class experience every time they show up in scarlet and gray."

259 Libit, *supra* note 256. Rep. Yvette Clarke (D-N.Y.) calls the SCORE Act the "NCAA Wishlist Act," and Rep. Lori Trahan (D-Mass.) argues that, "Once we give that shield to an organization like the NCAA, we won't get that power back."

260 Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 248 (2019), explaining that "Guaranty Trust maintains the equitable remedial rights doctrine for state-law cases." This refers to *Guaranty Trust Co. v. New York*, 326 U.S. 99 (1945).

261 Mother Goose, *Humpty Dumpty Sat on a Wall*, POETRY FOUND., <https://www.poetryfoundation.org/poems/46951/humpty-dumpty-sat-on-a-wall> (citing *The Dorling Kindersley Book of Nursery Rhymes* (2000)).

ENFORCING AND ARBITRATING NAME, IMAGE, AND LIKENESS COMPENSATION LIMITS

JOSH LENS*

Abstract

The parties' historic settlement agreement in In re: College Athlete NIL Litigation, more commonly known as House v. NCAA, has received significant attention from legal scholars, the national media, and college athletics constituents. While those groups focus on settlement outcomes, like universities sharing revenue with their athletes, and its imposition of roster limits, along with potential resulting Title IX ramifications, they have largely overlooked the creation of a new system for regulating collegiate athletes' receipt of name, image, and likeness (NIL) compensation. Specifically, the settlement agreement's inclusion of both a third-party and arbitration in NIL policy enforcement is drastic for college athletics and warrants examination.

Procedurally, this new process will determine whether collegiate athletes' compensation from many NIL agreements falls within an acceptable range of compensation. When a third-party entity determines NIL compensation exceeds this suitable range, the student-athlete must decide among a few options on how they will proceed. Per the settlement agreement, a student-athlete in this situation may renegotiate or cancel the NIL agreement or proceed with arbitration on an expedited timeline, with the athlete's university possessing the ability to fund the latter proceedings. Should a student-athlete proceed with an unapproved NIL agreement, enforcement actions could include loss of athletics competition eligibility. This article examines these new processes, their significant ramifications for universities and their student-athletes, and potential legal issues with them.

* Associate Professor of Instruction, University of Iowa (J.D., University of Iowa College of Law). Prior to entering academia, Lens worked on Baylor University's athletics compliance staff. In addition to his academic duties, Lens owns and manages The Compliance Group, which provides consulting services regarding NCAA compliance matters for college athletics conferences and university athletics departments. Lens can be reached at joshua-lens@uiowa.edu and 479-595-1631. This article's opinions are not necessarily representative of the University of Iowa.

TABLE OF CONTENTS

INTRODUCTION.....	59
I. PRE-HOUSE ENFORCEMENT OF NCAA NIL REGULATIONS.....	61
A. COLLEGE ATHLETICS’S NIL ERA.....	61
B. THE ENFORCEMENT STAFF AND COI’S ROLES IN ENFORCING NCAA NIL REGULATIONS	64
II. POST-HOUSE ENFORCEMENT OF NIL COMPENSATION LIMITS.....	67
A. <i>House v. NCAA</i> BACKGROUND.....	68
B. <i>House v. NCAA</i> SETTLEMENT.....	69
C. THE SETTLEMENT AGREEMENT’S INSERTION OF A THIRD-PARTY ENTITY INTO THE NIL RULES ENFORCEMENT PROCESS	75
D. THE SETTLEMENT AGREEMENT’S INSERTION OF ARBITRATION INTO THE NIL RULES ENFORCEMENT PROCESS	83
III. IMPLICATIONS FOR UNIVERSITIES	85
IV. CONCLUSION.....	87

INTRODUCTION

The parties' settlement agreement in *In re: College Athlete NIL Litigation*, more commonly known as *House v. NCAA*, is "historic" for numerous reasons and resulted in changes to several long-standing policies and practices in college athletics.¹ Chief among the changes is that universities may share millions of dollars in revenue directly with their student-athletes under a new athlete compensation model.²

Optimists, including National Collegiate Athletic Association (NCAA) president Charlie Baker,³ view the settlement as a means to eliminate or mitigate the perceived chaos emanating from the name, image, and likeness (NIL) era in college athletics.⁴ This NIL era commenced in July 2021 when, largely due to pressure from state legislatures, the NCAA began permitting collegiate athletes to accept compensation for use of their NIL.⁵ These changes allowed student-athletes to accept pay or in-kind compensation for third-parties' use of athletes' personal brands, for example.⁶

Those who believe a state of chaos exists may point to examples like quarterback Nico Iavaleava refusing to participate in a University of Tennessee practice in an attempted professional sports-like "holdout" for increased NIL compensation⁷ or

1 *In re: College Athlete NIL Litigation, Opinion and Order Granting Final Approval to Settlement*, No. 979, N.D. Cal., June 6, 2025. See Ross Dellenger, *Historic House-NCAA Settlement Leaving Hundreds of Olympic Sport Athletes in Peril*, YAHOO! SPORTS (Oct. 25, 2024), [https://sports.yahoo.com/historic-house-ncaa-settlement-leaving-hundreds-of-olympic-sport-athletes-in-peril-125238713.html#:~:text=The%20deal%20features%20three%20main,3\)%20the%20overhauled%20roster%20structure](https://sports.yahoo.com/historic-house-ncaa-settlement-leaving-hundreds-of-olympic-sport-athletes-in-peril-125238713.html#:~:text=The%20deal%20features%20three%20main,3)%20the%20overhauled%20roster%20structure) (referring to the parties' settlement agreement as "groundbreaking and landmark"); see also Shehan Jeyarajah, *How Historic House v. NCAA Settlement Will Impact College Athletics On and Off the Field For Years to Come*, CBSSPORTS (May 24, 2024), <https://www.cbssports.com/college-football/news/how-historic-house-v-ncaa-settlement-will-impact-college-athletics-on-and-off-the-field-for-years-to-come/> (opining that the case's resolution will forever alter college athletics by abolishing its amateurism model).

2 See Dellenger, *supra* note 1; see also Jeyarajah, *supra* note 1.

3 David Hale, *Charlie Baker Hopes NCAA Settlement Creates Stability for Schools*, ESPN (May 13, 2024), https://www.espn.com/college-sports/story/_/id/40140633/charlie-baker-hopes-ncaa-settlement-creates-stability-schools (citing Baker's statement that the settlement would result in "clarity and a framework for a sustainable business model for college sports").

4 See Jerry Kutz, *House-NCAA Settlement Could Clean Up Wild West of NIL*, THE OSCEOLA (Nov. 21, 2024), <https://floridastate.rivals.com/news/house-ncaa-settlement-could-clean-up-wild-west-of-nil> (quoting Florida State University athletics director Michael Alford as proclaiming that the settlement "is really going to clean up where we've been in this wild west atmosphere we've had the last few years ...").

5 Jada Allender, *The NIL Era Has Arrived: What the Coming of July 1 Means for the NCAA*, HARV. J. SPORTS & ENT. L. (July 1, 2021), <https://journals.law.harvard.edu/jsel/2021/07/the-nil-era-has-arrived-what-the-coming-of-july-1-means-for-the-ncaa/>.

6 Sara Coello, *What Is NIL in College Sports? How Do Athlete Deals Work?* ESPN (Mar. 24, 2025), https://www.espn.com/college-sports/story/_/id/41040485/what-nil-college-sports-how-do-athlete-deals-work (explaining that student-athletes can now accept things like footwear and dorm room supplies in exchange for promoting the items as examples).

7 See Margaret Fleming, *Nico Iavaleava Leaves Tennessee After NIL Standoff*, FRONT OFF. SPORTS (Apr. 11,

quarterback Matthew Sluka sitting out the remainder of UNLV's 2024–25 season over an NIL compensation dispute after leading the team to wins in its first three games.⁸ More specifically, some idealists theorize that in the post-*House* settlement era, universities' ability to provide additional compensation directly to their student-athletes will minimize the substantial influence that third parties like NIL booster collectives currently possess.⁹ Others hope the settlement will stem the tide of lawsuits against the NCAA.¹⁰

The national media, legal scholars, and college athletics constituents have been quick to identify issues that remain in spite—or perhaps because—of the settlement, however. These issues include Title IX's potential application¹¹ and athletics departments' continued attempts to shift increased expenses in the form of additional athlete compensation to fans¹² and/or nonathlete students.¹³

Perhaps overlooked in the significant commentary regarding the *House* settlement is its controversial¹⁴ creation of an NIL policy enforcement process that differs vastly from any current or former such NCAA procedure.¹⁵ Specifically, the NIL rules enforcement process now includes both a third-party investigatory and adjudicative entity and arbitration.¹⁶ While the NCAA attempted to utilize a third-party to

2025), <https://frontofficesports.com/tennessee-nico-iamaleava-nil-holdout/>.

8 See Ralph D. Russo, *UNLV QB to Sit Out Season After Agent Says \$100,000 Promised for Transfer Has Not Been Paid*, ASSOC. PRESS (Sept. 25, 2024), <https://apnews.com/article/unlv-sluka-59449174adffe0940266427158d964d3>.

9 Kutz, *supra* note 4.

10 See Charlie Baker, *A Letter from NCAA President Charlie Baker*, NCAA (June 6, 2025), <https://www.ncaa.org/news/2025/6/6/media-center-a-letter-from-ncaa-president-charlie-baker.aspx> (stating that the settlement agreement's final approval results in a "release from future litigation" on certain "subjects").

11 See Amanda Christovich, *DOE Issues More Guidance on Title IX Application to Athlete Pay*, FRONT OFF. SPORTS (Jan. 17, 2025), <https://frontofficesports.com/education-department-clarifies-proportionate-college-athlete-pay/> (describing Department of Education guidance regarding Title IX's application to universities' revenue share distributions to their athletes).

12 See David Rumsey et al., *How Fans Could Be on the Hook for Player Pay in College Sports*, FRONT OFF. SPORTS (Sept. 18, 2024), <https://frontofficesports.com/newsletter/the-price-fans-pay-for-nil/> (explaining that while student-athletes' compensation increases, "It is also—perhaps not surprisingly—getting more expensive for fans.").

13 For example, see WCCO Staff, *University of Minnesota Adds \$200 Fee at Twin Cities Campus to Help Pay Student Athletes*, WCCO NEWS (July 19, 2025), <https://www.cbsnews.com/minnesota/news/university-of-minnesota-athletics-fee/> (explaining that University of Minnesota students will pay \$100 per semester with those funds helping pay, among other things, student-athletes following the *House* settlement).

14 Michael McCann, *Clearinghouse Denial of NIL Deals to Be Limited by Arbitration*, SPORTICO (June 8, 2025), <https://www.sportico.com/law/analysis/2025/arbitration-nil-clearinghouse-lawsuits-1234855588/>.

15 Ross Dellenger, *NCAA College Leaders File Landmark Agreement in Antitrust Cases; Here's What Was Settled and What's Next*, YAHOO! SPORTS (July 26, 2024) (describing the amended settlement agreement as creating "an enforcement mechanism unlike anything college sports has seen").

16 Amended Injunctive Relief Settlement, *In re: College Athlete NIL Litigation*, No. 4:20-CV-03919, 23–24 (N.D. Cal.) [hereinafter Amended Settlement Agreement].

adjudicate certain rules violations allegations previously through the Independent Accountability Resolution Process,¹⁷ the disastrous practice was mercifully short-lived.¹⁸ The introduction of arbitration into the NCAA rules enforcement process in the post-*House* college athletics landscape is a first, however.¹⁹

More specifically, the *House* settlement agreement created a system whereby a third-party clearinghouse evaluates certain NIL agreements that compensate student-athletes \$600 or more to determine whether the compensation amount falls within a “reasonable range.”²⁰ When the clearinghouse determines that an NIL arrangement’s compensation amount exceeds this acceptable range, the athlete is left with a couple of choices to avoid imposition of penalties, which can include loss of the ability to compete athletically.²¹ In such a situation, the student-athlete may choose to renegotiate or cancel the NIL arrangement or appeal the clearinghouse’s decision to neutral arbitrators.²² In the latter instance, a student-athlete’s university can fund their legal expenses.²³

In this new era of college athletics, universities and their NIL-involved student-athletes must familiarize and prepare to engage with this new process. Thus, this article explores the process and its potential ramifications, which, as the article shows, are significant for both universities and their student-athletes.

I. PRE-HOUSE ENFORCEMENT OF NCAA NIL REGULATIONS

To appreciate how much the *House* settlement agreement alters enforcement of NIL regulations, one must understand how the NCAA enforced them presettlement. Thus, this part overviews that unique,²⁴ oft misunderstood²⁵ process.

A. College Athletics’s NIL Era

Prior to July 1, 2021, the NCAA staunchly enforced its amateurism rules, including those that prohibited a student-athlete from accepting compensation for

17 See *Independent Investigators and Decision-Makers*, NCAA (Oct. 31, 2018), <https://www.ncaa.org/sports/2018/8/8/independent-investigators-and-decision-makers.aspx> (describing the process that previously existed for “complex” cases).

18 See Dennis Dodd, *After Kansas Joins Other Teams Recently Let Off Easy for NCAA Violations, the IARP Will Thankfully RIP*, CBS SPORTS (Oct. 11, 2023), <https://www.cbssports.com/college-basketball/news/after-kansas-joins-other-teams-recently-let-off-easy-for-ncaa-violations-the-iarp-will-thankfully-rip/> (“The idea turned out to be ill-conceived and further complicated the process.”).

19 See *House v. NCAA Settlement—FAQ*, Temple University Athletics Department, <https://owlsports.com/sports/2025/3/31/faq-house-settlement> (referring to the arbitration system as “new”).

20 Coll. Sports Comm’n, *Student-Athlete NIL Deals*, <https://www.collegesportscommission.org/nil>.

21 *Id.*

22 *Id.*

23 Amended Injunctive Relief Settlement, *supra* note 16.

24 See Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 487 (1995).

25 Jerry R. Parkinson, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Processes*, 12 WYO. L. REV. 215, 219 (2012).

use of their NIL.²⁶ For example, University of Georgia football student-athlete and Heisman Trophy contender²⁷ Todd Gurley missed four games due to suspension in the 2014 season after acknowledging he violated NCAA rules by selling autographed memorabilia.²⁸

One of the NCAA's main rationales for precluding student-athletes from accepting NIL compensation was helping maintain and foster prioritization of academics over athletics, which simultaneously advanced its notion of amateurism within college athletics.²⁹ And for most of the NCAA's history, the public largely accepted that, because they are amateurs, collegiate athletes should not be able to accept compensation for their athletics exploits.³⁰ Limiting athletes' compensation to education-related benefits like athletics scholarships also helped differentiate the NCAA's product—college athletics—from professional sports, where the *employees* receive salaries in exchange for their play.³¹

Amid pressure from state legislatures,³² and in a seismic shift, the NCAA eliminated many of its long-standing rules forbidding student-athletes from permissibly accepting NIL compensation in late June 2021.³³ As a result, and with limited exceptions, student-athletes could accept remuneration for use of their

- 26 Tim Tucker, *'The Wild West': College Sports' NIL Era Brings Upheaval*, ATLANTA J.-CONST. (Mar. 18, 2022), <http://ajc.com/sports/georgia-bulldogs/the-wild-west-college-sports-nil-era-brings-upheaval/YORTVG5VAZCMPBLMVK42QMA63E/>; see also Pete Nakos, *NIL Timeline: Key Moments That Have Defined the Era*, ON3 (Feb. 26, 2024), <https://www.on3.com/nil/news/nil-timeline-key-moments-ncaa-greg-sankey-charlie-baker-livvy-dunne-jaden-rasahda-nico-iamaleava/> (“The NCAA prohibited college athletes from profiting from their name, image and likeness for more than a century.”).
- 27 Steve Almasy, *Heisman Trophy Contender Todd Gurley Suspended by Georgia*, CNN (Oct. 9, 2014), <https://www.cnn.com/2014/10/09/us/heisman-trophy-frontrunner-suspended/index.html#:~:text=Running%20back%20Todd%20Gurley%2C%20one,possible%20violation%20of%20NCAA%20rules.>
- 28 *Georgia's Gurley Eligible to Play Nov. 15*, NCAA (Oct. 29, 2014), <https://www.ncaa.org/news/2014/10/29/georgia-s-gurley-eligible-to-play-nov-15.aspx>.
- 29 Jordan Zaia, *The History and Future of Amateurism in College Sports*, 35 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 503, 505 (2025); see also William W. Berry III, *SAVING CAMELOT? NIL and the Future of Amateurism*, 50 BYU L. REV. 197, 213 (2024) (explaining that “unchecked commercialization” within collegiate athletics could threaten universities’ educational missions).
- 30 Robert J. Romano, *The Concept of Amateurism: How the Term Became Part of the College Sports Vernacular*, 1 U. N.H. SPORTS L. REV. 29, 29 (2022) (describing the NCAA’s successful public pitch that amateur competition serves as a core college athletics principle and that maintaining amateurism is necessary to ensure collegiate athletes receive a quality education).
- 31 Berry, *supra* note 29, at 219–20; see also Audrey C. Sheetz, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 865 (2016) (noting that the NCAA and its member universities began requiring athletes to be amateurs in 1910).
- 32 Dan Murphy, *Universities, NCAA See Pros and Cons of New State NIL Laws*, ESPN (July 1, 2023), https://www.espn.com/college-sports/story/_/id/37940566/universities-ncaa-nil-laws-texas-texas-am (“Competition from different states is what initially forced the NCAA to allow athletes to make NIL money....”).
- 33 Ross Dellenger, *'It's Going to Be a Clusterf---': The New Era of College Sports Is Here. Is Anyone Ready?* SPORTS ILLUSTRATED (July 1, 2021), <http://si.com/college/2021/07/01/ncaa-athletes-profit-nil-daily-cover>.

NIL beginning in July 2021.³⁴ This pivot generally permitted student-athletes to accept compensation for selling their autographs, hosting camps or clinics,³⁵ and promoting goods, services, and entities, for example.³⁶ Student-athletes immediately took advantage of their newfound abilities, collectively earning over \$900 million in NIL compensation within a year.³⁷

Instead of adopting a comprehensive NIL policy that included numerous new rules, the NCAA instead initially implemented a minimalist interim NIL policy.³⁸ The interim policy's basic stipulations included prohibiting both pay-for-play and use of NIL as a recruiting inducement, and requiring student-athletes to perform *quid pro quo* in exchange for NIL compensation.³⁹

The NCAA subsequently released guidance regarding the interim policy's application on multiple occasions.⁴⁰ In May 2022, for example, the NCAA clarified that NIL booster collectives meet its legislated booster definition, and thus NCAA rules largely preclude them from engaging in the process through which universities recruit prospective student-athletes.⁴¹ These entities formed as early as August 2021⁴² and have provided millions of dollars in compensation to student-athletes in what many classify as pay-for-play or recruiting inducements in the guise of NIL compensation.⁴³ The NCAA's interim NIL policy was in place for over three years until the NCAA largely codified it as permanent legislation in 2024.⁴⁴

34 *Id.*

35 *NIL (Name, Image, Likeness)*, NCAA (July 9, 2021), <https://www.ncaa.org/sports/2021/7/9/name-image-likeness.aspx>.

36 Tucker, *supra* note 26.

37 Josh Moody, *The Current State of NIL*, INSIDE HIGHER ED (June 7, 2023), <https://www.insidehighered.com/news/students/athletics/2023/06/07/two-years-nil-fueling-chaos-college-athletics>.

38 See Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <http://ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

39 *Id.*

40 See Josh Lens, *NIL Enforcement Preemption*, 2024 UTAH L. REV. 891, 904 (2024) (describing the NCAA's guidance released in May and October of 2022 and June 2023).

41 *Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf. Note, however, that a federal judge issued an injunction in February 2024 that precluded the NCAA from enforcing certain NIL regulations that sought to prevent boosters and NIL collectives from negotiating NIL agreements with prospective student-athletes, including prospective transfer student-athletes, during the recruiting process. Brandon Marcello, *House v. NCAA Attorneys Amend 'Booster' Language in Settlement as Two Sides Look for Federal Judge Approval*, CBS SPORTS (Sept. 26, 2024), <https://www.cbssports.com/college-football/news/house-v-ncaa-attorneys-amend-booster-language-in-settlement-as-two-sides-look-for-federal-judge-approval/>.

42 Nakos, *supra* note 26.

43 Dellenger, *supra* note 15.

44 For example, see NCAA, § 22.01.1, LSDBi, <https://web3.ncaa.org/lldb/search/bylawView?id=134186>.

B. *The Enforcement Staff and COI's Roles in Enforcing NCAA NIL Regulations*⁴⁵

Rules, such as those regulating NIL, are hollow unless enforced.⁴⁶ Thus, the NCAA empowers a group of its employees known as the enforcement staff to enforce its myriad rules⁴⁷ so compliant schools and coaches will not be disadvantaged.⁴⁸

The enforcement staff effectually serves as the NCAA's prosecutor,⁴⁹ receiving and reviewing information regarding potential NCAA rules violations via numerous means, including anonymous tips.⁵⁰ After reviewing this information in a "fair, accurate, collaborative, and timely manner,"⁵¹ the enforcement staff determines whether and how to proceed. If it believes the information it uncovers during an investigation may substantiate NCAA rules violations, the enforcement staff alleges potential Level I or Level II violations, with the former being the more egregious categorization.⁵²

45 As a private association, the NCAA possesses the ability to not only adopt governing rules, but to enforce them. Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 272 (2010).

46 Pete Nakos, *NCAA Releases Updated NIL Guidance Aimed at Institutions*, ON3NIL (Oct. 26, 2022), <http://on3.com/nil/news/ncaa-division-i-board-of-directors-nil-guidance-collectives-schools-member-institution/> (quoting an anonymous NIL collective operator); see also Jeremy Crabtree, *Enforcement is Key to Solving NIL 'Pay-For-Play' Concerns on Recruiting Trail*, ON3 (Dec. 22, 2012), <https://www.on3.com/nil/news/ncaa-enforcement-is-key-to-solving-nil-pay-for-play-concerns-on-college-football-recruiting-trail/> (quoting an unidentified collective operator). "Were there no rules setting up an enforcement and infractions system to find and punish cheaters, unscrupulous coaches and staff would have a field day," for example. Potuto, *supra* note 45, at 262.

47 See NCAA, *Division I Infractions: 2019–20 Annual Report 9* (2020), https://ncaaorg.s3.amazonaws.com/infractions/d1/2019D1Inf_AnnualReport.pdf [hereinafter 2019–20 Annual Report]; see also NCAA, *NCAA Enforcement Overview 1*, https://ncaaorg.s3.amazonaws.com/infractions/d1/glnccgrphcs/D1INF_InsideEnforcement.pdf ("The enforcement staff supports schools and individuals who play by the rules and are committed to integrity."). "[E]nforcement staff members ... are paid employees of the NCAA." Parkinson, *supra* note 25, at 224.

48 Potuto, *supra* note 45, at 272.

49 See Timothy Davis & Christopher T. Hairston, *Majoring in Infractions: The Evolution of the National Collegiate Athletic Association's Enforcement Structure*, 92 OR. L. REV. 979, 988 (2014); see also Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major Infractions Cases*, 37 SETON HALL L. REV. 749, 753–54 (2007). The enforcement staff largely consists of attorneys and former student-athletes, coaches, scouts, academic advisors, compliance staff members, or other athletics administrators. NCAA *Enforcement Overview*, *supra* note 47, at 1.

50 Potuto, *supra* note 45, at 289–90 (listing examples of sources of reports to include university self-reports, rival coaches, media stories, anonymous tips, and disgruntled staff members or student-athletes). In one case, for example, a University of California, Los Angeles assistant football coach's ex-girlfriend notified the NCAA that the "coach had knowledge of and/or involvement in potential NCAA recruiting violations." See COMM. ON INFRACTIONS, NCAA, UNIVERSITY OF CALIFORNIA, LOS ANGELES PUBLIC INFRACTIONS DECISION, 6 (2016), <http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=1025586> (describing violations of NCAA recruiting rules).

51 2019–20 Annual Report, *supra* note 47, at 9 (describing a university's trust and collaboration as "vital to the process").

52 See *id.* at 7. Note that the third category of violations is Level III, which the enforcement staff and university typically handle sans Committee on Infractions involvement. *Id.* at 9.

When the enforcement staff alleges potential Level I or II violations, the Committee on Infractions (COI) ultimately determines their merit.⁵³ Thus, while the enforcement staff is the NCAA's prosecutorial group,⁵⁴ the COI is the rules infractions process's judge and jury.⁵⁵ Founded in 1954,⁵⁶ the COI is an independent administrative body consisting of volunteers.⁵⁷ More specifically, COI panelists' professional profiles include current and former university presidents, chancellors, athletics directors, conference commissioners, former coaches, attorneys, and professors.⁵⁸ Thus, the COI touts the infractions process as "peer-review[ed]."⁵⁹ There are up to twenty-four COI members at any given time, a smaller panel of

-
- 53 The NCAA's infractions process is a form of alternative dispute resolution with similarities to arbitration in that it works via the parties' formal agreement identifying the adjudicator and processes. Potuto, *supra* note 45, at 304.
- 54 Potuto, *supra* note 45, at 289 (describing the enforcement staff's role as "something like that of police in investigating crimes or a prosecutor presenting cases in court").
- 55 Josh Lens, *NCAA's Changing Landscape Offers Chance to Improve Infractions Process*, SPORTICO (Feb. 2, 2022), <http://sportico.com/leagues/college-sports/2022/ncaa-infractions-reform-1234659517/>; see also Pat Forde, *Meet the Officials Who Volunteered for an NCAA Job Most Would Run Away From*, SPORTS ILLUSTRATED (Feb. 28, 2023), <https://www.si.com/college/2023/03/01/committee-infractions-ncaa-rulings-inside-look-tennessee> ("There are some major distinctions, but this is the college sports version of a courtroom and the people seated around the square are both judge and jury."). A hearing at which the COI adjudicates enforcement staff violation allegations is akin to the college athletics court room. Bryan Fischer, *How Will New College Sports Commission Enforce Post-Settlement Regulations?* SPORTS ILLUSTRATED (June 17, 2025), <https://www.si.com/college-football/college-sports-revenue-sharing-era-concerns-collectives>.
- 56 See Greg Heller, *Preparing for the Storm: The Representation of a University Accused of Violating NCAA Regulations*, 7 MARQ. SPORTS L.J. 295, 298 (1996) (explaining that the COI's creation "gave the NCAA some legitimacy and spurred growth, as it now had a mechanism in place with investigative powers and powers to punish member institutions").
- 57 Division I Committee on Infractions, NCAA, <http://ncaa.org/governance/committees/division-i-committee-infractions> (describing COI) (last visited Feb. 12, 2025). The NCAA enforcement staff and COI are "entirely separate enterprise(s)." Gene Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667, 677 (2003). However, the COI affirmed a staggering ninety-three percent of the enforcement staff's allegations over a recent three-year period. JON DUNCAN, NCAA, ENFORCEMENT SELF-STUDY OPERATIONS AND COMPLIANCE 7 (2019), http://ncaaorg.s3.amazonaws.com/infractions/guides/2019ENF_SelfStudyOperComp.pdf (contending that this data shows that the enforcement staff makes well-supported charges). Some question the COI's neutrality and describe the COI as an arm of the enforcement staff that will not deviate from the enforcement staff's recommendations. For example, see Davis & Hairston, *supra* note 49, at 993. For additional analysis of the propriety of the COI's affirmation rate of enforcement staff allegations, see Josh Lens, *Examining the Committee on Infractions's Affirmation Rate of NCAA Enforcement Staff Allegations of Rules Violations*, 22 FLA. L. REV. F. 121 (2022).
- 58 See NCAA Division I Committee on Infractions Roster, NCAA, <http://ncaa.org/sports/2018/3/20/ncaa-division-i-committee-on-infractions-roster.aspx>. Former COI chair Gene Marsh has likened Committee on Infractions service to "being on jury duty in perpetuity." Marsh & Robbins, *supra* note 57, at 679.
- 59 See 2019–20 Annual Report, *supra* note 47, at 5. For discussion regarding the benefits of judgment by peers, see Gene A. Marsh, *A Call for Dissent and Further Independence in the NCAA Infractions Process*, 26 CARDOZO ARTS & ENT. L.J. 695, 709 (2009) (recommending, among other things, more independent COI members). For analysis regarding whether the process is actually peer reviewed for coaches who face allegations that they violated NCAA rules, see Josh Lens, *The NCAA Infractions Process and Peer Review*, 83 OHIO STATE L.J. ONLINE 80 (2022).

which considers each infractions case on the COI's behalf.⁶⁰ These volunteers "love college sports and seek fairness and competitive balance in them."⁶¹

The COI ultimately produces a publicly available written decision detailing a case's facts, violations, penalties,⁶² and reasons for its findings and penalties.⁶³ The COI bases penalties on guidelines that attempt to align them with the violations' severity and degree of fault while offsetting any competitive or advantage.⁶⁴ Penalties range from monetary fines and vacation of wins and records to athletics scholarship reductions and postseason participation bans.⁶⁵

An example of this process occurring was in an NIL rules violations case involving Florida State University. The case resulted from an assistant football coach including an executive from an NIL booster collective in a prospective transfer student-athlete's recruitment.⁶⁶ Specifically, the assistant coach facilitated a meeting between the executive, the student-athlete, and the latter's family.⁶⁷ Not only did the assistant coach inform the student-athlete and their family about the meeting, the assistant coach transported them to it.⁶⁸ During the meeting, the executive recruited the student-athlete on behalf of the University and offered him an NIL deal.⁶⁹ The executive's involvement did not end there, as they called and sent a text message to the student-athlete's mother.⁷⁰ The COI concluded that the

60 Division I Committee on Infractions Composition, NCAA (Jan. 2019), http://ncaaorg/s3.amazonaws.com/infractions/d1/glnc_graphcs/D1INF_COIComposition-FactSheet.pdf. Panels of three, five, or seven COI members consider each case and panelists' "experience, availability and the absence of a conflict of interest" determines a panel's makeup. NCAA, Division I Infractions: 2021-22 Annual Report 18 (2022), https://ncaaorg.s3.amazonaws.com/infractions/d1/2022D1Inf_AnnualReport.pdf [hereinafter 2021-22 Annual Report].

61 Pete Thamel, *In New College Sports World, What Is Role of NCAA Committee on Infractions?* ESPN (Feb. 29, 2024), https://www.espn.com/college-football/story/_id/39623660/in-new-college-sports-world-role-ncaa-committee-infractions/.

62 See 2019-20 Annual Report, *supra* note 47, at 22.

63 Potuto, *supra* note 45, at 295. Not many are aware that COI written decisions, which are comparable to courts' decisions, are publicly available. Parkinson, *supra* note 25, at 218.

64 Potuto, *supra* note 45, at 301.

65 Nathaniel Richards, *The Judge, Jury, and Executioner: A Comparative Analysis of the NCAA Committee on Infractions Decisions*, 70 ALA. L. REV. 1115, 1116 (2019) (citing relevant NCAA legislation).

66 COMM. ON INFRACTIONS, NCAA, FLORIDA STATE UNIVERSITY NEGOTIATED RESOLUTION, 1 (2024), https://ncaaorg.s3.amazonaws.com/infractions/decisions/Jan2024D1INF_FloridaStateNegotiatedResolution.pdf [hereinafter Florida State Case].

67 *Id.*

68 *Id.*

69 *Id.* Since the Florida State infractions case, the NCAA and attorneys general of Tennessee and Virginia settled an antitrust lawsuit the states brought that challenged NCAA rules banning NIL collectives from communicating with prospective athletes regarding potential NIL agreements during the recruiting process. Ralph D. Russo & Justin Williams, *Settlement Reached in Tennessee Suit Against NCAA Regarding NIL Recruiting Inducements*, THE ATHLETIC (Jan. 31, 2025), <https://www.nytimes.com/athletic/6104215/2025/01/31/settlement-tennessee-virginia-nil-ncaa/>. As a result of the settlement, the NCAA will no longer enforce its rules preventing such communications. *Id.*

70 Florida State Case, *supra* note 66, at 1.

executive's recruitment of the prospective transfer student-athlete violated NCAA recruiting rules that existed at the time.⁷¹

Penalties from the case included:⁷² (1) two years of NCAA probation; (2) a financial penalty; (3) scholarship reductions in the football program; (3) recruiting restrictions (e.g., prohibiting the assistant coach from recruiting off campus in the fall of 2023); (4) a two-year show-cause order⁷³ for the assistant coach, which included a three-game suspension; and (5) disassociation⁷⁴ of the executive and collective for periods of time.⁷⁵

II. POST-HOUSE ENFORCEMENT OF NIL COMPENSATION LIMITS

When the parties agreed to settle the *House* case, the NCAA explained that the settlement would permit the installation of a more "robust and effective enforcement and oversight program" that would help ensure that student-athletes' NIL deals with third parties are "legitimate."⁷⁶ Specifically, the NCAA hopes the settlement will curtail NIL collectives' influence and payments to athletes to induce them to attend, or remain enrolled at, universities instead of as compensation for their value as influencers.⁷⁷ This part overviews the *House* case and then details the new

71 *See id.* at 3 (citing violations of NCAA Bylaw 13 recruiting rules).

72 The case involved other NCAA rules violations, as the assistant coach was not completely forthcoming during the investigation, thus violating NCAA rules requiring ethical conduct. *See id.* at 3.

73 Show-cause orders are a form of an NCAA penalty that make it more difficult for universities to hire or retain individuals subject to them. Ellen J. Staurowsky et al., *California Judge Rules NCAA's Show-Cause Order Violates State Law*, SPORTS L. EXPERT (Dec. 12, 2018), <http://sportslawexpert.com/2018/12/12/California-judge-rules-ncaas-show-cause-order-violates-state-law>. In such a situation, the university must "show cause" to the COI for its employment decision, which includes demonstrating why it should not receive a penalty. NCAA, § 19.02.3, LSDBi, <https://web3.ncaa.org/lstdbi/search/bylawView?id=122303>.

74 Disassociation is the COI's primary penalty for illicit booster activity. Dennis Dodd, *NCAA to Soon Pass Name, Image and Likeness Rules Targeting Boosters Offering Inducements to Athletes*, CBS SPORTS (May 6, 2022), <https://cbssports.com/college-football/news/ncaa-to-soon-pass-name-image-and-likeness-rules-targeting-boosters-offering-inducements-to-athletes> (quoting former Ohio State University athletics director Gene Smith). It can include losing athletically related privileges that one enjoyed, including the ability to purchase season tickets, make donations, or belong to a booster club. *Consequences for Booster Involvement in NCAA Violations*, Marq. U. Acads. & Compliance (July 1, 2010), https://gomarquette.com/news/2010/7/1/Consequences_for_Booster_Involvement_in_NCAA_Violations.

75 Florida State Case, *supra* note 66, at 6–9.

76 Daniel Murphy, *Court Filing Reveals Terms of NCAA Antitrust Lawsuits Settlement*, ABC NEWS (July 26, 2024), <https://abcnews.go.com/Sports/court-filing-reveals-terms-ncaa-antitrust-lawsuits-settlement/story?id=112318798> (quoting the NCAA statement describing the parties' settlement when they negotiated it). For this article's purposes, third parties are individuals, corporate entities, etc. other than a student-athlete's university. *Question and Answer: Implementation of the House Settlement*, 30, NCAA (June 13, 2025), https://ncaaorg.s3.amazonaws.com/governance/d1/legislation/2024-25/June2025D1Gov_PhaseThreeInstSetQuestionandAnswer.pdf.

77 *Id.* ("The NCAA hopes its new system will reduce those types of arrangements.").

enforcement process for NIL regulations and its “significant”⁷⁸ changes, including insertion of both a third-party enforcement entity and arbitration.

A. *House v. NCAA Background*

Grant House, Sedona Prince, and other current and former student-athletes filed a class-action antitrust lawsuit against the NCAA and “power” athletics conferences⁷⁹ in 2020.⁸⁰ Considered the most significant antitrust case in college athletics history,⁸¹ the plaintiff-athletes argued that the NCAA deprived thousands of student-athletes of the opportunity to accept NIL compensation prior to permitting it on July 1, 2021.⁸² More specifically, the plaintiffs alleged antitrust law violations including (1) fixing student-athletes’ amount of NIL compensation at zero, (2) prohibiting student-athletes from engaging in the NIL market, (3) fixing student-athletes’ compensation for their athletics services at an amount equal to or less than their scholarship amount, and (4) limiting the number of available athletics scholarships.⁸³ Among other remedies, the lawsuit sought an injunction restraining the NCAA and power conferences from enforcing rules that the plaintiffs described as anticompetitive and unlawfully restrictive.⁸⁴ Of note, the plaintiffs’ lawsuit targeted NCAA rules prohibiting universities from sharing

78 Steve Argeriset al., *What the Proposed House Settlement Means for NCAA Division I Institutions*, JD SUPRA (June 28, 2024), <https://www.jdsupra.com/legalnews/what-the-proposed-house-settlement-2128660/>.

79 The national media refers to certain college athletics conferences as “power” conferences. For example, see Amanda Christovich, *As Conference Realignment Becomes Official, the Power 5 Era Iis Over*, FRONT OFF. SPORTS (June 30, 2024), <https://frontofficesports.com/conference-realignment-end-of-power-5-end/>. When the plaintiffs filed the *House* lawsuit, there were five such conferences: the Pac-12 Conference, the Big Ten Conference, the Big 12 Conference, the Southeastern Conference, and the Atlantic Coast Conference. See Third Consolidated Amended Complaint, *In re: College Athlete NIL Litigation*, No. 4:20-CV-03919, 23-24 (N.D. Cal) [hereinafter Third Amended Complaint]. Though not named as defendants, numerous universities that belong to nonpower conferences will contribute to the payout. Gregg E. Clifton, *Will the NCAA Settlement Lead to Finalization of Agreements, or Are More Disputes and Legal Actions on the Horizon?* SPORTS LITIG. ALERT (Aug. 23, 2024), <https://sportslitigationalert.com/will-the-ncaa-settlement-lead-to-finalization-of-agreements-or-are-more-disputes-and-legal-actions-on-the-horizon/>.

80 See Third Amended Complaint, *supra* note 79. The intricacies of antitrust law placed the NCAA “at a critical crossroads.” Eli Henderson, *NCAA’s Revised Settlement Addresses Antitrust and NIL Concerns*, NIL DAILY (Sept. 30, 2024), <https://www.si.com/fannation/name-image-likeness/nil-news/ncaas-revised-settlement-addresses-antitrust-and-nil-concerns>.

81 See Marcello, *supra* note 41; see also Ben Portnoy, *House Settlement Moves to Next Stage in Passage Process*, SPORT BUS. J. (July 26, 2024), <https://www.sportsbusinessjournal.com/Articles/2024/07/26/house-settlement-long-form-filed/> (referring to the *House* case as “One of the most consequential court cases in the history of college athletics....”).

82 Ralph D. Russo, *House v. NCAA Agreement Replaces Scholarship Limits with Roster Caps, Details Athlete Compensation*, ASSOC. PRESS (July 27, 2024), <https://www.wholehogsports.com/news/2024/jul/27/house-v-ncaa-agreement-replaces-scholarship-limits-with-roster-caps-details-athlete-compensation/>.

83 Third Amended Complaint, *supra* note 79, at 3.

84 *Id.* at 4.

revenue from media rights agreements with their athletes.⁸⁵ The plaintiffs sought damages in the form of compensation that they would have received in the absence of these allegedly unlawful restraints,⁸⁶ including back pay for lost NIL opportunities, such as from broadcasts and NIL arrangements with third parties.⁸⁷

With \$20 billion in potential damages at stake, a loss in the case could have resulted in the NCAA and conferences seeking bankruptcy,⁸⁸ effectively destroying the former.⁸⁹ This possible nightmare scenario incentivized the NCAA to settle the case.⁹⁰

B. House v. NCAA Settlement

The parties agreed to settle the case in May 2024.⁹¹ At the time, the defendants described the settlement as a “road map” that would permit continuation of college athletics’ unique traditions and opportunities.⁹² And one of the plaintiffs’ attorneys credited the settlement with modernizing college athletics and equitably allocating revenue to student-athletes.⁹³

85 Brandon Marcello, *House v. NCAA Settlement Approved: Landmark Decision Opens Door for Revenue Sharing in College Athletics*, CBS SPORTS (June 6, 2025), <https://www.cbssports.com/college-football/news/house-v-ncaa-settlement-approved-landmark-decision-opens-door-for-revenue-sharing-in-college-athletics/>.

86 Third Amended Complaint, *supra* note 79, at 4–5.

87 Zaia, *supra* note 29, at 544.

88 Ross Dellenger, *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>.

89 Dennis Dodd, *Meet Grant House, the Man Front and Center Fighting the NCAA's Last Gasp to Cap Athlete Compensation*, CBS SPORTS (May 15, 2023), <https://www.cbssports.com/general/news/meet-grant-house-the-man-front-and-center-fighting-the-ncaas-last-gasp-to-cap-athlete-compensation/> (quoting sports law attorney Mit Winter).

90 Lauren Merola et al., *What's at Stake with the House v. NCAA Settlement? Goodbye Amateurism, Hello Revenue Sharing*, THE ATHLETIC (Apr. 7, 2025), <https://sports.yahoo.com/article/stake-house-v-ncaa-settlement-101605313.html>; see also Mark Zeigler, *House Settlement Not the Final Answer*, SAN DIEGO UNION-TRIBUNE (June 17, 2025), <https://www.nwaonline.com/news/2025/jun/17/house-settlement-not-the-final-answer/> (explaining that the settlement “consolidated three antitrust lawsuits and opted to avoid trial and the prospect of potentially catastrophic financial losses, essentially accepting a 20-point beatdown instead of what could be 40 or 50 given its inauspicious record in litigation”).

91 See *Joint Statement on the Agreement of Settlement Terms*, NCAA (May 23, 2024), <https://www.ncaa.org/news/2024/5/23/media-center-joint-statement-on-the-agreement-of-settlement-terms.aspx>. The parties’ settlement agreement settles two additional antitrust cases, *Hubbard v. NCAA* and *Carter v. NCAA*. Kristi Dosh, *10 Things to Know About the NCAA's House Settlement*, FORBES (May 24, 2024), <https://www.forbes.com/sites/kristidosh/2024/05/24/10-things-to-know-about-the-ncaas-house-settlement/>.

92 *Joint Statement on the Agreement of Settlement Terms*, *supra* note 91 (quoting NCAA president Charlie Baker and the commissioners of the five power conferences as they existed at the time).

93 Dosh, *supra* note 91 (quoting plaintiffs’ attorney Steve Berman, “Our clients are the bedrock of the NCAA’s multibillion-dollar business and finally can be compensated in an equitable and just manner for their extraordinary athletic talents.”).

More specifically, the parties' "mammoth"⁹⁴ and "transformative"⁹⁵ settlement agreement included, among other things: (1) NIL backpay for the plaintiffs and class members; (2) the opportunity for NCAA-member universities to provide student-athletes with increased benefits, including NIL compensation; and (3) utilizing roster limits in lieu of NCAA-legislated scholarship limits.⁹⁶ Thus, the parties' settlement agreement includes both backward-looking and forward-looking benefits for collegiate athletes.⁹⁷

Under the settlement agreement, the NCAA, conferences, and numerous universities will pay current and former student-athletes \$2.8 billion over a ten-year period for NIL compensation.⁹⁸ This distribution intends to compensate hundreds of thousands⁹⁹ of athletes for lost NIL compensation opportunities, including their appearances in video games and on broadcasts of their competitions.¹⁰⁰

The settlement agreement permits universities to opt in to this new system that provides them the ability to share revenue with their athletes in a quasi-salary cap system similar to those that exist in many professional sports leagues.¹⁰¹ The agreement permits participating universities to share \$20.5 million in revenue with their athletes in the 2025–26 academic year, an amount that will increase in subsequent years.¹⁰² Universities that opt into participating in the settlement agreement may also enter NIL arrangements directly with their athletes with any

94 Eddie Pells, *Attorneys Tweak \$2.78B College Settlement, Remove the Word 'Booster' From NIL Language*, ASSOC. PRESS (Sept. 26, 2024), <https://apnews.com/article/college-nil-lawsuit-settlement-booster-4812f2f48dfae4b9f6dfd536e652dc5a>; see also Russo, *supra* note 82 (referring to the settlement agreement as a "sprawling plan").

95 Argeris et al., *supra* note 78 (referring to the parties' settlement agreement as introducing a "transformative model" and "forward-looking framework").

96 Michelle Brutlag Hosick, *Settlement Documents Filed in College Athletics Class-Action Lawsuits*, NCAA (July 26, 2024), <https://www.ncaa.org/news/2024/7/26/media-center-settlement-documents-filed-in-college-athletics-class-action-lawsuits.aspx>.

97 Aaron Glas, Note, *A Breakthrough or a Band-Aid? The Hosue Settlement and the Future of College Athlete Compensation*, 79 U. MIAMI L. REV. INSIGHTS (2025).

98 Michael McCann, *NCAA House Settlement Faces Its Day of Reckoning in Court*, SPORTICO (Sept. 5, 2024), <https://www.sportico.com/law/analysis/2024/ncaa-house-settlement-judge-wilken-1234795985/>.

99 Jodi Balsam, *Free College Athletes*, LAW & LIBERTY (Mar. 21, 2025), <https://lawliberty.org/free-college-athletes/> (noting that 390,000 class members stand to receive backpay as a result of the settlement).

100 Glas, *supra* note 97.

101 McCann, *supra* note 98. Once a university elects to opt in to the settlement, it is subject to all of its obligations and limitations. *Question and Answer: Implementation of the House Settlement*, *supra* note 76, at 1.

102 Dan Murphy, *Judge OK's \$2.8B Settlement, Paving Way for Colleges to Pay Athletes*, ESPN (June 6, 2025), https://www.espn.com/college-sports/story/_/id/45467505/judge-grants-final-approval-house-v-ncaa-settlement (noting that the agreement's term spans ten years). In total, universities will share around a billion dollars with their athletes annually. Jessica Mendoza, *NCAA President on a New Era for College Sports*, WALL ST. J. (June 24, 2025), <https://www.wsj.com/podcasts/the-journal/ncaa-president-on-a-new-era-for-college-sports/7674f565-1c2f-4ec1-b295-1aa554861d87> (quoting NCAA president Charlie Baker). The cap on the amount of revenue that universities can distribute to their athletes will increase by four percent annually over the next ten years. Marcello, *supra* note 85.

such compensation counting against the \$20.5 million maximum total amount they can provide in revenue share payments.¹⁰³

The parties appeared before Judge Claudia Wilken in September 2024 for the settlement's preliminary approval hearing¹⁰⁴ at which Wilken professed concerns with the parties' agreement.¹⁰⁵ Specifically, Wilken took issue with its language regarding perceived pay-for-play NIL compensation and booster involvement¹⁰⁶ that effectively permitted the NCAA to target NIL booster collectives by forcing them to prove their NIL payments served a "valid business purpose."¹⁰⁷ Wilken believed that the parties intended to continue to simultaneously: (1) permit NIL compensation for what they considered valid endorsement or sponsorship arrangements based on athletes' right of publicity and (2) mitigate pay-for-play and signing or retention bonuses for athletes disguised as NIL compensation.¹⁰⁸ Wilken suggested that the parties "go back to the drawing board"¹⁰⁹ to address her concern that such regulation could chill the marketplace to athletes' detriment.¹¹⁰ She also queried why NIL deals with certain third parties would receive heightened scrutiny under the settlement agreement's terms while universities' deals with their athletes would not.¹¹¹ Given her concerns, Wilken declined to preliminarily approve the agreement during the hearing.¹¹²

103 *Question and Answer: Implementation of the House Settlement*, *supra* note 76, at 23 (noting that such arrangements may not extend past an athlete's period of competition eligibility and universities may not compensate their athletes for athletics participation or achievement).

104 *See* Murphy, *supra* note 102 (stating that the future of college athletics was in Judge Wilken's hands). Judge Wilken has presided over other important litigation involving the NCAA. Clifton, *supra* note 79.

105 Ben Portnoy, *NCAA, Power Five Conferences Don't Get Immediate Preliminary Approval From Judge in House Settlement*, *SPORT BUS. J.* (Sept. 6, 2024), <https://www.sportsbusinessjournal.com/Articles/2024/09/06/house-ncaa-settlement-analysis/> (quoting Wilken at the hearing's outset, "We've got a lot to get to. I have a lot of questions.").

106 *Id.* (describing Wilken's concerns with contrasting "pay-for-play" and "real NIL" and the agreement's "nebulous" and "subjective" definition of boosters).

107 Marcello, *supra* note 41. For its part, the NCAA explained at the preliminary approval hearing that enforcing NIL regulations against NIL booster collectives was a "central part" of the settlement for the NCAA, the absence of which could derail the settlement. Pete Nakos, *House v. NCAA Settlement Attorneys Working to Clarify Booster, NIL Collective Enforcement*, *ON3* (Sept. 17, 2024), <https://www.on3.com/nil/news/house-v-ncaa-settlement-attorneys-working-to-clarify-booster-nil-collective-enforcement/>.

108 Glas, *supra* note 97 (identifying the agreement's subject language as Wilken's main concern).

109 Ross Dellenger, *Plaintiff Attorneys in House-NCAA Settlement File Brief to Clarify Language in Hopes of Appeasing Judge*, *YAHOO! SPORTS* (Sept. 26, 2024), <https://sports.yahoo.com/plaintiff-attorneys-in-house-ncaa-settlement-file-brief-to-clarify-language-in-hopes-of-appeasing-judge-223754328.html> (quoting Wilken).

110 *Id.* (noting that some settlement objectors believed that such regulation could cost collegiate athletes billions in NIL deals with collectives).

111 *Id.*

112 Glas, *supra* note 97 ("This was not just a mere rubber stamping of the agreement.").

After the “contentious”¹¹³ preliminary approval hearing, the parties’ negotiations resulted in the filing of a historic¹¹⁴ amended settlement agreement that attempted to address Wilken’s concerns, and she granted preliminary approval of it in October 2024.¹¹⁵ Key to the amended settlement for the NCAA and conference defendants is their belief that it attempts to eliminate pay-for-play transactions and compensation to attend or remain at a university guised as NIL payments, instead permitting NIL payments that further valid business purposes that actually promote goods or services.¹¹⁶ Specifically, while the revised settlement agreement permits entities or individuals associated with a university (i.e., NIL booster collectives) to compensate student-athletes for use of their NIL, such payments must be “for a valid business purpose related to the promotion or endorsement of goods or services offered to the general public for profit and are at fair-market value rates.”¹¹⁷

The parties thereafter began notifying current and former student-athletes of the settlement’s terms and the procedures through which they could submit claims.¹¹⁸ And athletics departments proceeded to operate under the assumption that the revised settlement agreement would ultimately receive Wilken’s stamp of final approval, with some cutting student-athletes from rosters to meet the settlement’s imposition of roster limits.¹¹⁹

113 Michael McCann, *NCAA House Settlement Not Approved, Faces Fire in Hearing*, SPORTICO (Sept. 5, 2024), <https://www.sportico.com/law/analysis/2024/ncaa-house-settlement-not-approved-1234796270/>; see also Dan Wetzel, *Wetzel: How the Spoils of NCAA Settlement Will Be Divided*, ESPN (June 7, 2025), https://www.espn.com/college-sports/story/_/id/45469494/ncaa-settlement-done-divide-spoils (quoting University of Alabama athletics director Greg Byrne as explaining that the three most significant events in college athletics’s history are the NCAA’s foundation, Title IX’s adoption, and the *House* settlement).

114 See Eric Prisbell, *Long-Form House v. NCAA Settlement Document Filed in Court*, ON3 (July 26, 2024), <https://www.on3.com/news/long-form-house-v-ncaa-settlement-document-filed-in-court/> (explaining that the long-form settlement document moved college athletics “closer to a landscape-shifting new financial model.”).

115 See Steve Berkowitz, *Judge Gives Preliminary Approval for NCAA Settlement Allowing Revenue-Sharing with Athletes*, USA TODAY (Oct. 7, 2024), <https://www.usatoday.com/story/sports/college/2024/10/07/ncaa-revenue-sharing-house-settlement-approved/75514164007/> (referring to the amended settlement agreement as “slightly revised”). The revised settlement agreement “softened” restrictions on NIL agreements. Michael McCann, *NCAA House Settlement Preliminarily Approved*, SPORTICO (Oct. 7, 2024), <https://www.sportico.com/law/analysis/2024/ncaa-house-settlement-preliminarily-approved-college-sports-1234800114/>. It also replaced the term “boosters” in the agreement with more narrow terminology that limits enforcement of third-party NIL agreement regulations. Marcello, *supra* note 41.

116 Prisbell, *supra* note 114 (explaining that the settlement aligns with college athletics administrators’ desire for “authentic” or “true” NIL deals). “What was once mostly unregulated is now mostly regulated.” Wetzel, *supra* note 113.

117 *House Settlement: A Guide for Schools*, NCAA (Feb. 2025), https://ncaaorg.s3.amazonaws.com/ncaa/legal/house/Feb2025D1Gov_MembershipEducation_AGuideforSchools.pdf.

118 Berkowitz, *supra* note 115.

119 Daniel Libit, *Rise of the Roster Resistance: House v. NCAA’s Unwelcome Underdogs*, SPORTICO (May 2, 2025), <https://www.sportico.com/leagues/college-sports/2025/roster-limit-objectors-house-v-ncaa-settlement-1234850724/> (noting that some athletics departments made preparations to drop certain athletics programs).

Meanwhile, individuals and entities filed dozens of objections to the revised agreement, among them collegiate athletes like Louisiana State University gymnast Livvy Dunne, who objected to the settlement's damages calculations.¹²⁰ Another notable objector was the Department of Justice (DOJ), which took issue with the artificial cap on the amount that universities may distribute to their athletes, arguing that it does not represent free-market value and effectively shields against potential future antitrust claims.¹²¹ Yet another group of objectors focused on the settlement agreement's replacement of NCAA scholarship limits with roster limits and the effects the change would have on nonscholarship student-athletes.¹²²

The parties sought Wilken's final approval of the settlement agreement at an April 2025 hearing.¹²³ After hearing and considering the objectors' positions, Wilken provided the parties two weeks to amend their settlement agreement to address her concerns, which primarily involved the immediate imposition of roster limits and the effects on athletes who would lose their places on teams.¹²⁴

After the parties agreed to provide temporary flexibility to student-athletes affected by the imposition of roster limits such that they would not count against roster size caps,¹²⁵ Wilken granted final approval of the settlement agreement in June 2025.¹²⁶ In doing so, Wilken's "landmark" decision¹²⁷ ushered in a new era of college athletics¹²⁸ that effectively cut the legs out from under the NCAA's century-old amateurism model¹²⁹ and repositioned college athletics as quasi-professional

120 Jack McNabola, Note, *Where Does Amateurism Stand After House v. NCAA*, VAND. J. ENT. & TECH. L. (Feb. 2025), <https://www.vanderbilt.edu/jetlaw/2025/02/13/where-does-amateurism-stand-after-house-v-ncaa/>. Dunne's success in NIL endeavors is in large part due to her significant social media following, which includes millions of followers on social media sites like Instagram and TikTok. See Alexis Yoder, *Olivia Dunne Gives Statement During Hearing for NCAA Settlement Case*, YAHOO! SPORTS (Apr. 8, 2025), <https://sports.yahoo.com/article/olivia-dunne-gives-statement-during-132220897.html>.

121 Glas, *supra* note 97 (describing the DOJ's position that some universities could compensate their football and basketball athletes an amount that exceeds the maximum amount permitted by the settlement).

122 *Id.*

123 Gary Adornato, *NCAA Roster Caps Could Squeeze Out High School Recruits Under NIL Settlement*, SPORTS ILLUSTRATED (June 9, 2025), <https://www.si.com/high-school/recruiting/ncaa-roster-caps-could-squeeze-out-high-school-recruits-under-nil-settlement-01jx8mckdc12>.

124 *Id.*

125 Libit, *supra* note 119. The parties effectively compromised on the roster limits issue by providing universities the option of temporarily exceeding the maximum roster limit for current athletes who would have lost their spots. Marcello, *supra* note 85.

126 Murphy, *supra* note 102.

127 Pete Nakos, *Judge Approves Landmark House v. NCAA Settlement*, ON3 (June 6, 2025), <https://www.on3.com/news/judge-approves-landmark-house-v-ncaa-settlement/>.

128 Murphy, *supra* note 102.

129 a et al., *supra* note 90 ("the amateurism model that has ruled college sports for more than a century will nearly cease to exist at the Division I level."); see also Murphy, *supra* note 102 ("Friday's order is a major milestone in the long push to remove outdated amateurism rules from major college sports."). Per Oregon State University athletics director Scott Barnes, "Amateurism as we knew it is dead." Jackson Demmler, *Oregon State AD Scott Barnes Discusses New Revenue Sharing Payments*,

sports.¹³⁰ Notably, prior to Wilken’s decision, the NCAA had not permitted universities to directly pay their athletes in its existence, which spans over a century.¹³¹

Despite this substantial, new cost in the form of additional athlete compensation, 319 Division I universities—82 percent of Division I membership—opted in to participating in the settlement for the 2025–26 academic year.¹³² The maximum amount that individual universities may share with their athletes in the 2025–26 academic year is \$20.5 million, an amount that will increase in subsequent years.¹³³ A common allocation breakdown is to provide at least seventy percent of this amount to football student-athletes, at least ten percent to men’s basketball student-athletes, and the remaining amount to student-athletes in other sports.¹³⁴ In many cases, universities are allocating revenue to those sports that produce it as, for example, football programs generally generate roughly seventy-five to eighty percent of an athletics department’s revenue.¹³⁵ In all, universities will share

-
- KVAL (July 8, 2025), <https://kval.com/sports/content/oregon-state-university-beavers-athletic-director-ad-scott-barnes-discusses-new-revenue-sharing-payments> (explaining that the pendulum has swung away from amateur athletics to professionalism within college sports).
- 130 McCann, *supra* note 115 (referencing a salary cap system akin to many professional sports leagues).
- 131 Marcello, *supra* note 85; *see also* Nakos, *supra* note 127 (quoting Wilken’s opinion describing the settlement agreement as permitting “levels and types of student-athlete compensation that have never been permitted in the history of college sports...”). Only student-athletes who satisfy NCAA eligibility requirements may receive additional payments or benefits from their universities. *Question and Answer: Implementation of the House Settlement*, *supra* note 76, at 27.
- 132 @RossDellenger, Twitter (July 1, 2:39PM), <https://x.com/RossDellenger/status/1940133285905961189>. The University of Central Arkansas is an example of a university that will not opt in to the settlement agreement, with its athletics director citing its imposition of roster limits as a main reason for the decision. *See* Sam Lane, *University of Central Arkansas to Opt Out of House Settlement*, NW. ARK. DEMOCRAT GAZETTE (July 3, 2025), <https://www.nwaonline.com/news/2025/jul/03/uca-to-opt-out-of-house-settlement/> (quoting the athletics director as explaining that opting in to the settlement would result in a loss of student-athletes due to roster limits, which would result in less revenue for the university). In addition to roster limits, the University of Idaho cited insufficient finances as reasons for declining to opt in. Trevor Junt, *Idaho Chooses to Opt Out of Revenue Sharing*, LEWISTON TRIB. (July 9, 2025), <https://www.lmtribune.com/sports/ui-chooses-to-opt-out-of-revenue-sharing-19894943> (quoting athletics director Terry Gawlik).
- 133 Murphy, *supra* note 102 (noting that the agreement’s term spans ten years). In total, universities will share around a billion dollars with their athletes annually. Jessica Mendoza, *NCAA President on a New Era for College Sports*, WALL ST. J. (June 24, 2025), <https://www.wsj.com/podcasts/the-journal/ncaa-president-on-a-new-era-for-college-sports/7674f565-1c2f-4ec1-b295-1aa554861d87> (quoting NCAA president Charlie Baker). The cap on the amount of revenue that universities can distribute to their athletes will increase by four percent annually over the next ten years. Marcello, *supra* note 85.
- 134 Ross Dellenger, *Could Impending Rev-Share Changes Help Cinderellas in the Future? ‘Everybody Will Be in the Game,’* YAHOO! SPORTS (Mar. 26, 2025), <https://sports.yahoo.com/college-basketball/article/could-impending-rev-share-changes-help-cinderellas-in-the-future-everybody-will-be-in-the-game-130005097.html> (noting that the formula causes strife among a university’s coaches, each of which seeks a higher percentage). Universities that do not have a football program could gain a competitive advantage in basketball by providing a larger allocation to basketball student-athletes relative to those schools with football programs. *Id.*
- 135 David Cunningham, *Full Transcript: Hokes AD Whit Babcock and Bill Roth Discuss the House Settlement*, TECHSIDELINE (June 11, 2025), <https://virginiatech.sportswar.com/article/2025/06/11/transcript-hokies-ad-whit-babcock-bill-roth-discuss-house-settlement/> (quoting Virginia Tech University athletics director Whit Babcock).

roughly a billion dollars with their student-athletes annually under the settlement.¹³⁶

These universities will enter revenue-sharing agreements with their athletes under which the latter receives compensation for things like media appearances and use of their NIL in advertisements.¹³⁷ These contracts can include buyouts and penalties for transferring.¹³⁸ Texas Tech University, for example, made headlines in July 2025 for its rumored three-year, \$2.3 million revenue sharing contract with a rising high school football prospect.¹³⁹

C. *The Settlement Agreement's Insertion of a Third-Party Entity into the NIL Rules Enforcement Process*

In effect, the *House* settlement repositions college athletics under a professional sports-like model¹⁴⁰ without expanding the NCAA's rules enforcement authority.¹⁴¹ Thus, who—or what—will monitor and enforce NIL policies such as those seeking to eradicate pay-for-play NIL compensation? This section introduces and describes the responsible entity and the process by which it will enforce NIL compensation limits.

136 Jessica Mendoza, *NCAA President on a New Era for College Sports*, WSJ PODCASTS (June 24, 2025), <https://www.wsj.com/podcasts/the-journal/ncaa-president-on-a-new-era-for-college-sports/7674f565-1c2f-4ec1-b295-1aa554861d87>.

137 Glas, *supra* note 97 (describing the forward-looking aspects of the settlement agreement as “a move toward a more equitable future for college athletes, who have long seen their labor benefit everyone but themselves”). The settlement agreement does not specify how universities must allocate revenue distributions among their teams. The University of Washington, for example, will share revenue among five teams: football, men’s basketball, women’s basketball, softball, and volleyball. Christian Caple, *Pat Chun Says Washington Revenue Share Will Focus on 5 Teams*, ON MONTLAKE (June 18, 2025), https://www.onmontlake.com/p/pat-chun-says-washington-revenue?utm_source=post-email-title&publication_id=1456757&post_id=166285880&utm_campaign=email-post-title&isFreemail=false&r=2t3w8&triedRedirect=true&utm_medium=email. The University of Kansas, on the other hand, will distribute revenue among seven teams. Shreyas Laddha, *What We Know About Kansas Jayhawks’ Approach to Revenue Share – and 7-Sport Split*, KANS. CITY STAR (June 18, 2025), https://www.kansascity.com/sports/college/big-12/university-of-kansas/article308758335.html?taid=6852aca2e78de70001113a69&utm_campaign=trueanthem&utm_medium=social&utm_source=twitter. Montana State University, which does not belong to a Power conference, elected to opt in to the settlement and will distribute revenue—not the maximum \$20.5 million—based on individual teams’ fundraising abilities. Ethan Becker, *Athletic Director Discusses MSU’s Plans on House Settlement*, NBC MONT. (June 18, 2025), <https://nbcmontana.com/sports/local-sports/athletic-director-costello-discusses-msus-plans-with-house-settlement>. Some have expressed that universities need to abide by Title IX’s gender equity requirements when distributing this revenue. For example, see Zeigler, *supra* note 90.

138 Dan Wolken, *Can New Commission Police Money Paid to College Athletes? Good Luck with That*, USA TODAY (June 15, 2025), <https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2025/06/15/nil-college-sports-commission-policing-new-rules/84218254007/>.

139 See Sam Khan, Jr. et al., *Texas Tech’s Latest Recruiting Coup: How Big Is Deal for 5-Star Offensive Tackle?* THE ATHLETIC (July 5, 2025), <https://www.nytimes.com/athletic/6475649/2025/07/05/texas-tech-felix-ojo-nil-deal/> (noting that billionaire oil magnate and Texas Tech supporter Cody Campbell predicted that Texas Tech student-athletes would receive a total combined amount of \$55 million in NIL compensation and revenue share distributions for the 2025–26 academic year).

140 McCann, *supra* note 98 (referencing a salary cap system akin to many professional sports leagues).

141 Marcello, *supra* note 41. In fact, attorney for the *House* plaintiffs Steve Berman acknowledged that the revised settlement agreement’s language restricts the NCAA’s already-diminished oversight of NIL agreements. Pells, *supra* note 94.

The *House* case's amended settlement agreement inserts a third-party entity, referred to as "the Designated Enforcement Entity," into the NIL policy enforcement process.¹⁴² Of note is that this clearinghouse¹⁴³ also provides a compliance function,¹⁴⁴ possessing the ability to provide advisory opinions when student-athletes have questions regarding the permissibility of potential NIL agreements.¹⁴⁵ This process could benefit universities by increasing transparency regarding their student-athletes' NIL deals with third parties.¹⁴⁶

More relevant to this article is the process through which the enforcement entity—the conference defendants have created the College Sports Commission (CSC)¹⁴⁷ and hired Deloitte¹⁴⁸—will attempt to ensure that student-athletes' compensation meets certain settlement agreement requirements. Specifically, the revised settlement agreement requires student-athletes' NIL arrangements with certain third parties to both: (1) advance a valid business purpose and (2) compensate student-athletes within a reasonable range.¹⁴⁹

The CSC is independent from the NCAA and possesses authority for enforcing the new rules that the NCAA adopted pertaining to the settlement, including those

142 Amended Settlement Agreement, *supra* note 16, at 24.

143 Dellenger, *supra*, note 109.

144 See Colin J. Cloherty & Natalia Maria Szlarb, *NCAA's New Arbitration System: A Paradigm Shift in College Sports Discipline*, *SPORT BUS. J.* (Nov. 12, 2024), <https://www.sportsbusinessjournal.com/Articles/2024/11/12/Unpacks/oped-12-cloherty-szlarb/>.

145 Berkowitz, *supra* note 115.

146 See Clifton, *supra* note 79 (opining that the disclosure requirement will permit "better management of third-party influence and better assurance of legitimate NIL activity").

147 Ross Dellenger, *House Attorneys Slam NCAA and Power Conferences over Denied NIL Deals, Issue Legal Warning About Settlement*, *YAHOO! SPORTS* (July 11, 2025), <https://sports.yahoo.com/college-football/breaking-news/article/house-attorneys-slam-ncaa-and-power-conferences-over-denied-nil-deals-issue-legal-warning-about-settlement-205015881.html>.

148 See *Conferences Share New and Significant Progress Toward Implementation of House Settlement*, *NCAA* (Mar. 12, 2025), <https://www.ncaa.org/news/2025/3/12/media-center-conferences-share-new-and-significant-progress-toward-implementation-of-house-settlement.aspx>. Deloitte is an accounting firm. See Dan Shanoff, *The Launch of NIL Go Signals a High-Stakes Evolution in College Sports: Money Call*, *THE ATHLETIC* (June 11, 2025), <https://www.nytimes.com/athletic/6418924/2025/06/11/nil-go-deloitte-bryan-seeley-college-sports-commission-moneycall/>. It also has provided consulting services for at least one prominent athletics department. See Daniel Libit, *As Deloitte's 'NIL Go' Draws Heat, Other Athletic Work Stays Low-Key*, *SPORTICO* (June 1, 2025), <https://www.sportico.com/leagues/college-sports/2025/deloitte-college-sports-consulting-nil-go-1234854616/> (describing Deloitte's relationship with the University of Kansas). This may lead to questions about a perceived lack of experience within the college athletics industry or Deloitte's relationships with key constituents. And Deloitte's services are not cheap—it will charge anywhere between \$5,000 and \$500,000 per university. Amanda Christovich, *Will the House v. NCAA Settlement Actually End 'Pay-for-Play' NIL Deals?* *FRONT OFF. SPORTS* (May 16, 2025), <https://frontofficesports.com/will-the-house-v-ncaa-settlement-actually-end-pay-for-play-nil-deals/>.

149 Ranjan Jindal, *The House v. NCAA Settlement is Officially Approved. What Does It Mean for Duke and College Sports?* *THE CHRON.* (June 7, 2025), <https://www.dukechronicle.com/article/2025/06/duke-athletics-house-v-ncaa-settlement-approved-judge-wilken-revenue-sharing-commission-deloitte-nil-durham-devils-club>. One media member uses Caitlin Clark's arrangement with State Farm as an example of an NIL deal that would satisfy these requirements. See Wetzels, *supra* note 113.

regarding roster limits, revenue sharing, and NIL arrangements.¹⁵⁰ To enforce these policies, it possesses investigatory and adjudicative abilities.¹⁵¹

Procedurally, the amended settlement agreement requires student-athletes to disclose NIL agreements with all third parties worth \$600 or more to both their university¹⁵² and a database operated by the enforcement entity.¹⁵³ Student-athletes report such NIL arrangements within five days of their execution¹⁵⁴ through an online portal called NIL Go, which the CSC created with Deloitte's assistance.¹⁵⁵ This reporting requirement exists regardless of whether a student-athlete's university opts in to the settlement.¹⁵⁶ In the first couple months of NIL Go's existence, the CSC analyzed over five thousand reported deals, which ranged from \$600 to \$1.5 million in compensation.¹⁵⁷ As of this writing, CSC staff members are scrutinizing these reported deals manually, as opposed to using artificial intelligence.¹⁵⁸

150 Coll. Sports Comm'n, *FAQ*, <https://www.collegesportscommission.org/faq>. The NCAA is largely removed from enforcing student-athletes' financial deals with third parties. Dan Wetzel & Pete Thamel, *Sifting Legitimate NIL Deals from the Darker World of Pay-to-Play*, ESPN (Apr. 2, 2025), https://www.espn.com/college-sports/story/_/id/44491912/ncaa-nil-pay-play-house-settlement.

151 Col. Sports Comm'n, *FAQ*, <https://www.collegesportscommission.org/faq>. Former Major League Baseball executive Bryan Seeley will serve as the CSC's first CEO. Coll. Sports Comm'n, *Bryan Seeley Named Inaugural CEO of the College Sports Commission* (June 6, 2025), <https://assets.tina.io/29b83311-e587-42b1-861e-87ebde9aa253/BRYAN%20SEELEY%20NAMED%20INAUGURAL%20CEO%20OF%20THE%20COLLEGE%20SPORTS%20COMMISSION.pdf>.

152 *Updated Question and Answer: Impact of the Proposed Settlement on Division I Institutions*, NCAA (Dec. 9, 2024), https://ncaaorg.s3.amazonaws.com/governance/d1/legislation/2024-25/Dec2024D1Gov_PhaseTwoInstSetQuestionandAnswer.pdf. Some have noted that disclosure may violate a student-athlete's contract with a third party if it has a confidentiality clause. See Christovich, *supra* note 148.

153 Erica Hamilton, *The Death of Amateurism—Implications of the Proposed House Settlement for the Future of College Sports*, SPORTS LITIG. ALERT (Jan. 24, 2025), <https://sportslitigationalert.com/the-death-of-amateurism-implications-of-the-proposed-house-settlement-for-the-future-of-college-sports/>.

154 *Question and Answer: Implementation of the House Settlement*, *supra* note 76, at 30.

155 Coll. Sports Comm'n, *Student-Athlete NIL Deals*, <https://www.collegesportscommission.org/nil> (describing NIL Go as a "simple way for student-athletes to report third-party NIL deals to be evaluated for rules compliance"). NIL Go is "the single most talked-about concept of college athletics' new revenue-sharing era." Ross Dellenger, *What Is NIL Go, and Why Is It the Latest Subject of Debate Among College Sports Leaders?*, YAHOO! SPORTS (June 13, 2025), <https://sports.yahoo.com/college-sports/article/what-is-nil-go-and-why-is-it-the-latest-subject-of-debate-among-college-sports-leaders-120028561.html>. The web-based submission system operates similarly to registering for a passport. *Id.* Student-athletes may designate an individual to enter deals on their behalf. Coll. Sports Comm'n, *supra*.

156 *House Settlement: A Guide for Schools*, *supra* note 117; see also *Updated Question and Answer: Impact of the Proposed Settlement on Division I Institutions*, *supra* note 152.

157 Kassandra Ramsey, *What Is the College Sports Commission? What Is NIL Go?* ESQUIRE COACH (Sept. 3, 2025), <https://www.theesquirecoach.com/blog/what-is-the-college-sports-commission-what-is-nil-go?categoryId=406689>.

@RossDellenger, Twitter (Aug. 22, 2025 9:47 AM), <https://x.com/RossDellenger/status/1958903864784036300>.

158 @achristovichh, Twitter (Aug. 22, 2025 9:25 AM), <https://x.com/achristovichh/status/1958898238745981111>.

The parties' revised settlement agreement addressed Judge Wilken's concerns regarding the original agreement's use of the broad term "booster" by explicitly limiting the deals subject to heightened scrutiny based on (1) the source of the student-athlete's NIL compensation¹⁵⁹ and (2) the source's relationship with the athlete's university.¹⁶⁰ More specifically, only deals between student-athletes and a narrower group of people or entities associated with universities will be subject to heightened scrutiny.¹⁶¹ Such entities include, for example, NIL booster collectives, a university's marketing department, a booster-owned business, a university's fundraising foundation, and a university's media rights partner.¹⁶² One of the primary goals of this process is to keep universities from trying to use third parties to circumvent the \$20.5 million revenue share cap.¹⁶³ Another is to mitigate the authority that boosters and other third parties have gained in the NIL era and place more of the financial onus on universities.¹⁶⁴

For deals between student-athletes and these third-party entities, Deloitte will utilize a formula for determining whether NIL payments exceed an acceptable compensation range¹⁶⁵ under the presumption that only deals that reflect something akin to fair-market value are legitimate.¹⁶⁶ Thus, Deloitte will flag NIL compensation provided by this narrower group if, based on Deloitte's calculations, it exceeds this range,¹⁶⁷ defined as "commensurate with compensation paid to similarly situated individuals,"¹⁶⁸ or is not for a valid business purpose to promote

159 Dellenger, *supra* note 109.

160 Coll. Sports Comm'n, *supra* note 155.

161 Dellenger, *supra* note 109 (noting that NIL arrangements between student-athletes and commercial third parties such as shoe companies are not subject to the process); see also *Updated Question and Answer: Impact of the Proposed Settlement on Division I Institutions*, *supra* note 152. The amended settlement agreement exempts only shoe and apparel companies and brands and families who donate less than \$50,000 to the university from clearinghouse scrutiny. Marcello, *supra* note 41. The onus is on universities to determine whether a third party triggers application of the heightened scrutiny. Christovich, *supra* note 148.

162 Ross Dellenger, *Do College Football Coaches Think New Enforcement Arm Will Work? LSU's Brian Kelly: 'It Is Not a Slap on the Wrist'*, YAHOO! SPORTS (Feb. 24, 2025), <https://sports.yahoo.com/college-football/article/do-college-football-coaches-think-new-enforcement-arm-will-work-lsus-brian-kelly-it-is-not-a-slap-on-the-wrist-200619854.html>.

163 Wetzel & Thamel, *supra* note 150.

164 Cunningham, *supra* note 135 (quoting Virginia Tech University athletics director Whit Babcock).

165 Ross Dellenger, *With Non-Football Early Signing Period Upon Us, We're About to See How Messy College Sports Is Going to Get*, YAHOO! SPORTS (Nov. 13, 2024), <https://sports.yahoo.com/with-non-football-early-signing-period-upon-us-were-about-to-see-how-messy-college-sports-is-going-to-get-150224345.html?guccounter=1>; see also *Updated Question and Answer: Impact of the Proposed Settlement on Division I Institutions*, *supra* note 152. (noting that the defendant conferences will bear some responsibility for fair-market value system oversight).

166 Hamilton, *supra* note 153; see also *Implementation Committee Status Report—Feb. 2025*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/legal/house/Feb2025D1Gov_ImplementationCommitteeStatusReport.pdf ("The NIL Clearinghouse development has met several important benchmarks in partnership with Deloitte.").

167 Dellenger, *supra* note 165; see also Hamilton, *supra* note 153.

168 Coll. Sports Comm'n, *supra* note 155.

goods and services provided to the public for profit.¹⁶⁹ The unacknowledged goal behind NIL Go is to prevent booster payments to student-athletes that have masqueraded as NIL compensation for over four years.¹⁷⁰

While acceptable compensation for an NIL arrangement is notoriously difficult to determine,¹⁷¹ Deloitte will access thousands of prior NIL deals involving collegiate and professional athletes to develop an acceptable “compensation range” for a deal or prospective deal within a day.¹⁷² Factors for determining this range include the student-athlete’s performance obligations under the arrangement, the athlete’s athletics performance and social media following, the local market, and the athlete’s university’s market reach.¹⁷³ A deal potentially subject to rejection could be a local car dealership’s \$1 million in NIL compensation to a student-athlete for deliverables that would normally result in \$10,000 in compensation to a different endorser.¹⁷⁴

The CSC will also review student-athletes’ NIL deals with these select third parties to determine whether the latter’s use of the former’s NIL serves a valid business purpose, meaning promotion or endorsement of a good or service offered to the public for profit.¹⁷⁵ In conducting this inquiry, the CSC will focus on whether the third-party’s sale of goods or services is for profit—not whether the entity operates at a profit or loss.¹⁷⁶ CSC guidance states that it could require the athlete or entity to provide documentation to verify compliance with this requirement, refusal of which could result in the CSC not clearing the NIL arrangement.¹⁷⁷

Once NIL Go completes its analysis, there are three potential outcomes.¹⁷⁸ The CSC will either clear the deal to proceed as submitted, not clear it, or flag the arrangement for additional review by the CSC.¹⁷⁹ In the latter instance, a flag could be the result of the need to conduct additional review over concerns regarding payor identity, compensation amount, or contract terms.¹⁸⁰ When this occurs,

169 *Question and Answer: Impact of the Proposed Settlement on Current Division I Student-Athletes*, NCAA (Dec. 23, 2024), https://ncaaorg.s3.amazonaws.com/governance/d1/legislation/2024-25/Jan2025D1Gov_StudentAthleteSetQuestionandAnswerCourtApproved.pdf.

170 Dellenger, *supra* note 155.

171 McCann, *supra* note 113.

172 Dellenger, *supra* note 162.

173 Coll. Sports Comm’n, *supra* note 155.

174 McCann, *supra* note 14.

175 Coll. Sports Comm’n, *supra* note 155.

176 *Id.*

177 *Id.*

178 *See id.*

179 *Id.* Deloitte itself will not block deals—it will only flag them. Christovich, *supra* note 148. The CSC is the entity that can reject deals. *Id.* Deloitte estimates that it would have flagged 70 percent of previous NIL arrangements with booster collectives while 90 percent of arrangements with public companies would have satisfied its analysis. Ross Dellenger, *Power Conferences Working on Contract to Bind Schools to New Enforcement Rules, with Strict Punishments*, YAHOO! SPORTS (May 19, 2025),

180 Coll. Sports Comm’n, *supra* note 155.

the CSC conducts another layer of review and provides the student-athlete with guidance.¹⁸¹

In instances of uncleared deals, the CSC provides student-athletes with three options.¹⁸² One possibility is to work with the payor to renegotiate the arrangement and resubmit it¹⁸³ (student-athletes have the ability to resubmit a deal once).¹⁸⁴ Another option is to cancel the deal and refund any compensation they already received.¹⁸⁵ Or a student-athlete may appeal the CSC's decision to not clear a deal to neutral arbitration,¹⁸⁶ which the next section further explores.

If a student-athlete proceeds with an NIL deal that the CSC has rejected, the CSC's chief executive officer (CEO) enjoys enforcement power greater than the COI ever possessed.¹⁸⁷ With final say in penalties, the CEO could declare that a student-athlete forfeited their competition eligibility by entering the rejected arrangement.¹⁸⁸ Further, the athlete's university could face reduction of financial distributions for violating the settlement agreement's terms.¹⁸⁹

The CSC's effectiveness is college coaches' biggest question.¹⁹⁰ College athletics constituents like Florida State University athletics director Michael Alford,¹⁹¹ University of Florida athletics director Scott Stricklin,¹⁹² Louisiana State University

181 *Id.*

182 *See id.*

183 *Id.*

184 Ross Dellenger, 'We Don't Know the Rules' — Big 12 Coaches Still Wrestling with New World Order After Player Payment Changes, YAHOO! SPORTS (July 8, 2025), <https://sports.yahoo.com/college-football/article/we-dont-know-the-rules--big-12-coaches-still-wrestling-with-new-world-order-after-player-payment-changes-013454522.html>.

185 Coll. Sports Comm'n, *supra* note 155.

186 *Id.*

187 *See* Pete Thamel, *How Proposed CEO Could Dole Out Punishments in College Sports*, ESPN (May 19, 2025), https://www.espn.com/college-sports/story/_/id/45227143/how-proposed-ceo-college-sports-dole-punishments (referring to the CSC's CEO as "one of the most powerful and influential people in college sports").

188 Coll. Sports Comm'n, *supra* note 155. Some believe that such regulation of NIL deals will result in additional litigation. For example, *see* Prisbell, *supra* note 114 (quoting sports attorney Mit Winter); *see also* Dellenger, *supra* note 162 (quoting Mississippi State University president Mark Keenum (commenting on the likelihood that a student-athlete's representative will challenge Deloitte's fair-market value assessment). Withholding revenue share compensation is among the most damaging penalties the new enforcement entity could implement. *See* Dennis Dodd, *There Will Be a College Sports CEO — Who They Are and How They'll Execute an Impossible Task Is Up in the Air*, CBS SPORTS (Feb. 12, 2025), <https://www.cbssports.com/college-football/news/there-will-be-a-college-sports-ceo-who-they-are-and-how-theyll-execute-an-impossible-task-is-up-in-the-air/>.

189 Amended Settlement Agreement, *supra* note 16, at 24 *see also* Dellenger, *supra* note 15.

190 Wolken, *supra* note 138 (pointing out that assuming that student-athletes will report their deals may be folly).

191 *See* Kutz, *supra* note 4 (quoting Alford).

192 Dellenger, *supra* note 165 (explaining that "Martial Law" would go into effect after the settlement receives final approval).

head football coach Brian Kelly,¹⁹³ and Oregon State University athletics director Scott Barnes¹⁹⁴ believe the CSC will enforce these NIL policies strictly.¹⁹⁵ Big 12 Conference Commissioner Brett Yormark, sums up this sentiment, “We’re providing rules. And we will be governed by those rules. And if we break those rules, you know, the ramifications will be punitive.”¹⁹⁶ Effective enforcement could create a more level playing field in college athletics.¹⁹⁷ Without it, a few universities with more resources would compete for championships.¹⁹⁸ Power conference executives have gone so far as to circulate a draft document that university officials would sign that would, among other things, waive their right to pursue legal challenges against the CSC.¹⁹⁹ Failure to sign this membership agreement could result in loss of conference membership and games scheduled against other power conference universities.²⁰⁰

Other college athletics constituents are skeptical that the new system will work—or that it is legal.²⁰¹ Regarding the former, some are not confident that the CSC and Deloitte will really be able to curb rule breaking.²⁰² In fact, within a month of the settlement’s imposition, the CSC already relaxed its position regarding applying heightened scrutiny of NIL collectives’ deals with student-athletes.²⁰³ At first, the CSC denied dozens of deals between collectives and athletes, finding

193 Dellenger, *supra* note 162 (quoting Kelly, “There will be real enforcement. It will be an across-the-board, consistent enforcement with severe sanctions. They will be quick. They will be swift. I think everybody is on board with that.”).

194 John Canzano, *Canzano: Is the Smoke Lifting for Pac-12?* BALD FACED TRUTH BY JOHN CANZANO (May 1, 2025), <https://www.johncanzano.com/p/canzano-is-the-smoke-lifting-for/> (“This is not the NCAA. This is a separate entity with professional enforcement staff. Nimble, small, autonomous decision making, and a big stick. Penalties that will absolutely hurt.”).

195 Some are skeptical that the acceptable range of compensation requirement would withstand legal scrutiny. See Dellenger, *supra* note 165 (quoting attorney Brian Davis, who maintains that the valuation is unlawful absent collective bargaining).

196 Fischer, *supra* note 55.

197 Dellenger, *supra* note 184. Virginia Tech University athletics director Whit Babcock echoes those sentiments, explaining that the new enforcement structure, if it has penalties with “teeth,” could level the playing field. Cunningham, *supra* note 135.

198 Dellenger, *supra* note 203 (quoting Southeastern Conference commissioner Greg Sankey, “If you allow what’s happened to continue to escalate, there would be a very small number of programs that would be competitive with each other and we’d not have a national sport or a national championship.”).

199 Dellenger, *supra* note 179.

200 *Id.*

201 See Amanda Christovich, ‘Kind of a Joke’: Frustrations Mount as New NIL Deal Approval Process Lags, FRONT OFF. SPORTS (July 10, 2025), <https://frontofficesports.com/kind-of-a-joke-frustrations-mount-as-new-nil-deal-approval-process-lags/>; see also Dellenger, *supra* note 179 (quoting Tulane University law professor Gabe Feldman).

202 For example, see Steven Johnson, *TCU’s Athletic Director Opens Up on NIL and a New Era for College Football*, FORT WORTH STAR-TELEGRAPH (June 12, 2025), <https://www.star-telegram.com/sports/college/big-12/texas-christian-university/article307994270.html> (quoting Texas Christian University athletics director Mike Buddie).

203 See Ross Dellenger, *House Attorneys, Power Conferences Work Out Deal to Relax NIL Collective Roadblocks: Sources*, YAHOO! SPORTS (July 22, 2025), <https://sports.yahoo.com/college-football/breaking-news/article/house-attorneys-power-conferences-work-out-deal-to-relax-nil-collective-roadblocks-sources-213706035.html>.

that the arrangements could not satisfy the valid business purpose requirement.²⁰⁴ After pushback from, among others, the *House* plaintiffs' attorneys, the CSC will no longer apply additional scrutiny to collectives' deals,²⁰⁵ instead reviewing only for a valid business purpose and range of fair market value compensation as with other deals.²⁰⁶ This is significant, as compensation from approved deals with third parties does not count against the \$20.5 million revenue share cap.²⁰⁷ As a result, some see what was originally a \$20.5 million "hard" compensation cap as morphing into a "soft cap" that collectives will exploit.²⁰⁸

With respect to the concern that the new enforcement system would not withstand legal scrutiny, some feel that a rejected NIL deal could result in a lawsuit against the clearinghouse based on alleged violations of state NIL laws, tortious interference with contractual relations, and suppression of economic opportunities protected by state and federal antitrust laws.²⁰⁹ These doubts occur amidst a backdrop of at least one state—Tennessee—passing a bill permitting its universities to proceed without regard to the *House* settlement-related rules and attempting to preclude the CSC from enforcing them.²¹⁰

Regardless, by involving a third-party—the CSC—in the NIL rules enforcement process, the NCAA acquiesced to significantly altering its long-standing history of almost exclusively using its own enforcement unit to enforce its rules.²¹¹ The NCAA's lone previous dalliance using a third-party to enforce its rules proved disastrous. Amid calls for enforcement reform, the NCAA created the Independent Accountability Resolution Process (IARP), an independent body that briefly presided over infractions cases deemed complex²¹² in 2018.²¹³ The IARP's existence was short-lived, however, for reasons including its inefficiencies, and many consider

204 *Id.*

205 *Id.* (citing "athlete merchandise sales, autograph signings and athlete appearances at, for example, golf tournaments" as examples of arrangements that would satisfy CSC requirements).

206 Ross Dellenger, *College Sports Commission Informs Schools that NIL Collectives Can Pay Athletes Directly with Limitations*, YAHOO! SPORTS (July 31, 2025), <https://sports.yahoo.com/college-football/breaking-news/article/college-sports-commission-informs-schools-that-nil-collectives-can-pay-athletes-directly-with-limitations-135802722.html>.

207 *Id.*

208 Dellenger, *supra* note 203.

209 McCann, *supra* note 14.

210 Dellenger, *supra* note 179 (referring to Tennessee Senate Bill No. 536 as "a launched missile toward plans from the NCAA and power conferences").

211 Murphy, *supra* note 76. NCAA President Charlie Baker explains that removing itself from enforcing NIL regulations will permit it to focus on providing student-athletes with an exceptional academic and athletics experience. See *A Letter from NCAA President Charlie Baker*, *supra* note 10.

212 Dodd, *supra* note 188 (noting that individuals employed outside of the NCAA and its member universities comprised the IARP).

213 *Inside the Division I Infractions Process: Independent Accountability Resolution*, NCAA (Jan. 2019), https://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_graphcs/DIINF_InfractionsProcessIndependentAccountabilityResolutionFactSheet.pdf.

it a failure.²¹⁴ And now another third party, the CSC, will now largely enjoy enforcement authority over third-party NIL arrangements.²¹⁵

D. The Settlement Agreement's Insertion of Arbitration into the NIL Rules Enforcement Process

As stated above, the *House* settlement agreement creates a neutral arbitration system that permits student-athletes and their universities to challenge adverse CSC decisions regarding athletes' NIL arrangements with third parties.²¹⁶ While the introduction of the CSC into the NIL rules enforcement process is radical, its insertion of arbitration is likewise significant²¹⁷ and unprecedented in college athletics.

Procedurally, the settlement permits a student-athlete or their university to appeal a CSC rejection of an NIL agreement,²¹⁸ including when the basis for the rejection is Deloitte's determination that the compensation exceeds its acceptable range of compensation.²¹⁹ When a student-athlete proceeds with arbitrating the CSC's rejection, Deloitte will serve as the prosecutorial group²²⁰ in front of arbitrators that the *House* parties approve.²²¹ Once arbitration commences, the arbitrator must reach a final, written decision within 45 days.²²²

If the arbitrators agree with Deloitte's analysis that compensation from an NIL agreement exceeds the acceptable range, the student-athlete who entered it

214 For example, see Dodd, *supra* note 188.

215 Karen Weaver, *House v. NCAA Settlement Proposal: Athletes Could Earn 51% of Revenue, Curb 'Booster' Role, and Use Neutral Arbiter for NIL*, FORBES (Sept. 26, 2024), <https://www.forbes.com/sites/karenweaver/2024/09/26/house-v-ncaa-settlement-proposal-athletes-could-earn-51-of-revenue-curb-booster-role-use-neutral-arbiter-for-nil/> (quoting revised settlement agreement). The NCAA will continue to handle enforcement of academic and eligibility requirements. Thamel, *supra* note 187.

216 Ralph D. Russo, *College Athlete Advocacy Group Opposes NCAA Lawsuit Settlement, Says It Limits Potential Earnings*, ASSOC. PRESS (Aug. 29, 2024), <https://apnews.com/article/ncaa-lawsuit-athletes-61e2e2f9a98eaf03403ad9caa0747849#> (quoting *House* plaintiffs' attorney Steve Berman).

217 Henderson, *supra* note 80 (explaining that the availability of arbitration mitigates the likelihood that the NCAA will unilaterally impose its rules); see also Weaver, *supra* note 215 (referring to the revised agreement's inclusion of arbitration as a "sea change for college athletics").

218 Dellenger, *supra* note 15.

219 See *Updated Question and Answer: Impact of the Proposed Settlement on Division I Institutions*, *supra* note 152. Some are already questioning Deloitte's neutrality and/or ability to effectively determine fair-market value given that the relevant market is relatively limited in time. See Dodd, *supra* note 188.

220 See Cloherty & Szlarb, *supra* note 144.

221 Penalties that Deloitte imposed are stayed pending the arbitrator's ruling. Dellenger, *supra* note 15. As of this writing, college athletics executives and attorneys are finalizing a group of eight arbitrators, including many former judges, to constitute the independent arbitration group. Dellenger, *supra* note 184.

222 *Question and Answer: Implementation of the House Settlement*, *supra* note 76, at 35 (noting that any CSC-imposed penalties are stayed during arbitration).

may terminate the agreement²²³ or renegotiate it.²²⁴ If a student-athlete accepts the compensation originally bargained in a rejected deal, they can be deemed ineligible for competition.²²⁵

By including arbitration in their settlement agreement, the *House* parties intended to mutually benefit student-athletes, their universities, and the NCAA.²²⁶ While inserting arbitration into the NIL rules enforcement process largely removes the NCAA from it, optimists believe it should result in a more efficient²²⁷ and equitable²²⁸ process while potentially making it more difficult to challenge adverse decisions in court.²²⁹ According to the *House* parties' brief on their revised settlement, any arbitrations will occur quickly and, absent good cause, any penalties issued by the CSC are stayed during such proceedings.²³⁰ Additionally, universities may especially appreciate the fact that arbitration can be less public than litigation.²³¹ The NCAA benefits from arbitration as, theoretically, it provides some cover against potential

223 Weaver, *supra* note 215.

224 *Question and Answer: Impact of the Proposed Settlement on Current Division I Student-Athletes*, *supra* note 169. "For example, if Deloitte deems a submitted \$100,000 deal between an athlete and third party to actually be valued at \$50,000, the player can alter the deal to align with the clearinghouse's suggested fair market value figure." Ross Dellenger, *NCAA's House Settlement Approved, Ushering in New Era Where Schools Can Directly Pay Athletes*, YAHOO! SPORTS (June 7, 2025), <https://sports.yahoo.com/college-football/article/ncaas-house-settlement-approved-ushering-in-new-era-where-schools-can-directly-pay-athletes-011814078.html>.

225 Dellenger, *supra* note 224.

226 Portnoy, *supra* note 81.

227 Portnoy, *supra* note 105. The process contemplates a forty-five-day timeline to resolve such arbitration. Cloherty & Szlarb, *supra* note 144. Some feel so strongly about the inefficiency of the traditional NCAA investigative process that two U.S. senators recently reintroduced a bipartisan bill seeking to increase efficiencies and add procedural protections to it. See Pete Nakos, *Senators Re-Introduce NCAA Accountability Act to Enable Enforcement*, ON3 (Mar. 12, 2025), <https://www.on3.com/nil/news/senators-re-introduce-ncaa-accountability-act-to-enable-enforcement/>.

228 Henderson, *supra* note 80. To increase fairness, arbitrators may require document production and witness appearances, for example. Cloherty & Szlarb, *supra* note 144.

229 Wetzel & Thamel, *supra* note 150; see also McCann, *supra* note 14 (explaining that the judiciary is generally deferential to arbitrators' decisions). At least one media member points to lawsuits as the biggest story in college sports. See Matt Brown, *Nothing Really Matters Until the Lawyers Are Done Lawyering*, EXTRA POINTS (May 21, 2025), <https://www.extrapointsmb.com/p/nothing-really-matters-until-the-lawyers-are-done-lawyering-2639>.

230 Weaver, *supra* note 215 (quoting *House* parties' brief). Such a stay in disciplinary actions permits student-athletes and their universities to avoid immediate consequences. Cloherty & Szlarb, *supra* note 144.

231 See McCann, *supra* note 14 (explaining that arbitration would shield many relevant documents and proceedings from public review); see also Karen Weaver, *NIL Contracts and Disputes: Will They Shape the Future of College Athletics?* FORBES (Mar. 3, 2025), <https://www.forbes.com/sites/karenweaver/2025/03/03/nil-contracts-and-disputes-will-they-shape-the-future-of-college-athletics/> (noting that universities and their current and former student-athletes could also pursue arbitration over disputes regarding the former's use of the latter's NIL).

antitrust claims²³² since the NCAA no longer possesses jurisdiction over NIL rules enforcement as the proverbial judge, jury, and prosecutor.²³³

III. IMPLICATIONS FOR UNIVERSITIES

Following Judge Wilken granting final approval of the *House* settlement, universities must alter their approach within athletics to become—or remain—competitive.²³⁴ While the national media focuses on universities' newfound ability to share over \$20 million in revenue annually with their athletes,²³⁵ universities face a new regulatory environment that includes a novel process for adjudicating potential violations of NIL regulations.²³⁶ This new enforcement mechanism is perhaps an even bigger sea change than revenue sharing for student-athletes, coaches, and administrators.²³⁷ The revised settlement agreement's complexity increases this burden on university and athletics administrators faced with creating new processes to help ensure and monitor compliance with these new NIL policies.²³⁸

A starting point for universities is evaluating current systems to determine whether they are adequate or require updating.²³⁹ Among necessary processes is one including facilitating and requiring disclosure of student-athletes' NIL arrangements worth \$600 or more and educating constituents about this requirement.²⁴⁰ This could prove difficult for some as many universities were previously averse to involvement with student-athletes' disclosure of NIL agreements.²⁴¹ Further, some states have counseled against it.²⁴²

232 Portnoy, *supra* note 81.

233 Weaver, *supra* note 215; *see also* Hamilton, *supra* note 153.

234 Argeris et al., *supra* note 78 (explaining that athletics departments must be “more nimble”).

235 Cloherty & Szlarb, *supra* note 144. For example, *see* Henderson, *supra* note 80 (explaining that the settlement's outcome “could reshape the financial dynamics of college athletics for years to come ...”).

236 Weaver, *supra* note 215; *see also* Argeris et al., *supra* note 78 (“[I]nstitutions should prepare for a new and evolving set of rules and processes for infractions investigations under the settlement's framework.”).

237 Fischer, *supra* note 55.

238 Argeris et al., *supra* note 78 (explaining that the settlement requires universities to take a “multidisciplinary approach”).

239 *See* Cloherty & Szlarb, *supra* note 144 (specifically referencing systems involving NIL booster collectives as one that universities should evaluate).

240 *Id.* (suggesting training for employees and student-athletes).

241 Sanjay Reddy, *NIL and Data Transparency: Implications for Student-Athletes*, GEO. L. TECH. REV. (May 2024), <https://georgetownlawtechreview.org/nil-and-data-transparency-implications-for-student-athletes/GLTR-05-2024/> (citing the Family Educational Rights and Privacy Act as a reason that universities have been loath to involve with student-athletes' disclosure of NIL agreements). Prior to the settlement agreement's implementation, universities and conferences have largely decided whether and how to enforce disclosure requirements. For an example of a university with a disclosure requirement, *see* Brown U. Athletics Compliance, *Name, Image and Likeness Resources*, <https://brownbears.com/sports/2021/7/1/name-image-and-likeness-resources>.

242 Reddy, *supra* note 241 (citing Louisiana and Kentucky laws that have exempted student-athletes' NIL agreements from open records laws).

One power conference describes the amount of education that department staffers will need to deliver to student-athletes, coaches, and agents as “monumental.”²⁴³ Universities, however, must not only educate regarding the *House* settlement disclosure requirement but monitor for its compliance, too.²⁴⁴ Administrators’ monitoring practices can include observing student-athletes’ social media—especially high-profile student-athletes or those who compete in high-profile sports—for suggestion of unreported NIL deals and issuing reports to sport staff members listing agreements reported by student-athletes, in case sport staff members are aware of others.²⁴⁵ Not only is disclosure required in many instances, it ensures that NIL arrangements promptly receive Deloitte’s compensation valuation analysis.

Universities and their student-athletes should also familiarize themselves with, and take advantage of, the process through which the latter can receive an advisory opinion regarding potential NIL deals through the NIL Go platform.²⁴⁶ Universities may even consider requiring high-profile student-athletes or those in high-profile sports to utilize Deloitte’s advisory services as taking advantage of this resource could save proactive student-athletes and universities from significant hassle, anxiety, penalties, and arbitration (and expenses related to arbitration).

Universities must prepare for teaming up with their athletes²⁴⁷ who, because of the CSC’s rejection of a deal, participate in the arbitration process.²⁴⁸ Designed to be more efficient than the current NCAA infractions process, student-athletes and universities must remain primed to face the relatively condensed forty-five-day arbitration timeline when challenging Deloitte’s determinations.²⁴⁹ Discovery deadlines, for example, will be tight.²⁵⁰ Thus, universities and their student-athletes must be equipped to produce evidence not only in the discovery process but to the arbitrator, too.²⁵¹

243 Fischer, *supra* note 55.

244 To access documents that reflect the numerous changes to NCAA rules as a result of the settlement, see *Proposed Division I Rule Changes Involving Student-Athlete NIL Activities*, NCAA (last updated Aug. 19, 2025), <https://www.ncaa.org/sports/2025/4/6/proposed-rule-changes-contingent-on-house-settlement-final-approval.aspx>.

245 Josh Lens, *NIL Compliance*, 103 B.U. L. REV. ONLINE 69 (2023).

246 Cloherty & Szlarb, *supra* note 144.

247 Dellenger, *supra* note 155.

248 *Id.* (quoting Kessler).

249 *See id.*

250 *Id.*

251 *See* Ross Dellenger, *With NIL Era Ending, College Sports Is on Verge of Seismic Change. How Will Schools Adapt with Industry in Upheaval?* YAHOO! SPORTS (Jan. 7, 2025), <https://sports.yahoo.com/with-nil-era-ending-college-sports-is-on-verge-of-seismic-change-how-will-schools-adapt-with-industry-in-upheaval-154722732.html> (quoting Kessler as explaining that an arbitrator’s decision may depend on the evidence that the parties produce).

Further, arbitration will cost universities money.²⁵² While some may utilize in-house counsel to arbitrate, others may hire outside representation, particularly those experienced with alternative dispute resolution.²⁵³ Further, the *House* settlement agreement provides universities with the option of paying for their student-athletes' legal representation.²⁵⁴ This possibility first requires universities to determine whether such an arrangement creates an ethical conflict.²⁵⁵ This is not a new dynamic, however, as universities have long possessed the ability to pay for their prospective and current student-athletes' legal representation in NCAA eligibility disputes, for example.²⁵⁶ Universities may consider evaluating whether and how funding such legal matters impacts their student-athletes' cost of attendance calculations, however.

Navigating the post-*House* regulatory scheme, particularly Deloitte's acceptable range of compensation determinations and the potential for arbitrating its conclusions, requires universities to evaluate current processes, create and implement new ones, and be prepared to participate in arbitration on a relatively condensed timeline. Given the dire potential consequences of adverse ruling, which include student-athlete competition ineligibility, universities must remain vigilant.

IV. CONCLUSION

The *House v. NCAA* settlement agreement significantly alters college athletics in myriad ways, including providing universities the ability to share tens of millions of dollars in revenue directly with their student-athletes. These student-athletes, however, risk their ability to compete by entering NIL agreements that, according to Deloitte's calculations, exceed an acceptable range of compensation or that do not further a valid business purpose. Universities and their student-athletes can mitigate the likelihood of such a determination by proactively seeking an advisory opinion of potential NIL deals through NIL Go, disclosing NIL agreements, and remaining prepared to arbitrate instances where the CSC does not approve their NIL agreement. While such endeavors are largely new and complicated, college athletics' new reality requires familiarity with, and preparedness for, them.

252 Cloherty & Szlarb, *supra* note 144.

253 *Id.*

254 *Id.* When a university elects to fund their student-athlete's attorney's fees and costs for arbitration proceedings, the university must also pay the arbitrator's reasonable fees and expenses. *Question and Answer: Implementation of the House Settlement*, *supra* note 76, at 36.

255 Cloherty & Szlarb, *supra* note 144.

256 See NCAA, 2024–25 Division I Manual, §§ 12.11.2.1, 16.3.2 (2024), <https://ncaapublications.com/productdownloads/D125.pdf>.

POTENTIAL ANTITRUST ISSUES WITH NIL GO'S ALGORITHMIC DETERMINATIONS OF NIL "FAIR MARKET VALUE"

SAM C. EHRLICH*, KATHERINE VAN DYCK,† AND TYLER PHILLIPS‡

Abstract

The House Settlement introduces a new regulatory architecture for college sports: Universities may now share revenue directly with athletes but only within a capped system accompanied by centralized oversight of third-party name, image, and likeness (NIL) transactions. The newly formed College Sports Commission (CSC), working with Deloitte, has operationalized these rules through NIL Go, a data-driven platform that evaluates whether athlete deals fall within a permissible "reasonable range of compensation." This article situates NIL Go within a broader set of industries turning to algorithmic tools to structure markets, including rental housing and hospitality, where shared pricing systems have recently come under judicial antitrust scrutiny. By comparing the CSC's model to these emerging forms of algorithmic coordination, the article identifies the key questions NIL Go raises for universities implementing the settlement and considers how developments in algorithmic-pricing litigation may shape future governance of athlete compensation.

* Assistant Professor of Legal Studies, Department of Management, Boise State University College of Business and Economics.

† Senior Fellow, UC Berkeley School of Law Civil Justice Research Initiative, Senior Legal Fellow, American Economic Liberties Project, Principal, KVD Strategies PLLC. Previously Attorney-Advisor, Federal Trade Commission Office of Policy Planning.

‡ Attorney, Causa Valori, PLLC.

TABLE OF CONTENTS

INTRODUCTION.....	91
I. HOW THE NCAA (TRIES TO) STOP CAP CIRCUMVENTION ..	93
A. THE NEW ENFORCEMENT REGIME.....	93
B. IMPLEMENTATION AND COMPLIANCE.....	96
II. ALGORITHMIC PRICE FIXING	102
A. UNDERSTANDING ALGORITHMIC PRICING AS COLLUSION.....	104
B. PRESUMPTIVE ILLEGALITY VS. FACT-SPECIFIC ASSESSMENTS	105
C. PRICING ALGORITHMS IN THE COURTS.....	107
1. <i>Understanding RealPage</i>	108
2. <i>Lessons from Other Algorithm Challenges</i>	109
III. NIL GO AS ALGORITHMIC-BASED COLLUSION.....	111
A. THE CSC'S "HUB-AND-SPOKE-AND-SPOKE-AND-SPOKE" MODEL.....	111
B. SETTING THE STANDARD OF REVIEW: PER SE ILLEGAL OR RULE OF REASON?	115
C. NIL GO UNDER THE RULE OF REASON—CAN THE RULES PASS THE TEST?	116
D. THE PARTICULAR PROBLEM WITH THE CSC'S <i>ALGORITHMIC</i> MAXIMUM PRICE FIXING.....	120
E. POTENTIAL PLAINTIFFS: WHAT LITIGATION DOES THE <i>HOUSE</i> SETTLEMENT STOP AND WHAT LITIGATION DOES IT NOT STOP?	124
IV. CONCLUSION.....	129

INTRODUCTION

The Supreme Court's decision in *NCAA v. Alston*¹ and the class action and settlement that followed in *House v. NCAA*² have ushered in a new era in intercollegiate sports. Alongside new roster limits, controls over third-party name, image, and likeness (NIL) deals with college athletes,³ and \$2.576 billion in damages for lost earnings, the *House* Settlement requires the National Collegiate Athletic Association (NCAA) to change its rules and permit—for the first time since its formation in 1906—direct payments from universities to athletes, commonly called “revenue sharing.”⁴

But this new right for athletes comes with a catch. The *House* Settlement also created a regime modeled after salary caps in professional sports leagues.⁵ It puts a uniform “pool limit” on university revenue sharing, which acts as a ceiling on the amount of revenue schools are allowed (but not required) to distribute to their athletes.⁶ The pool limit is ostensibly designed to create more parity between the

1 See 594 U.S. 69, 75, 94 (2021) (refusing to grant the NCAA “immunity from the normal operation of the antitrust laws”).

2 See *In re College Athlete NIL Litigation (House Lawsuit)*, No. 20-cv-03919, 2025 WL 1675820 (N.D. Cal. June 6, 2025) (granting motion for final approval of class action settlement). The settlement also incorporates two other antitrust lawsuits *Hubbard v. NCAA*, No. 23-cv-01593 (N.D. Cal.) (alleging that the collective refusal of schools to fund pre-2021 athletes the cash academic achievement awards provided to athletes after the Supreme Court's decision in *NCAA v. Alston* violates antitrust law), and *Carter v. NCAA*, No. 23-cv-06325 (N.D. Cal.) (alleging that a variety of NCAA rules prohibiting schools from directly compensating athletes for their athletic services violates antitrust law.) See Marc Edelman & Michael A. Carrier, *Of Labor, Antitrust, and Why the Proposed House Settlement Will Not Solve the NCAA's Problem*, 93 *FORDHAM L. REV.* 1603, 1604 (2025).

3 NIL refers to a person's legal right to control and profit from the commercial use of their name, physical appearance, and personal brand. See, e.g., Sara Coello, *What Is NIL in College Sports? How Do Athlete Deals Work?*, *ESPN* (Mar. 24, 2025), https://www.espn.com/college-sports/story/_/id/41040485/what-nil-college-sports-how-do-athlete-deals-work. NIL deals are typically endorsement contracts, such as when an athlete appears on a Wheaties box or in a Gatorade commercial. They can also include paid personal appearances, social media sponsorships, autograph signings, television contracts, merchandising, and other similar ventures.

4 Fourth Am. Settlement Agreement, at art. 3, § 1, *House v. NCAA*, No. 20-cv-03919, 2025 WL 1675820 (N.D. Cal. May 7, 2025), Dkt. No. 958-1 [hereinafter *House* Settlement]. The settlement uses the NCAA's existing Membership Financial Reporting System to define “shared revenue.” *Id.* Broadly speaking, it includes revenue from ticket sales, guarantees for away games, media rights, NCAA and conference distributions, royalties, licenses, and advertisements. *Id.*; NCAA, *2025 Agreed-Upon Procedures*, App. A. It excludes revenue from direct government support, institutional support, student fees, booster contributions, third-party benefits like country club memberships and speaker fees, parking and concessions, sports camps, and in-kind contributions. *House* Settlement, *supra*; NCAA, *2025 Agreed-Upon Procedures*, *supra*.

5 See, e.g., Nat'l Football League & Nat'l Football League Players Ass'n, *Collective Bargaining Agreement*, art. 14, § 2 (Mar. 2020), <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf> (prohibiting clubs and players from entering into any agreements “that are designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by the provisions of this Agreement.”)

6 For the 2025–26 academic year, schools may only spend twenty-two percent of the average

NCAA's member institutions, dampening the advantage of those blessed with larger budgets.⁷ However, third-party payments to athletes, like those received from an advertiser or NIL collective, do not count against it. Thus, the *House Settlement* excludes donations from boosters, alumni associations, or corporations from the "Average Shared Revenue" calculations that serve as the basis for the pool limit. The settlement also explicitly allows the NCAA and defendant conferences to "adopt rules that prohibit any transaction, payment, or agreement designed to defeat or circumvent" the pool limit,⁸ seemingly to prevent pay-for-play schemes similar to the one that the Los Angeles Clippers are alleged by the National Basketball Association (NBA) to have created to compensate star Kawhi Leonard beyond the NBA's salary cap.⁹

This article explores how the Collegiate Sports Commission's (CSC's) reported use of centralized, algorithm-driven oversight creates antitrust exposure—not only

-
- shared revenue of "Power Four" conferences and Notre Dame. *House Settlement*, *supra* note 4, at art. 3, § 1(e). The "Power Four" conferences are the Atlantic Coast Conference (ACC), the Big Ten Conference (Big Ten), the Big 12 Conference, and the Southeastern Conference (SEC). They, along with the Pac-12, were defendants in the *House Lawsuit*, and they sit at the top of the NCAA pyramid (at least for football). In 2014, the NCAA gave the Power Four "autonomous" rulemaking authority, meaning they are allowed to adopt rules to allow their schools to provide certain athlete benefits beyond what the NCAA allows without the permission of the NCAA. Jon Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, CBS SPORTS (Aug. 7, 2014), <https://www.cbssports.com/college-football/news/ncaa-adopts-new-division-i-model-giving-power-5-autonomy/>. See, e.g., Jeffrey F. Levine, Christian D. Hanna, & Tiara Porterfield, *The Big Ten's Legal Duties and Risks: Protecting College Athletes Through the Voluntary Undertaking Doctrine in a Changing Landscape*, 35 MARQ. SPORTS L. REV. 69, 69 (2024) (using this label); Chris Vannini, *What It Means for Pac-12 to Be Classified as 'Nonautonomous FBS Conference'*, THE ATHLETIC (N.Y. TIMES) (Sept. 12, 2024), <https://www.nytimes.com/athletic/5437109/2024/04/22/pac-12-nonautonomous-conference/> (explaining the autonomy given to the power conferences while noting the Pac-12 Conference's loss of that status). The Pac-12 Conference lost its "Power" status due to member defections, but that has afforded them the power and responsibility to set the structure and power of the new system outside of normal NCAA governance. See, e.g., Brandon Marcello, *College Sports Power Conferences Hire MLB Exec to Serve in CEO Role After House v. NCAA Settlement Approval*, CBS SPORTS (June 6, 2025), <https://www.cbssports.com/college-football/news/college-sports-power-conferences-hire-mlb-exec-to-serve-in-ceo-role-after-house-v-ncaa-settlement-approval/> (noting that it was the power conferences—not the NCAA—who hired the CEO for the new College Sports Commission).
- 7 See, e.g., Press Release, Big Ten Conference, *New Era Begins as House Settlement Approved* (June 6, 2025), <https://nextgen.bigten.org/wsoc/article/blt49fe66a3aced8eb6/> (quoting Big Ten Commissioner Tony Pettiti as stating that the settlement is "designed to bring stability, integrity and competitive balance to college athletics").
- 8 *House Settlement*, *supra* note 4, at art. 6, § 3.
- 9 Pablo Torre (@pablofindsout), X/TWITTER, *Exclusive: Kawhi Leonard signed a \$28M endorsement deal for a "no-show job" with a fraudulent tree-planting company funded by \$50M from Clippers owner Steve Ballmer, according to documents obtained by @PabloTorre. "It was to circumvent the salary cap," an inside source says.* (Sept. 3, 2025, 4:02 AM), <https://x.com/pablofindsout/status/1963180670810767577>. See also, e.g., Shwetha Surendran, *What Is Aspiration, the Company Behind the Kawhi Leonard Deal?*, ESPN (Sept. 13, 2025), https://www.espn.com/nba/story/_/id/46242361/aspiration-company-kawhi-leonard-steve-ballmer-la-clippers (explaining the scandal further); Ryan Young, *Aspiration Investors File Lawsuit Against Clippers Owner Steve Ballmer over Kawhi Leonard Scandal*, YAHOO! SPORTS (Nov. 3, 2025), <https://sports.yahoo.com/nba/breaking-news/article/aspiration-investors-file-lawsuit-against-clippers-owner-steve-ballmer-over-kawhi-leonard-scandal-030344460.html> (detailing a lawsuit filed by Aspiration's founders alleging that Clippers owner Steve Ballmer "knew exactly what was happening with the Aspiration-Kawhi Leonard scandal" and "channeled funds through Aspiration" to sign Leonard for beyond the salary cap).

for those entities themselves, but also for the NCAA and its member institutions. The agreements between the conferences and universities to abide by the CSC's rules and excommunicate athletes who violate them are an explicit price-fixing cartel and group boycott under section 1 of the Sherman Act, and their use of an algorithm to police the cartel places it squarely in the zone of several hub-and-spoke conspiracies being challenged in court today.¹⁰ By comparing the NCAA's new scheme to these cases, it becomes clear that the CSC and NIL Go may find difficulty surviving if faced with antitrust scrutiny.¹¹ Despite those cases existing in different industries and somewhat different contexts, the same theories are in play—especially those related to data sharing and algorithmic coordination.

Part I of this article will provide an overview of the NIL Go system, explaining what the *House Settlement* allows and how the CSC has operationalized the settlement's provisions into a new world order for college sports. Part II surveys the growing legal scrutiny of algorithmic price fixing, focusing on the various actions that have been taken, are currently ongoing, and may yet still be filed against algorithmic price-fixing software firms and their clients and that represent the first major doctrinal tests of this antitrust theory. Part III then applies the logic of that litigation to the evolving NIL landscape, exploring who might bring antitrust claims against the CSC, what theories they might rely on, and how the use of shared pricing algorithms complicates the analysis. The article then concludes by identifying potential exposure points for member institutions and suggesting how they might navigate a compliance environment increasingly shaped by algorithmic price coordination.

I. HOW THE NCAA (TRIES TO) STOP CAP CIRCUMVENTION

A. *The New Enforcement Regime*

In the first half of 2025, the Power Four conferences used these provisions to create the CSC, tasked with “ensur[ing] that name, image and likeness (NIL) deals made between student-athletes and third parties are fair and comply with the

10 See Second Am. Compl., *In re RealPage, Inc., Rental Software Antitrust Litigation* (No. II), No. 23-md-03071 (M.D. Tenn. Feb. 5, 2024), Dkt. No. 728 (consolidated private class action litigation filed by affected tenants against RealPage and accused conspirator landlords); Am. Compl., *United States v. RealPage, Inc.*, No. 24-cv-00710 (M.D.N.C. Jan. 7, 2025), Dkt. No. 47 (civil enforcement action filed by the U.S. Department of Justice and the Attorneys General of North Carolina, California, Colorado, Connecticut, Illinois, Massachusetts, Minnesota, Oregon, Tennessee, and Washington).

11 Of course, it goes without saying that if Congress were to pass the Student Compensation and Opportunity through Rights and Endorsements (SCORE) Act, the analysis offered by this article would likely be for naught, as the Act permits “interstate intercollegiate athletic associations” like the NCAA and CSC to establish rules related to “prohibited compensation” and treats such rulemaking as lawful under antitrust law. H.R. 4312, 119th Cong. §§ 6(a)(3), 7(a) (2025). However, while as of this writing the SCORE Act is reportedly expected to pass an early December 2025 House vote, its chances in the Senate seem far more bleak. See *infra* note 42. However, arguments that by creating a “quasi-legislative” body the *House Settlement* may already qualify as exempt under the Noerr-Pennington Doctrine—which exempts restraints of trade that result from government regulatory action—would almost certainly fail under the precedent set by the Supreme Court in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), where the Court rejected a Noerr-Pennington defense by a private organization seeking to cloak its horizontal restraints as merely “quasi-legislative” standard-setting. *Id.* at 500–05.

[new] rules.”¹² The CSC, in turn, hired accounting firm Deloitte, which created a clearinghouse called “NIL Go.”¹³ As the CSC’s primary oversight tool, the NIL Go system is more than just a clearinghouse—it is the enforcement arm of a newly brokered financial order in college sports. Its mandate is to ensure that athlete compensation from third parties does not become a backdoor route around the cap on institutional payments. To that end, NIL Go and Deloitte are collectively charged with screening and flagging NIL deals that appear inconsistent with the settlement’s narrowly defined standards of legitimate compensation. All Division I college athletes are required to submit NIL deals worth \$600 or more to the CSC and Deloitte “to determine whether [these] deals are made with the purpose of using a student-athlete’s NIL for a valid business purpose and do not exceed a reasonable range of compensation.”¹⁴

But the NCAA and CSC are not concerned with advertisers like Gatorade and Nike. They are concerned with “Associated Entities and Individuals.”¹⁵ That term is defined in the *House Settlement* to capture alumni associations, booster clubs, and NIL collectives.¹⁶ And the settlement specifically allows the NCAA to prohibit deals with those groups that are not “for a valid business purpose related to the promotion or endorsement of goods or services provided to the general public for profit, with compensation at rates and terms commensurate with compensation paid to similarly situated individuals with comparable NIL value who are not current or prospective student-athletes at the Member Institution.”¹⁷ The CSC, deputized by the NCAA to effectuate the settlement, screens all NIL deals to determine first if they are with an “Associated Entity” and second if they are for “a valid business purpose” and within a “reasonable range of compensation.”¹⁸ Athletes who go forward with deals that have not been cleared can lose eligibility, and under certain circumstances, their schools can be punished as well.

The CSC defines “valid business purpose” as “the use of the student-athlete’s NIL ... to sell a good or service to the public for profit.”¹⁹ A “reasonable range of compensation” is one “commensurate with compensation paid to similarly situated

12 *Home*, COLLEGE SPORTS COMMISSION, <https://www.collegesportscommission.org/> (last visited July 21, 2025).

13 Press Release, College Sports Commission, *A New Era in College Sports Begins: Court Approves Landmark House Settlement, New College Sports Commission Launches* (June 6, 2025), <https://www.prnewswire.com/news-releases/a-new-era-in-college-sports-begins-court-approves-landmark-house-settlement-new-college-sports-commission-launches-302475820.html>.

14 *Student-Athlete NIL Deals*, COLLEGE SPORTS COMMISSION, <https://www.collegesportscommission.org/nil> (last visited July 21, 2025).

15 *House Settlement*, *supra* note 4, at art. 4, § 3.

16 *Id.* at art. 1, § 1(e). A “booster club” is an organization, also usually comprised of university alumni, that generates money, goods, and services for their schools’ athletic programs. They sometimes differ from NIL collectives in that they do not directly pay college athletes or otherwise enter into NIL deals.

17 *House Settlement*, *supra* note 4, at art. 4, § 3.

18 Ross Dellenger, *Monumental Shift: Power Conferences, Not NCAA, to Control Policing Athlete Compensation*, YAHOO! SPORTS (Feb. 6, 2025), <https://sports.yahoo.com/monumental-shift-power-conferences-not-ncaa-to-control-policing-athlete-compensation-172044629.html>.

19 *Id.*

individual[s].”²⁰ The range is determined “based on multiple factors, including but not limited to, the deal’s performance obligations, the student-athlete’s athletic performance and social media reach, the local market and the market reach of his or her institution and program.”²¹ Athletes are compared to “similarly situated individuals with comparable NIL value who are not current or prospective student-athletes at the institution the student-athlete is currently enrolled in or being recruited to attend.”²² If a deal fails to satisfy these criteria, athletes can attempt to negotiate a new deal, abandon the deal entirely, or appeal the decision through an arbitration process.²³ Athletes and schools who fail to adhere to this process risk losing eligibility for NCAA athletics.²⁴

Deloitte has developed an algorithm to manage these reviews, which involve over eight thousand deals valued at \$79.8 million.²⁵ While the specific algorithm used is proprietary, Deloitte’s determinations rely heavily not only on the specifics of the athlete and third-party deal, but also on comparisons to “similar types of NIL deals” previously submitted to the clearinghouse.²⁶ The algorithm has since become the CSC’s primary enforcement mechanism against athlete compensation that might circumvent the *House* Settlement’s pool limits.²⁷ It determines what NIL deals the CSC will accept as compliant, effectively substituting data-driven thresholds for the more categorical boycott it initially preferred.²⁸

NIL Go presents serious antitrust issues for both the CSC itself and for its institutional stakeholders. Its “anti-circumvention” measures simply replace the NCAA’s old compensation cap—a strict prohibition on NIL deals—with a new, higher tech one.

The CSC’s focus on “Associated Entities” matters because NIL collectives and

20 *Id.*

21 *FAQ*, COLLEGE SPORTS COMMISSION, <https://www.collegesportscommission.org/faq> (last visited July 21, 2025).

22 *Id.*

23 *Student-Athlete NIL Deals*, COLLEGE SPORTS COMMISSION, <https://www.collegesportscommission.org/nil> (last visited July 21, 2025).

24 *Id.*

25 College Sports Commission, *UPDATED NIL Deal Flow Report* (Sept. 5, 2025), [https://assets.tina.io/29b83311-e587-42b1-861e-87ebde9aa253/UPDATED%20NIL%20Deal%20Flow%20Report%209.5.25%20\(2\).pdf](https://assets.tina.io/29b83311-e587-42b1-861e-87ebde9aa253/UPDATED%20NIL%20Deal%20Flow%20Report%209.5.25%20(2).pdf).

26 *Id.*

27 When the CSC first rolled out NIL Go, it took the position that NIL collectives, usually an association of alumni, or “boosters,” who pool funds to pay college athletes for their NIL rights, served no valid business purpose. Ross Dellenger, *House Attorneys, Power Conferences Work Out Deal to Relax NIL Collective Roadblocks*, YAHOO! SPORTS (July 22, 2025), <https://sports.yahoo.com/college-football/breaking-news/article/house-attorneys-power-conferences-work-out-deal-to-relax-nil-collective-roadblocks-sources-213706035.html>. After receiving significant push back from the NIL collectives and a threat from class counsel in *House* to take the guidance to the appointed special master, the CSC retracted that “guidance” and will put NIL collectives on equal footing with other businesses being evaluated by NIL Go. *Id.* For further discussion, see *infra* notes 45–48 and accompanying text.

28 *Id.*

boosters are the primary source of income for college athletes under the *House Settlement* regime. Yes, the stars of college athletics command huge contracts with the most recognizable brands, but the rank and file of college athletics report far less. According to data from the NCAA, the average value of disclosed NIL deals for the 2024–25 academic year was just under \$3000 and the median deal was just under \$700.²⁹ Around eighty percent of those deals are with NIL collectives.³⁰ Targeting those income sources is targeting college athletes' main source of financial support.

B. Implementation and Compliance

Deloitte's role in the CSC, which primarily involves administering the NIL Go algorithm, has been met with skepticism and scrutiny—in large part due to its role in determining whether a third-party deal is properly within that “reasonable range of compensation.”³¹ Deloitte has made clear that calculating this value will be achieved through data aggregation, logic models, and algorithmic flagging tools that create acceptable “compensation ranges” for these third-party deals.³² While the specifics of the algorithm remain a black box, it is expected to include factors like athletic performance, social media reach and following, and the relative market size and “reach” of the athlete's school.³³ For example, while both Georgia State and the University of Georgia are located in the rich Atlanta market, an athlete at Georgia Tech will be considered to have more reach in that area than an athlete at Georgia State due to the greater popularity of the University of Georgia in the area.³⁴ Preliminary tests of the algorithm against presettlement deals revealed that a startling seventy percent of past deals from NIL booster collectives would have been denied while ninety percent of deals from public companies are approved.³⁵

29 NCAA, *Data Dashboard*, <https://nilassist.ncaa.org/data-dashboard/> (last visited July 21, 2025).

30 Opendorse, *NIL at 3: The Annual Opendorse Report*, at 5 (2025).

31 *Id. See, e.g.*, Dan Wetzel & Pete Thamel, *Sifting Legitimate NIL Deals from the Darker World of Pay-to-Play*, ESPN (Apr. 2, 2025), https://www.espn.com/college-sports/story/_/id/44491912/ncaa-nil-pay-play-house-settlement (raising a number of questions regarding the challenges of determining an NIL deal's reasonable range of compensation); Tim Heafner, Max Rothman, & Ethan Hicks, *Assessing the 'Fair Market Value' of Affiliated NIL Deals Under the House Settlement*, SPORTS BUS. J. (May 22, 2025), <https://www.sportsbusinessjournal.com/Articles/2025/05/22/assessing-the-fair-market-value-of-affiliated-nil-deals-under-the-house-settlement/> (same); Dan Shanoff, *The Launch of NIL Go Signals a High-Stakes Evolution in College Sports*, THE ATHLETIC (N.Y. TIMES) (June 11, 2025), <https://www.nytimes.com/athletic/6418924/2025/06/11/nil-go-deloitte-bryan-seeley-college-sports-commission-moneycall/> (calling the “fair market value” (later changed to “reasonable range of compensation”) criteria “hazy”).

32 Ross Dellenger, *NCAA's House Settlement Approved, Ushering in New Era Where Schools Can Directly Pay Athletes*, YAHOO! SPORTS (June 7, 2025), <https://sports.yahoo.com/college-football/article/ncaas-house-settlement-approved-ushering-in-new-era-where-schools-can-directly-pay-athletes-011814078.html>.

33 *Id.*

34 *Id.*

35 Ross Dellenger (@RossDellenger), TWITTER/X (May 13, 2025, at 4:10 PM), <https://x.com/RossDellenger/status/1922414102061695476>. This is what led to the aforementioned negotiations and policy changes related to how NIL collectives would be evaluated by NIL Go. *See supra* note 27.

Others have critiqued the potential privacy concerns with a required clearinghouse. NIL agent, attorney, and outspoken NCAA critic Darren Heitner pointed out in a blog post that Q&As provided by the NCAA are “silent on controls to prevent downloading or misusing sensitive deal terms outside the scope of compliance review”—a lack of clarity that is a “red flag.”³⁶ He questions whether access to the clearinghouse database will be limited to Deloitte and the CSC “or could schools, conferences, or even individuals who may have the intention to become these agents’ rivals peek at these contracts.”³⁷ Even advertisers or NIL collectives who obtained the data could use a separate algorithm to artificially suppress the market rate for college athletes’ NIL. He also predicted that the lack of clear confidentiality in the database could lead to issues where an athlete’s contract prohibits disclosure and that some brands could be deterred from engaging with college athletes altogether “if they fear their proprietary terms will be exposed.”³⁸

Many also wonder what state legislatures will continue to do to try to give their in-state schools a competitive advantage. Tennessee, for example, passed a law in May 2025 barring athletic associations like the NCAA and CSC from interfering with a Tennessee athlete’s ability to earn compensation or punishing a Tennessee institution “and its affiliated foundation” for activities like paying players.³⁹ New Jersey passed a similar bill in July 2025,⁴⁰ and a similar bill has been proposed in Oregon.⁴¹ Various bills have been proposed at the federal level to curb the inconsistencies of these individual state actions, but only the most recent effort—the Student Compensation and Opportunity through Rights and Endorsements Act (SCORE) Act—has been able to find much traction in Congress (and even this bill seems unlikely to receive bicameral support).⁴²

36 Darren Heitner, *NIL GO Allows for More Overreach than Meaningful Oversight*, LINKEDIN (June 27, 2025), <https://www.linkedin.com/pulse/newsletter-image-likeness-vol-138-nil-go-allows-more-than-heitner-oueze/>.

37 *Id.*

38 *Id.*

39 TENN. CODE ANN. § 49-7-2803 (West 2025). See Maddy Hudak, *Tennessee ‘Athlete-Friendly’ NIL Law Takes Shot at House Settlement*, NIL DAILY (SPORTS ILLUSTRATED) (May 18, 2025), <https://www.si.com/fannation/name-image-likeness/nil-news/tennessee-athlete-friendly-nil-law-takes-shot-at-house-settlement>. Of note, however, the statute explicitly does not create a private cause of action, leaving it to the Tennessee Attorney General to enforce the law if deemed appropriate. TENN. CODE ANN. at § 49-7-2803(b). See also *Zeigler v. NCAA*, No. 25-cv-00226, 2025 WL 1671952, at *4 (E.D. Tenn. 2025) (rejecting an athlete’s argument that the new Tennessee statute “augmented Tennessee antitrust law and rendered all of Defendant’s eligibility rules illegal in Tennessee”).

40 S4439 (N.J. 2025). See *Governor Murphy Takes Action on Legislation*, STATE OF NEW JERSEY: GOVERNOR PHIL MURPHY (July 22, 2025), <https://www.nj.gov/governor/news/news/562025/approved/20250722c.shtml> (noting that S4439 was signed into law).

41 H.B. 3694 (Or. 2025). See Ryan Clarke, *Oregon NIL Bill Passes Senate, Nears Governor’s Desk*, THE OREGONIAN (June 2, 2025), <https://www.oregonlive.com/sports/2025/06/oregon-nil-bill-passes-senate-nears-governors-desk.html>.

42 H.R. 4312, 119th Cong. (2025). The bill would forbid states from maintaining or enforcing any law that counteracts any part of the rest of the bill, which would grant antitrust immunity to the CSC, regulate agents, and disclaim college athlete employment status. *Id.* at § 10. It has received significant opposition from state Attorneys General, labor groups, Democrats, and groups supporting college athletes due to, among other things, the antitrust exemption it would hand

Finally, even more have expressed deep skepticism as to whether the CSC and NIL Go will actually be able to bridle an NIL collective market that reached \$1.3

the NCAA and its members and the manner in which it preempts state law. *See, e.g.*, Letter from Jonathan Skrmetti, Att’y Gen., Tenn., et al., to Hon. Tim Walberg et al., U.S. House of Representatives (July 22, 2025), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2025/pr25-39-letter.pdf> (opposition by the Attorneys General of Tennessee, the District of Columbia, Florida, Ohio, and New York); Press Release, Major League Baseball Players Ass’n et al., The Five Major Players Associations Oppose Antitrust Exemption/Liability Shield in College Sports (July 14, 2025), <https://nflpa.com/press/the-players-associations-oppose-antitrust-exemption-liability-shield-in-college-sports> (labor groups); Jesse Dougherty, *Another One, WHAT’S UP WITH COLLEGE SPORTS?* (July 15, 2025), <https://collegesportsmoney.substack.com/p/score-act-advances> (providing a play-by-play of THE SCORE Act’s markup hearing in the House subcommittee for commerce, manufacturing and trade while noting Democrat lawmaker opposition to the bill, including Rep. Yvette Clarke (D-NY) deeming the bill “*The NCAA Wish List Act*”). Despite this opposition, the bill passed both the House Energy and Commerce Committee and the Committee on Education and the Workforce in late July 2025 and as of this writing was scheduled for a full House vote in early December 2025, where it is expected to pass. Ralph D. Russo & Chris Vannini, *SCORE Act Advances Through Committee, Moving College Sports Reform Closer to House Floor*, THE ATHLETIC (N.Y. TIMES) (July 23, 2025), <https://www.nytimes.com/athletic/6511289/2025/07/23/score-act-congress-college-sports/>; Ross Dellenger (@RossDellenger), X/TWITTER (Nov. 19, 2025, 1:04 PM), <https://x.com/rossdellenger/status/1991236231519211916>. At the same time, however, given the criticism of the bill, it seems highly unlikely that it will receive the seven Democrat votes needed to pass the Senate—especially after an executive order signed by President Trump placed the issue firmly within the priorities of his administration. *See id.* (noting that the bill passed through committee solely on party lines); Bryan DeArdo, *SCORE Act, a Bill Alter that Would the Landscape of College Sports, Has Been Formally Introduced in U.S. House*, CBS SPORTS (July 10, 2025), <https://www.cbssports.com/college-football/news/score-act-a-bill-alter-that-would-the-landscape-of-college-sports-has-been-formally-introduced-in-u-s-house/> (summarizing the bill while noting that even though the bill has two Democrat cosponsors in the House, “the bill has largely been opposed by the Democratic party”); Matt Brown, *MAILBAG! Trump’s College Sports EO, CAA FB Realignment, and More*, EXTRA POINTS (July 25, 2025), <https://www.extrapointsmb.com/p/mailbag-trump-s-college-sports-EO-caa-fb-realignment-and-more-5e6310f57428f343> (arguing that “the more Trump gets involved, the harder it will be to convince a few Democratic senators to sign on to the SCORE Act, allowing it to break a filibuster”); Noah Henderson, *Fact Sheet: President Donald J. Trump Politicizes College Sports*, COLL. FRONT OFF. (July 25, 2025), <https://thecollegefrontoffice.substack.com/p/fact-sheet-president-donald-j-trump> (“By tethering the NCAA’s preferred policy outcomes to a partisan position in a highly polarized political climate, the Trump administration may be making it harder to build the bipartisan coalition needed to implement them.”). *See also* Saving College Sports, Exec. Order 14,322, 90 Fed. Reg. 35821 (July 24, 2025); Adam Luckett, *Executive Order Calls to Save College Sports but the SCORE Act Is Really What Matters*, ON3 (July 25, 2025), <https://www.on3.com/teams/kentucky-wildcats/news/president-trump-executive-order-nil-ncaa-college-athletics/> (comparing the executive order to the SCORE Act). Even if the bill were to pass, there is also an argument that the power the bill vests with the NCAA violates the private nondelegation doctrine and the Due Process Clause. *See* Sam C. Ehrlich, *The Constitutional Problems with Delegating Legislative Power to College Sports*, 98 ST. JOHN’S L. REV. 211, 247–58 (2025) (summarizing seven federal bills proposed between 2023 and early 2024 while discussing their potential constitutionality under the private nondelegation doctrine); Sam C. Ehrlich & Ryan M. Rodenberg, *The SCORE Act Is Unconstitutional: Private Nondelegation Problems with Congress’s Latest Attempt to Regulate College Sports*, 2025 CARDOZO L. REV. DE-NOVO 121, 128–35 (2025) (applying the same analysis to the SCORE Act while taking into account the Supreme Court’s comments on the private nondelegation doctrine in *Fed. Comm’n’s Comm’n v. Consumers’ Rsch.*, 606 U.S. ___, 145 S. Ct. 2482, 2507–09 (2025)). To provide an update during the copyediting process: the scheduled December 2025 House vote was canceled and delayed indefinitely after several House members previously committed to vote for the bill—including the entire Congressional Black Caucus—dropped their support. *See* Amanda Christovich, *How the SCORE Act Vote Fell Apart*, FRONT OFFICE SPORTS (Dec. 4, 2025), <https://frontofficesports.com/how-the-score-act-vote-fell-apart/>.

billion in 2024–25.⁴³ A June 2025 article in *The Athletic* (the sports department of the *New York Times*) quoted several unnamed athletic directors and player personnel directors questioning whether the CSC will actually be able to flex power the NCAA had not been able to show for the past several years, especially if (and when) athletes simply do not report their deals (or report their deals inaccurately) to the clearinghouse.⁴⁴

To counter these concerns, the CSC released a memo shortly after it took power making clear its position that NIL collectives—as entities that “ha[ve] a business purpose to pay student-athletes associated with a particular school or schools”—cannot reach deals that meet the “valid business purpose” standard unless the deal facilitates performance at a more “valid” business entity.⁴⁵ This guidance, effectively a boycott of the enterprises, was immediately met with harsh critique, with commentators suggesting that the CSC may be risking antitrust litigation in categorically excluding NIL collectives in this fashion.⁴⁶ The director of Utah State’s NIL collective, the Blue A Collective, noted on social media that a deal he signed with an athlete for \$2,333.00 was denied in accordance with this guidance, sparking further critique and discussion.⁴⁷ *House v. NCAA* class counsel quickly threw gasoline on this fire with a letter to the CSC threatening to bring the matter in front of Judge Wilken’s appointed special master, Magistrate Judge Nathanael Cousins, if the guidance was not retracted, eventually settling when the CSC agreed to drop their categorical exclusion of collective deals eleven days later.⁴⁸

At the same time, it is understandable to some degree why the NCAA and the CSC would firmly insist on including anticircumvention measures alongside the revenue-sharing cap. Almost all of the professional sports leagues that have a salary

43 NIL AT FOUR: MONETIZING THE NEW REALITY at 3, OPENDORSE (June 30, 2025), <https://biz.opendorse.com/blog/nil-at-4-the-annual-opendorse-report/>. This report also notes that collective spending was up 824 percent in June 2025, as collectives sought to “front load” athlete payments ahead of the July 1, 2025, start of the first *House* Settlement cap year. *Id.* at 10.

44 Justin Williams, *What I’m Hearing About NCAA Revenue Sharing: \$40M Football Rosters, Unintended Consequences*, *The Athletic* (Jun. 7, 2025), <https://www.nytimes.com/athletic/6372328/2025/06/07/college-sports-revenue-sharing-ncaa-house-settlement-changes/>.

45 Image posted by Ross Dellenger (@RossDellenger), X/TWITTER, *Memo from College Sports Commission to D1 Ads*, <https://x.com/RossDellenger/status/1943329431088439396/photo/1>.

46 See, e.g., Darrien Starling, *CSC Blocks Collective NIL Deals, Sparks Antitrust Concerns*, *ATHLON SPORTS* (July 11, 2025), <https://athlonsports.com/college/nil-daily/csc-blocks-collective-nil-deals-sparks-antitrust-concerns>; Andy Staples, *The New Group Policing NIL Payments Has Left Collectives Little Choice but to Sue for their Survival*, *ON3* (July 15, 2025), <https://www.on3.com/news/the-new-group-policing-nil-payments-has-left-collectives-little-choice-but-to-sue-for-their-survival/>.

47 Dalton K. Forsythe (@daltonkf68), X/TWITTER (July 10, 2025, 2:58 PM MT), <https://x.com/daltonkf68/status/1943414621643378966>. The deliverables for the athlete included “social media posts, appearances, and brand promotion” for the collective. *Id.*

48 Ross Dellenger, *House Attorneys Slam NCAA and Power Conferences Over Denied NIL Deals, Issue Legal Warning About Settlement*, *YAHOO! SPORTS* (July 11, 2025), <https://sports.yahoo.com/college-football/breaking-news/article/house-attorneys-slam-ncaa-and-power-conferences-over-denied-nil-deals-issue-legal-warning-about-settlement-205015881.html>; Ross Dellenger, *House Attorneys, Power Conferences Work Out Deal to Relax NIL Collective Roadblocks*, *YAHOO! SPORTS* (July 22, 2025), <https://sports.yahoo.com/college-football/breaking-news/article/house-attorneys-power-conferences-work-out-deal-to-relax-nil-collective-roadblocks-sources-213706035.html>.

cap have an accompanying anticircumvention provision in the league collective bargaining agreement that makes clear that third-party deals cannot be used to circumvent those caps.⁴⁹ And while the use of endorsement deals to circumvent salary caps is extraordinarily rare in professional sports, it is not unprecedented. In 2024, the WNBA (Women's NBA) opened an investigation when the Las Vegas Convention and Visitors Authority announced that they would give each player on the Las Vegas Aces \$100,000 to make "appearances on Las Vegas' behalf" and to "wear Las Vegas-centric gear," after previously finding in 2023 that the Aces circumvented the cap through under-the-table payments and impermissible benefits.⁵⁰ As of the writing, the NBA is investigating the Los Angeles Clippers for allegedly circumventing their salary cap through a "no-show job" NIL deal that purportedly used money funneled through a now-bankrupt company in which Clippers owner Steve Ballmer had invested.⁵¹

In the same vein, the Power Four conferences are treating the NIL Go system very seriously and are empowering it with the critical resources, personnel, and tools they say are needed to rein in what they see as an out-of-control NIL labor market. The conferences named former Major League Baseball executive Bryan

49 *Compare House Settlement*, *supra* note 4, at art. 6, § 3 (allowing the NCAA and/or conference defendants to "adopt rules that prohibit any transaction, payment, or agreement designed to defeat or circumvent, and with the effect of defeating or circumventing, the intention of the Parties as reflected in the terms of this Injunctive Relief Settlement") *with, e.g.*, NAT'L FOOTBALL LEAGUE & NAT'L FOOTBALL LEAGUE PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT, art. 14, § 2 (Mar. 15, 2020), <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf> (prohibiting clubs and players from entering into any agreements "which includes any terms that are designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by the provisions of this Agreement"); NAT'L BASKETBALL ASS'N & NAT'L BASKETBALL PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT, art. XIII, § 1(a) (July 1, 2023), <https://nbpa.com/cba> (forbidding "the Players Association, the NBA, nor any Team (or Team Affiliate) or player (or person or entity acting with authority on behalf of such player)" from undertaking any action or transaction "which is, or which includes any term that is, designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by all of the provisions of this Agreement"); NAT'L HOCKEY LEAGUE & NAT'L HOCKEY LEAGUE PLAYERS' ASS'N (June 12, 2013), <https://www.nhlpa.com/the-pa/cba> (barring players entering into any agreements that are intended to or have the effect of "defeating or Circumventing the provisions of this Agreement" including "provisions with respect to the Team Payroll Range.") *But see* NAT'L WOMEN'S SOCCER LEAGUE PLAYERS ASS'N & NAT'L WOMEN'S SOCCER LEAGUE, COLLECTIVE BARGAINING AGREEMENT (July 30, 2024), <https://www.nwslplayers.com/cba> (containing no anti-circumvention clause).

50 Jordan Mendoza, *WNBA Investigating Las Vegas Aces After Every Player Received \$100,000 in Sponsorship*, USA TODAY (May 18, 2024), <https://www.usatoday.com/story/sports/wnba/2024/05/18/wnba-investigating-las-vegas-aces-100k-sponsorship/73755527007/>; Alexa Philippou, *WNBA Rescinds Aces' 2025 1st-Round Pick, Suspends Becky Hammon*, ESPN (May 16, 2025), https://www.espn.com/wnba/story/_/id/37662397/wnba-rescinds-aces-2025-1st-round-pick-suspends-becky-hammon. As *Sports Illustrated's* Noah Henderson pointed out, the \$1.2 million that Las Vegas offered the twelve players in total would have allowed the Aces to effectively exceed the WNBA's salary cap of \$1.463 million by eighty-two percent. Noah Henderson, *NIL-Style WNBA Payments Threaten League Integrity, Prompt Investigation*, SPORTS ILLUSTRATED (May 20, 2024), <https://www.si.com/college/nil/nil-news/every-sec-football-team-projected-nil-leader-2025>.

51 Baxter Holmes, *Report: Clippers Skirted NBA Salary Cap with Kawhi Leonard Payment*, ESPN (Sept. 3, 2025), https://www.espn.com/nba/story/_/id/46146871/report-clippers-skirted-nba-salary-cap-kawhi-leonard-payment. *See supra* note 9.

Seeley as chief executive officer, drawing on Seeley's decade of experience leading MLB's Department of Investigations where he oversaw cases pertaining to domestic violence, performance-enhancing drugs, and age fraud.⁵² Seeley added former Washington Nationals chief of staff and senior vice president John Bramlette as the CSC's head of operations and deputy general counsel, expanding the Commission's legal bona fides and manpower.⁵³ The Power Four have also written into the governing agreements some degree of subpoena power—a much lesser degree of subpoena power than in a courtroom, but one that officials believe would still force access to necessary records in arbitration.⁵⁴ And they have worked to compel universities to sign contracts waiving their right to pursue legal challenges against the CSC, even if their state law is contradictory, threatening schools with expulsion from Power Four conferences if they do not sign or breach the agreement.⁵⁵ This has already received pushback from the Attorney General for the state of Texas, citing a host of other legal barriers to enforcement of a proposed contract between the CSC and Division I schools.⁵⁶

52 Pete Thamel & Jeff Passan, *MLB Exec Bryan Seeley to Be CEO of New College Sports Commission*, ESPN (June 6, 2025, 11:20 PM), https://www.espn.com/college-sports/story/_/id/45468012/mlb-exec-bryan-seeley-ceo-new-college-sports-commission.

53 Daniel Libit, *College Sports Commission Taps Another MLB Executive*, SPORTICO (June 30, 2025), <https://www.sportico.com/leagues/college-sports/2025/college-sports-commission-jonathan-bramlette-mlb-nationals-1234858624/>.

54 The exact power and procedures by which the CSC will be able to force production is unclear. Compare Pete Thamel, *How Proposed CEO Could Dole Out Punishments in College Sports*, ESPN (May 19, 2025), https://www.espn.com/college-sports/story/_/id/45227143/how-proposed-ceo-college-sports-dole-punishments (“Per sources, when cases do end up in arbitration, under the procedures that govern arbitration, subpoena power is a potential option via the discovery process -- an authority that was not available during NCAA investigations”) with Ralph D. Russo, *Bryan Seeley Is Charged with Enforcing College Sports' New Rules. What's His Plan?*, THE ATHLETIC (N.Y. TIMES) (June 9, 2025), <https://www.nytimes.com/athletic/6412743/2025/06/09/bryan-seeley-career-csc-mlb/> (quoting CSC CEO Bryan Seeley saying “We don't have subpoena power. We don't have search-warrant power”). § 7 of the Federal Arbitration Act (FAA), 9 U.S.C. § 7 (1947), does provide that arbitrators “summon in writing any person to attend before them or any of them as a witness and in a proper case” but this power has been interpreted as fairly limited when it comes to summoning nonparties (which in this case would include, for example, third party collectives and boosters). See, e.g., *Hay Group v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004) (reversing a trial court's grant of a subpoena for third party documents, holding that section 7 “clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier”); Danielle C. Beasley, *Recurring Concerns in Arbitration Proceedings: Examining the Contours of Arbitral Subpoenas Issued to Nonparty Witnesses*, 87 U. DET. MERCY L. REV. 315 (2009) (discussing the process and powers of arbitral subpoenas issued to nonparty witnesses while noting a split in how federal courts interpret section 7).

55 Ross Dellenger, *Power Conferences Working on Contract to Bind Schools to New Enforcement Rules, With Strict Punishments*, Yahoo! Sports (May 19, 2025), <https://sports.yahoo.com/college-football/breaking-news/article/power-conferences-working-on-contract-to-bind-schools-to-new-enforcement-rules-with-strict-punishments-005652210.html>. As Tulane sports law professor Gabe Feldman notes in the cited article, the enforceability of provisions requiring schools to follow CSC rules over state law is questionable. *Id.* However, for many schools the threat will be enough.

56 Press Release, Tex. Att'y Gen., *Attorney General Paxton Sends Letters to Universities and State AGs to Oppose Unlawful CSC Agreement that Would Hurt Schools and Undermine College Sports* (Nov. 26, 2025), <https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-sends->

Seeley and the CSC have been given the authority and flexibility to issue penalties they see fit from “a wide range of options,” not just against the athletes’ eligibility but against universities, coaches, and administrators as well.⁵⁷ Those could reportedly include fines of multiple millions of dollars, suspensions, postseason bans, and even a reduction of transfers a school can acquire from the transfer portal.⁵⁸ Yet perhaps the most pressing legal concerns lie not in the penalties themselves, but in the coordinated, data-driven compensation system they are designed to enforce—a system with striking and potentially dangerous parallels in other industries.

II. ALGORITHMIC PRICE FIXING

Just like the CSC, firms across sectors are increasingly deploying software tools that allow independent entities to share pricing logic, exchange competitively sensitive data, and outsource decision-making to algorithmic “clearinghouses.” This trend has already drawn antitrust scrutiny, most recently in litigation against RealPage—a property management software firm accused of facilitating horizontal price fixing among its landlord clients through centralized rent-setting algorithms.⁵⁹ As the NIL market enters its next phase, the structural and functional similarities between the CSC’s enforcement system and prior actions against algorithmic coordination models demand closer examination.

An algorithm is simply a set of steps used to complete a specific task or solve a mathematical problem.⁶⁰ A pricing algorithm can use information such as supply, demand, costs, and competitor pricing to maximize a seller’s profits.⁶¹ Today, sophisticated pricing algorithms use machine learning and vast amounts of data to perform this function in real time and on a customer-by-customer basis.⁶² Often, the data consists of competitively sensitive, highly granular, nonpublic information that is voluntarily submitted by competitors, usually with the understanding that

letters-universities-and-state-ags-oppose-unlawful-csc-agreement-would; Tex. Att’y Gen., Letter to Texas Universities Regarding CSC Participation Agreement (Nov. 25, 2025) (on file with author), <https://www.texasattorneygeneral.gov/news/releases/attorney-general-paxton-sends-letters-universities-and-state-ags-oppose-unlawful-csc-agreement-would>.

57 Ross Dellenger, *What Is NIL Go, and Why Is It the Latest Subject of Debate Among College Sports Leaders?*, YAHOO! SPORTS (June 13, 2025), <https://sports.yahoo.com/college-sports/article/what-is-nil-go-and-why-is-it-the-latest-subject-of-debate-among-college-sports-leaders-120028561.html>.

58 *Id.* One struggles to understand how forcing a school to reduce the number of transfers they can take in from the transfer portals would survive antitrust scrutiny, given that many of the findings about the anti-competitiveness of transfer portal restrictions from *Ohio v. NCAA*, 706 F. Supp. 3d 583 (N.D. W.Va. 2023) (enjoining the NCAA from enforcing the “year-in-residence” transfer restriction), would presumably apply. No part of the *House Settlement* granted the NCAA or CSC the ability to impose new restrictions on the transfer portal nor can be read to insulate the NCAA or CSC from scrutiny over such restrictions in any way. Still, the CSC is welcome to try.

59 *See infra* Part III.C.2.

60 *Algorithm*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/algorithm> (last visited July 22, 2025).

61 *See, e.g.*, Marco Bertini & Oded Koenigsberg, *The Pitfalls of Pricing Algorithms*, HARV. BIZ. REV. (Sept.–Oct. 2021), <https://hbr.org/2021/09/the-pitfalls-of-pricing-algorithms>.

62 *Id.*

everyone in the industry is actively participating.⁶³ And while these algorithms could be used to increase sales by undercutting competitors or to poach valuable employees with higher wages, they almost universally respond to competitors' higher prices and lower wages by following suit. For example, as *Berkeley Research Group's* Hassan Faghani recently noted in a white paper,

Algorithms using reinforcement learning can adopt supracompetitive pricing strategies through trial and error, even in the absence of preprogrammed coordinated pricing strategies. This occurs faster and more effectively in algorithmic pricing than in traditional oligopolies, where firms must rely on market signals or assumptions about competitors.⁶⁴

Algorithms can “quickly observe, synthesize, and respond to vast amounts of sales, purchases, and transaction data,” making it much easier to know if a conspirator is “cheating on its cartel partners” by pricing outside of agreed terms.⁶⁵ They “tamper[] with price structures,”⁶⁶ fostering illegal price-fixing and wage-fixing cartels and helping monopolies illegally maintain their market power over their industries.

In light of the many threats that algorithms pose to free and open markets, their use is increasingly drawing scrutiny from legislatures and law enforcement at the federal and state levels. In a February 2023 speech to GCR Live, then-Principal Deputy Assistant Attorney General Doha Mekki called out industries that facilitate “high-speed, complex algorithms can ingest massive quantities of ‘stale,’ ‘aggregated’ data from buyers and sellers to glean insights about the strategies of a competitor.”⁶⁷ She noted that the Justice Department’s concern “is only heightened” when competitors adopt the same pricing algorithms, as studies have shown that these algorithms “can lead to tacit or express collusion in the marketplace, potentially resulting in higher prices, or at a minimum, a softening of competition.”⁶⁸ In August 2024, the Justice Department, along with several state attorneys general, filed a lawsuit against rental housing software management company RealPage accusing the firm and its clients of distorting markets, harming customers, and creating a monopoly in the market for commercial revenue management software.⁶⁹ As a result, firms like RealPage in the rental housing

63 Maureen K. Ohlhausen, Acting Chairman, U.S. Fed. Trade Comm., *Should We Fear the Things that Go Beep in the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing* 5 (May 23, 2017), https://www.ftc.gov/system/files/documents/public_statements/1220893/ohlhausen_-_concurrences_5-23-17.pdf.

64 Hassan Faghani, *Algorithmic Pricing, Market Outcomes, and Antitrust Concerns: Lessons from Recent Literature*, CONCURRENCES No. 7-2025, at 3 (2025).

65 Henry Hauser, *Fixing Algorithmic Pricing? Competition Concerns and Solutions*, 23 COLO. TECH. L.J. 1, 11 (2024).

66 *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

67 Doha Mekki, Principal Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks at GCR Live: Law Leaders Global 2023 (Feb. 2, 2023), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0>.

68 *Id.*

69 Compl., *United States v. RealPage, Inc.*, No. 24-cv-00710 (M.D.N.C. Aug. 23, 2024). The Justice

industry and a number of other industries are facing class actions, discussed below, challenging these schemes and the skyrocketing housing costs they allegedly helped create.⁷⁰

Algorithmic price fixing has also drawn the eye of Congress. In February 2024, Senator Klobuchar and eight Democrat cosponsors introduced the “Preventing Algorithmic Collusion Act,” which would ban the use of a pricing algorithm “that uses, incorporates, or was trained with nonpublic competitor data” a presumptive violation of section 1 of the Sherman Antitrust Act.⁷¹ While the bill stalled in committee, it was reintroduced in January 2025, demonstrating the continued focus on the issue.⁷² Several state legislatures and local city councils are all also taking on pricing algorithms, whether through bans on their use in rental housing, surveillance pricing proscriptions, or more general prohibitions.⁷³ The state of California recently banned the coercive use of algorithms across markets,⁷⁴ and the state of New York banned the use of algorithms to “set or adjust rental prices, lease renewal terms, occupancy levels, or other lease terms and conditions ... [for] residential rental properties.”⁷⁵

Neither the NCAA nor the CSC have been deterred by these new developments or the multitude of lawsuits challenging older and existing rules. So as the NIL market for college athletes enters its next phase, the structural and functional similarities between the CSC’s enforcement system and these lawsuits demand closer examination.

A. *Understanding Algorithmic Pricing as Collusion*

The Sherman Act is the cornerstone of U.S. antitrust law. The Supreme Court has called it “the Magna Carta of free enterprise”⁷⁶ and “a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”⁷⁷

Department announced a settlement of the lawsuit on in late November 2025. Press Release, *Justice Department Requires RealPage to End the Sharing of Competitively Sensitive Information and Alignment of Pricing Among Competitors*, DEP’T OF JUSTICE (Nov. 24, 2025), <https://www.justice.gov/opa/pr/justice-department-requires-realpage-end-sharing-competitively-sensitive-information-and> [hereinafter DOJ Press Release see note 117]. This significance of the settlement is discussed *infra* Section III.C.

70 See, e.g., *In re Realpage, Inc., Rental Software Antitrust Litigation* (No. II), No. 23-md-03071 (M.D. Tenn.).

71 Preventing Algorithmic Collusion Act of 2024, S. 3686, 118th Cong. (2024).

72 Preventing Algorithmic Collusion Act of 2025, S. 232, 119th Cong. (2025).

73 Karen Servidea, *States Weigh Banning Algorithmic Pricing of Residential Rental Properties*, WOLTERS KLUWER (May 6, 2025), https://business.cch.com/ald/VB_algorithmic-pricing-residential-rental-properties_05-05-2025_locked.pdf; Annie Sciacca, *RealPage Sues Berkeley Over Impending Ban on Rent-Pricing Algorithms*, BERKELEYSIDE (Apr. 3, 2025), <https://www.berkeleyside.org/2025/04/03/realpage-sues-berkeley-over-impending-ban-on-rent-pricing-algorithms>.

74 CAL. BUS. & PROF. CODE § 16729; Assemb. B. 325, 2025-2026 Leg., Reg. Sess. (Cal. 2025).

75 N.Y. GEN. BUS. LAW § 340-b; S. 7882, 2025-26 Leg. Sess. (N.Y. 2025).

76 *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

77 *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.”⁷⁸ It applies to “any concerted action ‘in restraint of trade or commerce,’ even if the action does not threaten monopolization.”⁷⁹ This includes “all forms of combination, old and new.”⁸⁰ Concerted action, or “agreements,” are either horizontal or vertical. Horizontal agreements are “between competitors at the same level of the market structure,” like manufacturers of the same product or employers of the same labor.⁸¹ In the CSC context, for example, universities and their respective conferences—who compete in the markets for athletic talent; advertising, broadcasting, and merchandising revenue; student enrollment; and prize money (to name a few)—have entered into horizontal agreements to abide by the rules and regulations promulgated by the NCAA and CSC, including NIL Go’s criteria for NIL deals.

Vertical agreements involve “combinations of persons at different levels of the market structure, e.g., manufacturers and distributors.”⁸² In *RealPage*, the plaintiffs allege individual vertical agreements by the housing owners to use RealPage’s pricing algorithms for “pricing and price-monitoring” of their rental properties.⁸³ The NCAA and CSC similarly have vertical agreements with the athletic conferences and universities related to how NIL deals are governed and evaluated, including conference and university agreement to submit to and abide by that governance.

The combination of these horizontal and vertical agreements is known in antitrust parlance as a “hub-and-spoke” conspiracy.⁸⁴ Courts have found “all participants in ‘hub-and-spoke’ conspiracies liable when the objective of the conspiracy was a *per se* unreasonable restraint of trade.”⁸⁵ In college athletics, there are currently three “hubs”—the NCAA, the CSC, and the conferences. There are also two separate sets of “spokes,” reaching out to the conferences and then the universities.⁸⁶ The horizontal agreements between the universities and between the conferences are known as the “rims” that form the wheels and create significant exposure to liability under the Sherman Act.⁸⁷

B. Presumptive Illegality vs. Fact-Specific Assessments

To understand why the rim of the hub-and-spoke conspiracy is so important, we have to look at how courts differentiate between horizontal and vertical agreements

78 15 U.S.C. § 1 (1890).

79 *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 191 (2010) (cleaned up).

80 *United States v. Union Pac. R.R. Co.*, 226 U.S. 61, 86 (1912).

81 *Topco*, 405 U.S. at 608.

82 *Id.*

83 *In re RealPage, Inc., Rental Software Antitrust Litig.* (No. II), 709 F. Supp. 3d 478, 501, 502–03 (M.D. Tenn. 2023).

84 *Id.* at 500.

85 *United States v. Apple*, 791 F.3d 290, 322 (2d Cir. 2015). *See infra* notes 89–91 and accompanying text (discussing *per se* liability).

86 *Real Page*, 709 F. Supp. 3d at 500–01.

87 *Id.*

under the Sherman Act. Despite section 1's broad language, the Supreme Court has limited its application to concerted action that is "unreasonable."⁸⁸ Horizontal agreements are usually considered "per se," or presumptively, unreasonable due to their "pernicious effect[s] on competition and lack of any redeeming virtue."⁸⁹ They are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."⁹⁰ This standard is typically applied to price-fixing, bid rigging, and market allocation agreements between horizontal competitors.⁹¹

Vertical agreements, on the other hand, are reviewed under the Rule of Reason.⁹² This involves "a fact-specific assessment of market power and market structure' aimed at assessing the challenged restraints' 'actual effect on competition'"⁹³ The Rule of Reason asks "whether the restraint imposed ... merely regulates and perhaps thereby promotes competition or whether it ... may suppress or even destroy competition."⁹⁴ In a hub-and-spoke agreement, this distinction matters because, absent some agreement among the "spokes" (the horizontal competitors), the conduct only receives "rule of reason" analysis, a process that defendants win about 90 percent of the time.⁹⁵

For most hub-and-spoke cases, proving the existence of the horizontal agreements can be extraordinarily difficult when algorithms are involved. Even with direct evidence of information exchanges between competitors, information exchanges are not, standing alone, per se violations of the Sherman Act.⁹⁶ They certainly create significant opportunities for price fixing, but courts have required evidence that "the exchange indicates the existence of an express or tacit agreement to fix or stabilize prices" or that "the exchange is made pursuant to an express or

88 *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (citing *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918)).

89 *Id.*

90 *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

91 Dep't of Justice, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For*, at 2 (Feb. 2021), <https://www.justice.gov/d9/pages/attachments/2016/01/05/211578.pdf>.

92 *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), to hold that "[v]ertical price restraints are to be judged according to the rule of reason") The Rule of Reason test provides for a three-step approaching offering shifting burdens of proof, where

1. "[T]he plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition";
2. "If the plaintiff meets this burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct"; and
3. "If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner."

Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998).

93 *NCAA v. Alston*, 594 U.S. 69, 88 (2021) (quoting *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018)).

94 *Fed. Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986).

95 *Alston*, 594 U.S. at 97.

96 *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

tacit agreement that is itself a violation of §1 under a rule of reason analysis.”⁹⁷

Of course, cartels do not typically commit their agreement to fix prices and allocate markets to pen and paper.⁹⁸ Instead, it is usually established through circumstantial evidence, which “must include both parallel conduct [for example, simultaneous price increases] and at least one ‘plus factor,’” like motive, opportunity to collude, or conduct that would ordinarily be contrary to the party’s economic self-interest.⁹⁹ Otherwise, courts view parallel price increases (or wage decreases) as a lawful “common reaction of ‘firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions.’”¹⁰⁰

Pricing algorithms, usually evaluated as hub-and-spoke conspiracies,¹⁰¹ are even more challenging. Plaintiff are tasked with proving that market competitors’ parallel adoption of pricing algorithms amounts to unlawful concerted action,¹⁰² but “companies need not meet or even communicate directly to demonstrate to each other that they are complying with the agreement.”¹⁰³ Thus, the question for courts—whether the conduct “joins together separate decisionmakers” and “deprives the marketplace of independent centers of decisionmaking”¹⁰⁴—becomes harder.

C. Pricing Algorithms in the Courts

Plaintiffs bringing antitrust lawsuits against algorithm operators and users allege that there is a “tacit agreement” to collude between the spokes—via acceptance of an invitation from the algorithm operator to participate in the scheme—with the understanding that their competitors (and codefendants) are doing the same.¹⁰⁵ This type of conduct, though achieved with cutting edge is technology, is hardly novel. As former FTC Commissioner Maureen Olhausen described it, “a group of competitors sub-contracting their pricing decisions to a common, outside agent ... is fairly familiar territory for antitrust lawyers.”¹⁰⁶ “[A]ntitrust laws do not allow ... using an intermediary to facilitate the exchange of confidential business

97 *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990).

98 *In re RealPage, Inc., Rental Software Antitrust Litig. (No. II)*, 709 F. Supp. 3d 478, 501 (M.D. Tenn. 2023).

99 *Id.* at 501–02.

100 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007).

101 *See, e.g., Duffy v. Yardi Sys., Inc.*, 758 F. Supp. 3d 1283, 1293 (W.D. Wash. 2024); *Cornish-Adebiyi v. Caesars Ent., Inc.*, No. 23-cv-02536, 2024 WL 4356188, at *4 (D.N.J. Sept. 30, 2024); *Gibson v. Cendyn Grp., LLC*, No. 23-cv-00140, 2024 WL 2060260, at *2 (D. Nev. May 8, 2024); *In re RealPage*, 709 F. Supp. 3d at 502–03.

102 *See, e.g., Cornish-Adebiyi*, 2024 WL 4356188, at *4; *Gibson*, 2024 WL 2060260, at *2.

103 Hauser, *supra* note 65, at 11.

104 *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 195 (2010) (quotations omitted).

105 *Gibson*, 2024 WL 2060260, at *2.

106 Olhausen, *supra* note 63, at 10.

information.”¹⁰⁷ She quipped, “Everywhere the word ‘algorithm’ appears, please just insert the words ‘a guy named Bob.’”¹⁰⁸

1. *Understanding RealPage*

The ongoing litigation against RealPage presents an illustrative example. As noted, the firm and some of its largest rental housing clients are facing litigation on multiple fronts, including a joint action filed by the U.S. Department of Justice and the attorneys general of ten states in addition to actions filed separately by other states’ attorneys general and private plaintiffs.¹⁰⁹ Many of these lawsuits are still ongoing, and the Tennessee district court hearing the class action claims denied a motion to dismiss the multifamily tenant class members’ claims back in 2023.¹¹⁰ As a result, multiple codefendant landlords have already settled some of the claims arising from their participation with RealPage.¹¹¹ In *RealPage*, rental housing owners and operators—who compete in the market for multifamily rental housing—allegedly entered into horizontal agreements to use the same “revenue management software” to fix the cost of housing throughout the United States.¹¹² The lawsuits argue that RealPage and its clients, which are owners or managers of large multifamily residential properties (such as apartment complexes) that compete against each other, are violating antitrust laws by using RealPage’s collection and analysis of the nonpublic and competitively sensitive data of competing properties, via a pricing algorithm, to maintain high rent prices when the supply and demand pressure in a particular market would otherwise lead to decreases in the rental prices offered to potential tenants.

The lawsuits also allege that RealPage’s algorithm is not the only part of its operation that artificially inflates housing costs. To foster compliance, RealPage requires the internal revenue managers of its clients to be trained by RealPage to adhere to the reporting and price recommendation acceptance policies.¹¹³ RealPage

107 *Id.*

108 *Id.*

109 See Am. Compl., *United States v. RealPage*, *supra* note 10.

110 *In re RealPage, Inc., Rental Software Antitrust Litig.* (No. II), 709 F. Supp. 3d 478 (M.D. Tenn. 2023). The court did dismiss claims by a class of student tenants, finding that they did not allege adequate market power. *Id.* at 528–34. Ironically—and demonstrating the small world of major class action antitrust litigation—the lead plaintiff for the student class was Hagens Berman’s Steve W. Berman, who is, of course, one of the two lead class counsels in *House*. See Motion to Withdraw from Plaintiffs’ Steering Comm., *In re RealPage, Inc., Rental Software Antitrust Litig.* (No. II), 709 F. Supp. 3d 478 (M.D. Tenn. Jan. 17, 2024), Dkt. No. 704 (motioning to withdraw Berman and Hagens Berman Sobol Shapiro LLP from the plaintiffs’ steering committee after the dismissal of the student housing class claims).

111 See, e.g., Jon Brodtkin, *US Sues Six of the Biggest Landlords Over “Algorithmic Pricing Schemes”*, ARS TECHNICA (Jan. 7, 2025), <https://arstechnica.com/tech-policy/2025/01/big-landlord-settles-with-us-will-cooperate-in-price-fixing-investigation/> (noting a settlement with Cortland Management that included a cooperation agreement); Mike Scarcella, *DC Attorney General Inks First Settlement in RealPage Price-Fixing Lawsuit*, REUTERS (June 2, 2025), <https://www.reuters.com/legal/litigation/dc-attorney-general-inks-first-settlement-realpage-price-fixing-lawsuit-2025-06-02/> (noting a settlement with William C. Smith & Co.).

112 *In re RealPage, Inc., Rental Software Antitrust Litig.* (No. II), 709 F. Supp. 3d at 492, 502.

113 Am. Compl., *United States v. RealPage*, *supra* note 10, at 3–4.

employs pricing advisors who meet with internal revenue managers daily and review client requests to override RealPage price recommendations (with the power to engage the landlord's regional manager if the RealPage price advisor disagrees with the decision of the internal revenue manager).¹¹⁴ Additionally, RealPage coordinates meetings and conversations amongst competitors for the purpose of coordinating their activity and ensuring their mutual comfort with the collective mission to enjoy the benefits of the "rising tide" of RealPage's rental price recommendations.¹¹⁵ To the extent these efforts relate to the pricing for rental listings or similar matters that affect the offerings available to tenants, the lawsuits argue that these acts by RealPage are anticompetitive and unlawful. And, at least in the initial stages, the district court has approved the *RealPage* plaintiffs' legal theories. It largely denied *RealPage's* motions to dismiss, and the private class action is in discovery, with the cooperation of a number of defendants who reached early settlements.¹¹⁶

The Justice Department's settlement of its RealPage lawsuit includes injunctive relief barring a host of activities that reflect the anticompetitive concerns of the business. These include banning the use of "nonpublic, competitively sensitive information" for the operation of RealTime's algorithm; ceasing the use of "active" data for training the algorithm; and removing design features that "align[] pricing between competing users of the software."¹¹⁷ One can easily see parallels with the CSC's collection of college athletes' nonpublic NIL deals, the input of the information into NIL Go, and setting of what it deems reasonable rates for NIL deals.

2. Lessons from Other Algorithm Challenges

The Department of Justice and Federal Trade Commission have since gotten involved in two other algorithmic price-fixing class actions—one (*Duffy v. Yardi Systems*¹¹⁸) involving a competitor to RealPage, and another (*Gibson v. Cendyn Group*¹¹⁹) involving a company employing a similar system for the hotel industry. In statements of interest filed in each case, they argued that "an invitation for collective action followed by conduct showing acceptance" has always equated to concerted action within the meaning of section 1.¹²⁰ Quoting Supreme Court language from back in 1939, the agency noted that

114 *Id.* at 27–28.

115 *Id.* at 40.

116 Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Class Settlement, *In re RealPage, Inc., Rental Software Antitrust Litig.* (No. II), No. 23-md-03071, Dkt. 1247, at 6 (Oct. 1, 2025).

117 DOJ Press Release, *supra* note 69.

118 758 F.Supp.3d 1283 (W.D. Wash. 2024) (denying omnibus motion to dismiss).

119 No. 23-cv-00140, 2024 WL 2060260 (D. Nev. May 8, 2024) (granting motion to dismiss), *aff'd*, 148 F.4th 1069 (9th Cir. 2025). *See infra* notes 172–75 and accompanying text.

120 Brief for the United States in Support of Plaintiffs at 20, *Gibson v. Cendyn Grp.*, No. 24-3576 (9th Cir. Oct. 24, 2024), Dkt. No. 28 [hereinafter *Cendyn* Brief] (citing *Interstate Cir. v. United States*, 306 U.S. 208, 226–27 (1939); *PLS.com v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 843 (9th Cir. 2022)); Statement of Interest of the United States at 9, *Duffy v. Yardi Sys., Inc.*, No. 23-cv-01391 (W.D. Wash. Mar. 1, 2024) [hereinafter *Duffy* Brief].

It [is] enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, ... and knowing it, all participated in the plan.¹²¹

To participate independently, without one's competitors, would be illogical because the algorithm would raise your prices above the market rate. So—particularly when coupled with “plus factors” like parallel price increases, the exchange of confidential and commercially sensitive information, adherence to the algorithm's pricing recommendation, changes in policies to prioritize maximizing revenue over occupancy, acting against their own self-interest, and policing by the operator or competitors to ensure compliance—courts have found these allegations of concerted action sufficient to state a claim under section 1.¹²² And at least one has applied the per se standard of liability.¹²³

Long-standing Supreme Court precedent also makes clear that the temporal requirements to form an agreement under the Sherman Act are flexible. “[A]n unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators.”¹²⁴ Second, “[t]he test is not what the actual effect is on prices, but whether such agreements interfere with ‘the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.’”¹²⁵ Thus, compliance does not have to be perfect, and the absence of ultimate success, or some “cheating” on price, will not “absolve [a cartel] from their violation of the law.”¹²⁶ Third, algorithms can still artificially inflate prices above competitive levels, or in the case of NIL, suppress compensation below competitive levels. As former Assistant Attorney General William Baer explained at a congressional hearing on this topic, rapidly advancing technology allows algorithms to “gather[] publicly available pricing information about its competitors; and ‘learn’ in nanoseconds that price competition does not get you there, stop[] discounting, and stabilize[] prices—even in markets where the number of firms previously would have made oligopolistic pricing—tacit collusion—unsustainable.”¹²⁷

To be sure, these things are not easy to allege or prove. The hoops that plaintiffs must jump through to prove a hub-and-spoke conspiracy are complex and

121 *Cendyn* Brief, *supra* note 120, at 21 (quoting *Interstate Cir.* 306 U.S. at 226–27 (1939)); *see also* *Duffy* Brief, *supra* note 120, at 9 (quoting same).

122 *Duffy v. Yardi Sys., Inc.*, 758 F. Supp. 3d 1283, 1292–93 (W.D. Wash. 2024); *In re RealPage, Inc., Rental Software Antitrust Litig.* (No. II), 709 F. Supp. 3d 478, 503, 506–07, 510–12, 516 (M.D. Tenn. 2023).

123 *Duffy*, 758 F. Supp. 3d at 1297.

124 *Interstate Cir.*, 306 U.S. at 227.

125 *Plymouth Dealers' Ass'n of No. Cal. v. United States*, 279 F.2d 128, 132 (9th Cir. 1960).

126 *Id.* at 132–33.

127 Written Testimony of Bill Baer, U.S. SEN. COMM. ON THE JUDICIARY, SUBCOMM. ON COMPETITION POL'Y, ANTITRUST, AND CONSUMER RTS., *Hearing on “The New Invisible Hand? The Impact of Algorithms on Competition and Consumer Rights”* at 5 (Dec. 13, 2023).

challenging, even before introducing the complexity of a price algorithm. In the two lawsuits attacking the algorithm used by casinos in Las Vegas and Atlantic City, the district courts dismissed the claims, finding allegations of concerted action—particularly with respect to the time between each hotel’s adoption of the algorithm, the use of nonmandatory price “recommendations,” and the more limited use of confidential information—insufficient.¹²⁸ The plaintiffs in *Gibson v. Cendyn* lost their appeal to the Ninth Circuit, in large part because they abandoned their horizontal conspiracy claims,¹²⁹ but questions abound, there and in *Cornish-Adebiyi*, about whether the casinos actually agreed with each other to set prices using the algorithm and whether that agreement was binding.

No such questions exist regarding NIL Go. That is what makes the NCAA generally, and the CSC’s use of the NIL Go algorithm specifically, so remarkable. Their agreements are explicit, and they carry all of the plus factors seen in *RealPage* and *Duffy* with none of the problems identified by courts in the *Cendyn Group* litigation.

III. NIL GO AS ALGORITHMIC-BASED COLLUSION

A. The CSC’s “Hub-and-Spoke-and-Spoke-and-Spoke” Model

With the passage of the *House Settlement*, the NCAA, the CSC, Deloitte, and the conferences and universities have explicitly agreed to three collusive price-fixing mechanisms: first, to limit the amount of revenue they can share with their athletes; second, to restrict the allowable NIL deals to vague “valid business purpose” and “reasonable range of compensation” standards; and, third, to condition athletes’ eligibility to participate in NCAA-sanctioned athletic events—and enjoy the economic benefits that follow—on compliance with these rules.

The NIL Go algorithm determines acceptable rates of compensation for college athletes, via the exchange of ordinarily confidential data the athletes are required to submit for analysis. NIL Go’s rulings are strictly enforced through the threat of a group boycott.¹³⁰ Conferences and schools agree to ban college athletes from

128 *Cornish-Adebiyi v. Caesars Ent., Inc.*, No. 23-cv-02536, 2024 WL 4356188, at *5 (D.N.J. Sept. 30, 2024); *Gibson v. Cendyn Grp., LLC*, No. 23-cv-00140, 2024 WL 2060260, at *3, 5 (D. Nev. May 8, 2024). For further discussion, see *infra* notes 172–75 and accompanying text.

129 *Gibson v. Cendyn Grp., LLC*, 148 F.4th 1069, 1082 (9th Cir. 2025). At the time of writing, the Ninth Circuit was considering a petition for rehearing *en banc*. Oral argument in the case involving Atlantic City casinos, which still involves allegations of horizontal price fixing, was held on September 17, 2025. *Cornish-Adebiyi v. Caesars Ent. Inc.*, No. 24-3006 (3d Cir.).

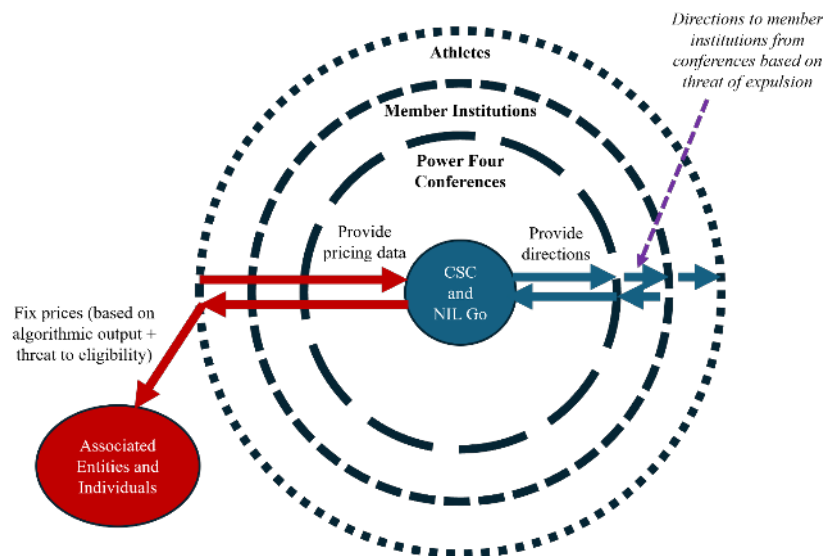
130 Group boycotts by horizontal competitors, like price-fixing cartels, are usually per se unlawful. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998). The NIL Go scheme is one such agreement. It is a hub-and-spoke agreement to exclude athletes, universities, boosters from college athletics generally, and the market for college athletes’ NIL rights specifically, if they do not adhere to NIL Go restrictions. This is, in the words of the Supreme Court, “what may be called a group boycott in the strongest sense: A group of competitors threaten[ing] to withhold business from third parties unless those third parties would help them injure their directly competing rivals.” *Id.*

The NIL Go group boycott is remarkably similar to the one found unlawful by the Supreme Court in *Fashion Originators’ Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941). The cartel

play if they fail to rescind an NIL deal that exceeds them¹³¹—and conferences are in turn threatening schools who do not go along with the scheme with expulsion.¹³² The agreements are published on the internet and openly agreed and adhered to. They are direct evidence of a horizontal agreement to artificially suppress athletes' NIL earnings below competitive levels and boycott schools and athletes that don't adhere to the scheme.

The end result is a well-defined multilayered hub-and-spoke (or, in this case, "hub-and-spoke-and-spoke-and-spoke") conspiracy with antitrust-relevant information and directives flowing in two different directions, as demonstrated by Figure 1:

FIGURE 1: NIL GO AND THE CSC AS A "HUB-AND-SPOKE-AND-SPOKE-AND-SPOKE" MODEL OF PRICE COORDINATION.



involved a guild of clothing designers, manufacturers, suppliers, and retailers to boycott retailers who colluded to push back against manufacturers who systematically flooded the market with lower priced copycat designs. *Id.* at 461. Much like the vilification of the NIL collectives and boosters within college athletics, the guild called the rival manufacturers' practices "unethical and immoral, and [gave] it the name of 'style piracy.'" *Id.* at 462–63. It also had a number of other anticompetitive rules, like a prohibition on retail advertising (similar to prior NCAA rules banning NIL agreements) and regulation of the amount and availability of discounts that retailers could offer (similar to current NCAA rules governing NIL). Finally, the guild employed secret shoppers, auditors, and an elaborate tribunal (like the CSC and Deloitte) to ensure compliance. *Id.*

The Court found this conduct contrary to the Sherman Act in a multitude of ways, including by narrowing who guild members could do business with, boycotting violators, and requiring disclosure of sensitive commercial information. *Id.* at 464. IT ALSO REJECTED THE GUILD'S CLAIM THAT THEIR ATTEMPTS TO STOP "piracy" justified the boycott: "The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts." *Id.* at 467–68.

131 See Student-Athlete NIL Deals, *supra* note 14 (advising that athletes will lose eligibility if they continue with rejected NIL deals).

132 Dellenger, *supra* note 55.

The antircumvention provisions in the *House Settlement* operate similarly as a horizontal maximum price-fixing mechanism and group boycott. While the relationships between the NCAA, the CSC, conferences, schools, athletes, and third parties may contain vertical elements, the functional outcome is horizontal: conferences and schools, through the CSC, coordinate around shared limits on athlete compensation by collectively rejecting NIL deals that exceed an algorithmically defined “reasonable range of compensation.” Though framed as cap enforcement, the system effectively restrains third parties from paying market rates and suppresses athlete compensation across the board, with athlete reporting requirements serving as the enforcement trigger. This is a clear restraint of trade. In fact, in any other market, this would be per se illegal under section 1 of the Sherman Act.¹³³ It indisputably gives rise to a colorable claim under the Sherman Act by either the athletes or the NIL collectives and boosters excluded and restrained by the rules. It may also be a violation of California’s new ban on the coercive use pricing algorithms, given that the CSC conditions both athlete and university eligibility for NCAA athletics on participation and compliance.¹³⁴

At first blush, antitrust litigation by a booster or collective against the CSC, the schools and their conferences, or the NCAA based on the *House Settlement*’s antircumvention measures could be seen as a rather strange and perhaps unlikely application of antitrust law. In the third-party NIL market, athletes act as sellers of their NIL rights while the third parties act as buyers. From the booster’s perspective, it follows that the antircumvention measures create a price *ceiling* for those offered NIL rights.

True, affected associated entities and individuals are inarguably *saving* money by being artificially prevented from paying more than the “reasonable range of compensation” of a prospective NIL deal. Yet of course, and as discussed, these boosters do not see this development as a positive, considering that their goal is to actually pay more, as a form of institutional or competitive support. The result is paradoxical: Boosters may be receiving some financial benefit from NIL Go, but it is one they did not ask for and do not want. The antircumvention provisions in the *House Settlement* operate as a horizontal maximum price-fixing mechanism and potential group boycott,¹³⁵ and they are suffering some form of harm.

And it is well established that antitrust law is not exclusively concerned with cartels that set price floors.¹³⁶ Price maximizing cartels can also violate the Sherman Act—a fact that the Supreme Court has made this clear in *Arizona v. Maricopa County Medical Society*, rebutting the dissent’s argument that maximum price-

133 *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

134 CAL. BUS. & PROF. CODE § 16729 (2025).

135 The potential of a group boycott was manifested with the CSC’s initial “valid business purpose” guidance (*see supra* notes 27 and 45–48 and accompanying text), but softens significantly with the rescission of that guidance. The risk still remains depending on how the rules are practically enforced moving forward.

136 *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) (“Every precedent in the field makes clear that the interaction of competitive forces, not price-rigging, is what will benefit consumers.”).

fixing schemes can have significant procompetitive and pro-consumer benefits.¹³⁷ The majority wrote that this argument “indicates a misunderstanding of the per se concept” as even if there were benefits to the scheme there are other, legal ways to accomplish the same goals.¹³⁸ Regardless, the Court also reasoned that making the per se rule clear serves to also “enhance the legislative prerogative to amend the law.”¹³⁹ The arguments made by the doctors “are better directed to the Legislature” as “Congress may consider the exception that we are not free to read into the statute.”¹⁴⁰ Barring that, the Supreme Court made clear that all horizontal price-fixing initiatives—including horizontal *maximum* price-fixing initiatives—must be found as per se violations of antitrust law.¹⁴¹

Thus, plaintiffs may have antitrust injury, and properly state a claim under the Sherman Act, when they are harmed by those schemes.¹⁴² As the Ninth Circuit noted, “[w]hen horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs.” Moreover, antitrust law is not exclusively concerned with effects on price. Anticompetitive effects can include decreased output, lower quality goods or services, loss of choice, stifled innovation, and barriers to entry. Here, the NIL Go algorithm is a significant barrier to entry for NIL collectives and is arguably protecting lower quality NIL collectives that offer poorer terms to college athletes for their NIL rights and services from more innovative and better financed competitors.

137 457 U.S. 332, 349–54 (1982). *Maricopa County* involved a challenge to an agreement by a group of physicians to set maximum fees that they can claim in full payment for health services provided to policyholders of specific insurance plans. *Id.* at 335–36. Both the Ninth Circuit and three dissenting Supreme Court justices wrote that the clear and obvious benefits of the scheme to the public interest needed to be discussed in analyzing the scheme’s legality under antitrust law, or at minimum more needed to be done to fully flesh out those benefits as compared to the anticompetitive effect of the price fix. *See id.* at 367 (Powell, J., dissenting) (“In its rush to condemn a novel plan about which it knows very little, the Court suggests that this end is achieved only by invalidating activities that may have some potential for harm. But the little that the record does show about the effect of the plan suggests that it is a means of providing medical services that in fact benefits rather than injures persons who need them”); *Arizona v. Maricopa Cty. Med. Soc’y*, 643 F. 2d 553, 560 (9th Cir. 1980) (“We believe this recognizes that a restraint may serve the public, the transcendent end of all professions, even though its presence in a purely commercial setting would violate the antitrust law. . . . There is sufficient probability of the challenged practice in this case being sheltered by this principle to justify our refusal to brand it as a per se violation.”).

138 *Maricopa Cty. Med. Soc’y*, 457 U.S. at 349–54.

139 *Id.* at 354–55.

140 *Id.*

141 *Id.*

142 *See State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (applying the Rule of Reason to vertical price maximizing schemes); *Maricopa Cty. Med. Soc’y*, 457 U.S. at 348 (applying the per se rule to horizontal price maximizing schemes). “A plaintiff may assert antitrust injury from ‘[c]oercive activity that prevents [consumers] from making free choices between market alternatives,’ as well as restraints that *artificially erect barriers to market entry and protect lower quality products.*” *CollegeNET, Inc. v. Common Application, Inc.*, 711 F. App’x 405, 406 (9th Cir. 2017) (citations omitted).

B. *Setting the Standard of Review: Per Se Illegal or Rule of Reason?*

As a horizontal maximum price-fixing arrangement, the anticircumvention provisions in the House Settlement revenue-sharing cap fall squarely within the scope of the Supreme Court's reasoning in *Maricopa County Medical Society*: that horizontal maximum price fixing is per se unlawful, regardless of any claimed procompetitive justifications.¹⁴³ At the same time, however, counterbalancing Supreme Court precedent casts doubt on whether plaintiffs challenging the NIL Go system will find success arguing based on the per se test. Defenders of these measures have an ace up their hole—doctrine from *NCAA v. Board of Regents*¹⁴⁴ pushing courts away from declaring the rules of sports leagues per se illegal, especially when those rules are focused around creating competitive balance on the playing field.¹⁴⁵ Taking the Court's reasoning from *Regents*, college sports “involves an industry in which horizontal restraints on competition are essential if the product is to be available at all,” making the per se test inapplicable for some restraints in competitive sports.¹⁴⁶

The *Alston* decision grappled with this exception to per se liability, and other dicta in that decision praising amateurism, head on. The NCAA argued that *Board of Regents* fully blessed its amateurism rules and that its rules should be given “at most an ‘abbreviated deferential review.’”¹⁴⁷ The Supreme Court rejected this gambit, writing that while they “do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive,” just because “some restraints are necessary to create or maintain a league sport does not mean all ‘aspects

143 *Maricopa Cty. Med. Soc’y*, 457 U.S. at 349–54. The *Maricopa County* court pushed the defenders of the scheme to petition Congress for a legislative exemption, *id.* at 346, making it resonate particularly strongly in the college sports context. This line of reasoning directly mirrors the Court's approach in *Alston*, where it rejected the NCAA's implicit plea for antitrust immunity and left policy-based exception-making to Congress. See *NCAA v. Alston*, 594 U.S. 69, 94–96 (2021) (“This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.”).

144 468 U.S. 85 (1984).

145 *Id.* at 100–04. See also *Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998) (holding in analyzing an NCAA rule capping the salaries of particular men's basketball coaches that while “[h]orizontal price-fixing is normally a practice condemned as illegal *per se* . . . courts consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product, even if such restraints involve horizontal price-fixing agreements”); *Smart v. NCAA*, Nos. 22-cv-02125, 23-cv-00425, 2023 WL 4827366 (E.D. Cal. 2023) (holding in analyzing an NCAA rule forbidding certain “volunteer” coaches from receiving compensation that such a rule “would [generally] be a per se violation of § 1 as horizontal price fixing” but that “in the context of the NCAA, courts typically apply a quick-look analysis”). But see *Shields v. World Aquatics*, Nos. 23-15092, 23-15156, 2024 WL 4211477, at *2 (9th Cir. Sept. 17, 2024) (finding that the district court erred “in concluding that a rule of reason analysis was necessary because courts lack experience with ‘the rules of a governing body for international and Olympic sports’” and that while “[i]t is true that sports leagues and joint venture restrictions are unique antitrust contexts that are generally analyzed under the rule of reason,” the defendant organizations were “not a joint venture sports league, but an association of independent national federations” and thus the per se rule applied).

146 *Alston*, 594 U.S. 69, at 101.

147 *Id.* at 91.

of elaborate interleague cooperation are.”¹⁴⁸ It refused to give the challenged restrictions a “quick look” and instead made clear that “[t]he NCAA’s rules fixing wages for student-athletes f[ell] on the far side of the line,” requiring a “fuller review.”¹⁴⁹ NCAA (or in this case CSC) rules fixing third-party compensation for athletes would undoubtedly be treated under the same principle—especially when those rules are set up to better effectuate “rules fixing wages” for said athletes.¹⁵⁰ Thus, *Alston* tells us that, if the per se test is inappropriate to analyze antitrust issues with NIL Go, either a quick look test used “as a path to condemnation, not salvation” or (more likely) the full Rule of Reason test must be the focus.¹⁵¹

C. *NIL Go Under the Rule of Reason—Can the Rules Pass the Test?*

Even if a court finds that the per se standard does not apply, the CSC’s NIL Go restrictions will face significant hurdles under the Rule of Reason: that they limit NIL deals to a “fair going market price is immaterial.”¹⁵² As the Supreme Court has noted,

[I]n terms of market operations[,] stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone.¹⁵³

The compensation limits “provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases.”¹⁵⁴ They also intentionally “discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs.”¹⁵⁵ NIL collectives, the newest entrants into the market for college athletes’ NIL and an important source of revenue for athletes, are being forcibly removed from the market. These are blatantly anticompetitive effects that go to the heart of the Sherman Act.

The burden will thus fall on the NCAA to offer a procompetitive justification. Amateurism is unlikely to suffice. It was wholly rejected in *Alston*.¹⁵⁶ In another

148 *Id.* at 90 (quoting *Am. Needle v. NFL*, 560 U.S. 183, 199 n.7 (2010)).

149 *Id.* at 88. “Quick looks” are reserved for restraints that sit “at opposite ends of the competitive spectrum.” *Id.* Some may be “so obviously incapable of harming competition that they require little scrutiny.” *Id.* Others are so obviously anticompetitive that they are “condemned as unlawful per se or rejected after only a quick look.” *Id.* at 89.

150 *Id.*

151 *Id.* at 91–92.

152 *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

153 *Id.*

154 *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 348 (1982).

155 *Id.*

156 *Alston*, 594 U.S. at 93–96 (declining to immunize amateurism-based restrictions from antitrust law); *id.* at 101–02 (noting that amateurism must merely be seen as a procompetitive justification

recent case challenging the NCAA's amateurism rules under the Fair Labor Standards Act, the Third Circuit rejected the argument that amateurism precluded a finding that college athletes could be employees, saying it would "not use a 'frayed tradition' of amateurism with such dubious history to define the economic reality of athletes' relationships to their schools."¹⁵⁷ The Tenth Circuit almost twenty years ago similarly refused to extend the concept of amateurism to assistant coaches in a lawsuit that successfully challenged rules limiting their salary.¹⁵⁸ Finally, in the same *Board of Regents* decision that called amateurism a "revered tradition," the Supreme Court found that "rules that restrict output are hardly consistent with this role" and invalidated the NCAA's broadcasting restrictions under the Sherman Act.¹⁵⁹

And, of course, the Supreme Court made clear in *Alston* that *Board of Regents* was not a declaration that "the NCAA's compensation restrictions [were] procompetitive both in 1984 and forevermore."¹⁶⁰ The NCAA offered no "consistent definition" of amateurism for the *Alston* court, and its defense that amateurism was a procompetitive justification for the challenged restraints was rejected.¹⁶¹ Thus, the limits on compensation challenged in that case, which the Supreme Court called "admitted horizontal price fixing in a market where the defendants exercise monopoly control," failed the Rule of Reason.¹⁶²

The NCAA would alternatively point to the need to preserve competitive balance as a key rationalization for the rules. This would not be a slam dunk of a procompetitive justification—an excellent 2006 law review piece by Professors Salil K. Mehra and T. Joel Zuercher found that the competitive balance argument in Rule of Reason analysis has yielded a circuit split and overall criticized the use of the concept as a defense to antitrust scrutiny.¹⁶³

And in this specific context there are certainly arguments to be made that the competitive balance rationales supporting the revenue-sharing cap—along with the NIL Go anticircumvention measures used to sustain it—are fairly weak when considering the broader state of competitive balance in college sports and could even be countered as pretextual. The revenue-sharing cap and anticircumvention measures do nothing to address the vast discrepancies in revenue that university athletic departments receive, either naturally through their individual markets and donor bases or more artificially through whether a school is blessed enough

under the Rule of Reason and that the district court properly held that the NCAA's failure to "adopt any consistent definition" of amateurism weakened it as a justification). *See also id.* at 109 (Kavanaugh, J. concurring) (deeming the NCAA's amateurism argument "circular and unpersuasive," framing it as "colleges may decline to pay student athletes because the defining feature of college sports ... is that the student athletes are not paid").

157 *Johnson v. NCAA*, 108 F.4th 163, 182 (3d Cir. 2024)

158 *Law v. NCAA*, 134 F.3d 1010, 1022 n.14 (10th Cir. 1998).

159 *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

160 *Alston*, 594 U.S. at 93.

161 *Id.* at 100–01.

162 *Id.* at 86.

163 *See generally* Salil K. Mehra and T. Joel Zuercher, *Striking Out "Competitive Balance" in Sports, Antitrust, and Intellectual Property*, 21 BERK. TECH. L.J. 1499 (2006).

to be included in a conference with a \$5 million per school television deal or, with respect to the SEC and Big Ten, a \$50 million or more per school television deal.¹⁶⁴ Direct (and above-the-table) athlete pay is only the newest of a long history of financial arms races between college athletic programs; the schools who have been able to hire the biggest-name coaches, build the flashiest facilities, and afford the best nutrition programs have dominated college sports well before the *House Settlement* and NIL.¹⁶⁵

It also does nothing to address the pervasive and intentional biases in playoff seeding systems that are (increasingly)¹⁶⁶ set to prioritize strength of schedule over actual performance, thus favoring teams in conferences with stronger perceived strengths of schedule and disfavoring teams who have little means of boosting their strength of schedule without a rarely offered invitation to one of those conferences. Regardless of whether there is a revenue-sharing cap or not, the Big Ten and SEC conferences will dominate in many sports (particularly the revenue sports of football and basketball)—a fact that pushes back strongly against the invocation of competitive balance to justify the cap and its anticircumvention measures. In fact, the NIL Go scheme will only exacerbate the problem by making it more difficult for schools with traditionally “weaker” programs but wealthier alumni to bolster their rosters through this recruitment tool.¹⁶⁷

164 Compare Matt Brown, *The American Athletic Conference is Reportedly Getting a Healthy Raise Without Sacrificing Flexibility*, SB NATION (Mar. 19, 2019), <https://www.sbnation.com/college-football/2019/3/19/18273232/aac-television-deal-espn-conference-realignment> (noting that the American Athletic Conference (AAC) television contract pays just short of \$7 million per school) with Pete Thamel, *Big 12 Nears Six-Year, \$2.28B TV Extension Deal With ESPN, Fox, ESPN* (Oct. 30, 2022), https://www.espn.com/college-football/story/_/id/34910144/big-12-nears-six-year-228b-tv-extension-deal-espn-fox (noting that the Big 12 television contract pays about \$31.7 million per school) with Daniel Libit, *SEC’s Total Revenue Dips While Payouts Jump in FY24*, SPORTICO (Feb. 6, 2025), <https://www.sportico.com/leagues/college-sports/2025/sec-conference-tax-return-2024-sankey-1234826842/> (citing SEC tax returns to show that the conference paid out \$52.5 million to each school in fiscal year 2024) with Adam Rittenberg, *Big Ten Completes 7-year, \$7 Billion Media Rights Agreement with Fox, CBS, NBC, ESPN* (Aug. 18, 2022), https://www.espn.com/college-football/story/_/id/34417911/big-ten-completes-7-year-7-billion-media-rights-agreement-fox-cbs-nbc (“The Big Ten is projected to eventually distribute \$80 million to \$100 million per year to each of its 16 members.”).

165 See, e.g., Dick Harmon, *It’s Getting Expensive to Stay in College Football Arms Race*, DESERET NEWS (July 28, 2024), <https://www.deseret.com/sports/2024/07/28/college-football-arm-race-extensive-financial-resources/> (giving several examples of programs spending more and more to compete with other programs outside of athlete pay); Rodney Fort, *College Athletics Spending: Principals and Agents v. Arms Race*, 2 J. AMATEUR SPORT 119 (2016) (same); Adam Hoffer et al., *Trends in NCAA Athletic Spending: Arms Race or Rising Tide?*, 16 J. SPORTS ECON. 576 (2015) (same); William Tsitsos & Howard L. Nixon II, *The Star Wars Arms Race in College Athletics: Coaches’ Pay and Athletic Program Status*, 36 J. SPORT & SOCIAL ISSUES 68 (2012) (same); John R. Than & Lawrence L. Wiseman, *Fiscal Fitness? The Peculiar Economics of Intercollegiate Athletics*, CAPITAL IDEAS (Feb. 1990), <https://files.eric.ed.gov/fulltext/ED323823.pdf> (same).

166 David Ubben & Ralph Russo, *CFP Leadership Says There’s No Leading Contender for Playoff Format in 2026*, THE ATHLETIC (N.Y. TIMES) (June 18, 2025), <https://www.nytimes.com/athletic/6436485/2025/06/18/college-football-playoff-schedule-strength-selection-meetings/> (“[College Football Playoff (CFP) executive director Rich] Clark said CFP staff met with data provider SportSource Analytics and some outside sources, including a mathematician from Google, to examine the statistics they provide the committee—with a focus on strength of schedule.”).

167 This is admittedly the genesis of the argument that college sports have become the “Wild Wild

Finally, the argument for competitive balance ignores that the salary caps used in professional sports leagues are arrived at through collective bargaining with the players' unions. The revenue-sharing caps enforced by the CSC were agreed upon pursuant to a class action settlement and received significant objections from groups advocating for college athletes.¹⁶⁸ They do not include trade-offs, such as guaranteed scholarships, health care, or improved safety standards. They only use the highest earning schools' revenue as a basis for calculating the cap, skewing the limits into a higher range that smaller schools will never be able to meet.¹⁶⁹ And they do not give athletes the leverage afforded by labor law to strike in case of bargaining impasse or receive the minimum benefits provided by employment law.¹⁷⁰ Worse still, the NIL Go algorithm uses criteria that were unilaterally arrived at by the CSC and Deloitte. Athletes and boosters had no seat at the table to discuss what would be reasonable. As a result, there are no statutory or nonstatutory labor exemptions available to insulate the NCAA, the CSC, the conferences, or the universities from liability under the Sherman Act.¹⁷¹ And there are sure to be considerably less restrictive ways to ensure parity between the schools and the conferences.

Still, if a court did find this "competitive balance" rationale persuasive at Step 2 of the Rule of Reason analysis, another critical issue arises—one that implicates both Step 1 and Step 3 of the analysis: the unique structure of the NIL Go anticircumvention mechanism, which relies on algorithmic logic and competitively sensitive pricing data to restrict market behavior. In this light, the concern is not just what the rules do, but how they do it, since the use of a centralized algorithm to evaluate and enforce "reasonable range of compensation" thresholds introduces a coordinated pricing logic across conferences and schools. This structure raises the possibility that the CSC, NIL Go, conferences, and member institutions are engaged not just in traditional horizontal price fixing, but in a more modern and diffuse form of algorithmic collusion—one that both resembles the structure currently under scrutiny in multiple courts, legislatures, and attorneys general offices across the country and also goes even further, using its formulas not just to artificially suppress compensation but also to boycott an entire group of competitors that were previously an innovative, robust, and dynamic part of the market.

West," destabilizing rosters by allowing athletes to chase the most lucrative NIL deals and transfer on a whim. See, e.g., Kevin Sherrington, *Texas Tech, Maryland on Opposing Ends of NIL's Wild, Wild West Impacting College Sports*, DALLAS MORNING NEWS (July 24, 2025), <https://www.dallasnews.com/sports/college-sports/2025/07/24/texas-tech-maryland-on-opposing-ends-of-nils-wild-wild-west-impacting-college-sports/>. However, there are a number of less restrictive means to mitigate this problem. For example, the NCAA could limit the availability of third-party NIL deals to a recruiting window similar to the transfer portal. And, as discussed *infra* notes 200–01 and accompanying text, all of this could be negotiated pursuant to collective bargaining and benefit from already existing statutory and nonstatutory labor exemptions.

168 See *Tracker*, THE COLLEGE SPORTS LITIGATION TRACKER, <https://www.collegesportslitigationtracker.com/tracker> (last visited July 24, 2025) (collecting these objections).

169 *House Settlement*, *supra* note 4, at art. 3, § 1(e). See *supra* note 6.

170 See generally, e.g., Sam C. Ehrlich & Neal C. Ternes, *The Paradox of 'Non-Union Unions': The Risks of Extending Antitrust Immunities without Labor Law's Protections*, 62 AM. BUS. L.J. 95 (2025) (contemplating the harms of nonemployee collective bargaining to worker leverage).

171 *Id.* at 99–102.

D. The Particular Problem with the CSC's Algorithmic Maximum Price Fixing

One of the first judicial tests for algorithmic price-fixing cases, *Gibson v. Cendyn Group*,¹⁷² did not go particularly well for the plaintiffs. The plaintiff hotel guests had alleged a price-fixing conspiracy focused around a hub-and-spoke model with the pricing recommendation algorithm—offered by a hospitality revenue management software company called Cendyn—at the center.¹⁷³ However, the court found that the plaintiffs failed to adequately allege that the defendants in direct competition with each other, the hotel casinos, had entered into an agreement, finding that the pricing software outputs were merely nonbinding recommendations.¹⁷⁴ In other words, there was no agreement to abide by the “fixed” price set by the algorithm—the plaintiffs did not “allege that each spoke—Hotel Defendants—ever agreed to charge a price that the hub—Cendyn—demanded them to charge.”¹⁷⁵

Allegations against Deloitte and the CSC over alleged third-party NIL price fixing would not suffer from such a deficiency. While this particular scheme has, as illustrated in Figure 1 above, more layers than the Cendyn or RealPage hub-and-spoke conspiracy, it still operates as a hub-and-spoke but simply with more “hubs” and more “spokes.” Deloitte and the CSC, running the pricing algorithm at the center, operate as the hub, providing information to the conferences, schools, and athletes themselves as to what athletes are permitted to charge interested third parties for their NIL services.¹⁷⁶ The conferences and schools act as additional enforcement mechanisms for the CSC, putting pressure on the athletes—the instruments of the price fix—to report deals while agreeing to accept and enforce punishments levied by the CSC.¹⁷⁷ Indeed, the power conferences have pushed their schools into a horizontal agreement to abide by the CSC’s mandates over countervailing state law if necessary.¹⁷⁸

And the CSC’s directions are just that—mandates, not recommendations. While the CSC’s decisions to prohibit NIL deals are appealable and framed as nonbinding, athletes that accept deals rejected by the CSC face potential enforcement consequences up to and including the loss of eligibility.¹⁷⁹ Similarly, schools that act to circumvent the revenue-sharing cap by facilitating NIL deals outside of NIL Go’s parameters face their own punishment, including multimillion dollar fines, a reduction in transfers that a school can acquire from the portal, and

172 *Gibson v. MGM Grp.*, No. 23-cv-00140, 2024 WL 2060260 (D. Nev. 2024) (dismissing initial complaint). See also *supra* notes 119–28 and accompanying text.

173 *Id.* at *3.

174 *Id.*

175 *Id.* Of course, it is worth noting that the nonbinding nature of the arrangement should not have been dispositive and ignores the power of algorithms, discussed in Part III to distort pricing structures and rob the market of independent decision makers.

176 Dellenger, *supra* note 32.

177 *Id.*

178 *Id.* See also Dellenger, *supra* note 55. However, as discussed earlier, at least one state attorney general has directed its schools not to sign this agreement. See *supra* note 56 and accompanying text.

179 Dellenger, *supra* note 32.

postseason bans.¹⁸⁰ And for schools who follow conflicting state law over CSC mandates, the participation agreement that the CSC is pushing power conference schools to sign means that schools that so much as “support, advocate for or lobby for any change in federal, state or local law that would alters its obligations under” the CSC participation agreement “risk[] the loss of conference membership and participation against other power league programs”—or, in other words, a group boycott.¹⁸¹ This activity is far closer (and even far beyond) the allegations of “conduct to facilitate and enforce the implementation of the pricing recommendations” that was sufficient to survive a motion to dismiss in the renter cases.¹⁸²

As in those cases, the CSC’s system only works if each athlete “divulges its confidential and commercially sensitive pricing,” allows the CSC “to determine the price” of each NIL deal, and then “adopts that price with very little, if any, second guessing.”¹⁸³ And while the court in *Gibson* agreed with the defendants that “Plaintiffs’ failure to plausibly allege the exchange of confidential information from one of the spokes to the other through the hub’s algorithms” was a “fatal defect” in the hub-and-spoke conspiracy claim, that failure is decidedly not the case in this new system.¹⁸⁴ Through the *House Settlement*, the CSC is requiring all Division I athletes to disclose any NIL deal over \$600 to the system—regardless of whether the agreement is made with an associated entity or individual or even if the athlete is at a school that does not opt in to the settlement agreement¹⁸⁵—almost certainly in part to acquire the information needed to train the NIL Go algorithm and compare incoming deals to “similar types of NIL deals struck between an athlete and the third party.”¹⁸⁶

And the data is very clearly confidential and commercially sensitive. Agents and third parties have already complained about the need to disclose this pricing and contract information, fearing accidental or intentional public disclosure by Deloitte.¹⁸⁷ Indeed, several states have acted to exempt athlete NIL deals from public disclosure laws.¹⁸⁸ With several algorithmic price-fixing cases distinguishing

180 *Id.*

181 Dellenger, *supra* note 55; Tex. Att’y Gen., Letter to Texas Universities Regarding CSC Participation Agreement, *supra* note 56, at 2.

182 *Duffy v. Yardi Systems*, 758 F. Supp. 3d 1283, 1294 (W.D. Wash. 2024).

183 *Id.* at 1292.

184 *Gibson v. Cendyn Grp., LLC*, No. 23-cv-00140, 2024 WL 2060260, at *5 (D. Nev. May 8, 2024)

185 *FAQ*, COLLEGE SPORTS COMMISSION, <https://www.collegesportscommission.org/faq/> (last visited July 6, 2025) (“All NCAA Division I student-athletes must report third-party NIL deals with compensation that equals or exceeds \$600 . . . A third-party NIL deal is any deal with an external payor, meaning *any entity not owned or controlled by the student-athlete’s institution* . . . all Division I student-athletes, *regardless of whether or not their school has opted in to revenue sharing*, will have to report third-party NIL deals valued at \$600 or more in the aggregate into the NIL Go platform.”) (emphasis added).

186 Dellenger, *supra* note 32.

187 JC Shelton, *Brands May Walk Away from NIL if NCAA Doesn’t Fix This One Rule*, NIL DAILY (SPORTS ILLUSTRATED) (June 27, 2025), <https://www.si.com/college/nil/nil-news/brands-may-walk-away-from-nil-ncaa-doesnt-fix-this-one-rule-section-e>; Heitner, *supra* note 36.

188 *See, e.g.*, H.B. 378 (N.C. 2025) (signed into law on July 1, 2025); HB 25-1041 (Colo. 2025) (signed

between the policing of public prices and more sensitive private prices,¹⁸⁹ NIL pricing information falling by state law into the latter category is clearly relevant and material when discussing the antitrust implications of that forced disclosure.

In this respect, NIL Go's algorithmic price fixing very much mirrors—and even goes beyond—the schemes challenged in *Duffy*, *Cendyn*, and *RealPage*. Indeed, as noted earlier, the NIL Go scheme carries all of the “plus factors” identified by the Supreme Court in *Twombly* like parallel price increases (or, in this case, parallel price decreases), the exchange of confidential and commercially sensitive information, mandatory adherence to the algorithm's pricing recommendation, changes in policies to only allow deals that are priced lower than what the free market may otherwise provide, acting against their own recruiting self-interests, and strict policing by the operator or competitors to ensure compliance.¹⁹⁰

Compare NIL Go to just some of the allegations in the *RealPage* cases, for example. The amended complaint filed by the United States and the state attorneys general alleges that landlords submit sensitive, nonpublic competitor pricing information so that *RealPage*'s algorithm can establish a “market range” for landlords.¹⁹¹ This allows landlords to “effectively agree to outsource their pricing function to *RealPage* with auto acceptance” making it so that *RealPage*'s algorithm “and not the free market, determines the price that a renter will pay.”¹⁹² Similarly, college athletes are required under the *House* Settlement to both submit *their* sensitive market information and outsource *their* pricing functions so that their services are only offered within the Deloitte algorithm's determination of a “reasonable range of compensation” rather than what the free market would otherwise bear.¹⁹³

Similarly, the government plaintiffs in *RealPage* have alleged that *RealPage* (1) created procedures that make it much more difficult and time consuming to use

into law on Mar. 28, 2025); S.B. 4439 (N.J. 2025) (passed both houses June 30, 2025); H.B. 4643 (Mich. 2025) (pending).

189 *See, e.g., In re Passenger Vehicle Replacement Tires Antitrust Litig.*, 767 F. Supp. 3d 681, 716 (N.D. Ohio 2025) (“Accordingly, because plaintiffs do not offer any explanation of how the exchange of unspecified non-public information could be useful in policing co-conspirators’ presumably public prices, the bare allegation that defendants may have been able to do so does not bolster the plausibility of the alleged conspiracy.”); *Cornish-Adebisi v. Caesars Ent., Inc.*, No. 23-CV-02536, 2024 WL 4356188, at *5 (D.N.J. 2024) (“What is more, the specific sources quoted by the Amended Complaint seem to confirm that the pricing recommendations at issue were never based on the confidential, proprietary data of their competitors. And the Casino-Hotels’ ‘supply and demand data’ to which Plaintiffs allude appears to be publicly available information.”).

190 *Duffy v. Yardi Sys., Inc.*, 758 F. Supp. 3d 1283, 1292–93 (W.D. Wash. 2024); *In re RealPage, Inc., Rental Software Antitrust Litig.* (No. II), 709 F. Supp. 3d 478, 503, 506–07, 510–12, 516 (M.D. Tenn. 2023). *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007). *See also In re Musical Instruments & Equip. Antitrust Litig.*, 798 F. 3d 1186, 1194 (9th Cir. 2015) (“Whereas parallel conduct is as consistent with independent action as with conspiracy, plus factors are economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action.”).

191 Am. Compl., *United States v. RealPage*, *supra* note 10, at 18.

192 *Id.* at 3.

193 *Student-Athlete NIL Deals*, *supra* note 14.

a price that was not recommended by RealPage; and (2) employs price advisors that train clients, encourage their use of the price recommendations, and review their requests to override price recommendations—both to ensure adherence to the algorithm’s pricing recommendation and police compliance.¹⁹⁴ The college sports industry has a similar setup, with compliance officers trained by the NCAA at each school, the CSC’s compliance enforcement, and the difficulty of an athlete challenging the rejection of a deal by the NIL Go system.

And finally, the government plaintiffs have also alleged in *RealPage* that RealPage encourages landlords to adhere to price recommendations, even if doing so leaves them below full occupancy or if the algorithm recommends prices that are above a weakened market, clearly pointing toward the idea that these landlords are acting against their self-interests by aligning with RealPage’s algorithmic recommendations.¹⁹⁵ For the CSC, the self-interest plus factor is obvious. Even if the industry as a whole has an interest in ensuring competitive balance (or, more cynically, tamping down labor costs), athletes clearly have an interest in higher-priced NIL deals, and the schools themselves have an interest in allowing third parties like boosters and collectives to pay those labor costs for them and to use their resources to recruit the best athletic talent for their programs.

These structural parallels matter not only because of how NIL Go is designed, but also because of how antitrust law treats enforcement—even when it is uneven, imperfect, or incomplete. So even if NIL Go compliance turns out to be uneven—if athletes misreport, schools look the other way, or state laws interfere—the system’s legal risk does not disappear. A price-fixing conspiracy need not be airtight to violate the law. So long as an arrangement creates a “coercive business climate” in which actors knew of the price fix, “understood the consequences of failure to comply and thus generally complied” with such an arrangement will go beyond the “safe harbor” of “announcement plus mere refusal to deal.”¹⁹⁶ A hole-filled conspiracy is still a conspiracy.

In summation, the NIL Go algorithm also runs afoul of a principle that guides every antitrust lawsuit: “In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces ‘yield the best allocation’

194 Am. Compl., *United States v. RealPage*, *supra* note 10, at 24.

195 *Id.* at 52–53 (“RealPage succinctly summarized for landlords the effect of using AIRM and YieldStar in down markets: it ‘curbs [clients]’ instincts to respond to down-market conditions by either dramatically lowering price or by holding price when they are losing velocity and / or occupancy.’ These tools instill pricing discipline in landlords, curbing normal fully independent competitive reactions by substituting them with interdependent decision-making.”) *See also id.* at 57–58 (“In other words, when market conditions weaken and the model calculates that a price decrease is warranted, this guardrail kicks in and recommends keeping the recent rent even though it is suboptimal. This asymmetry favors price increases over price decreases.”).

196 *Yentsch v. Texaco*, 630 F.2d 46, 53 (2d Cir. 1980). *See also United States v. Colgate*, 250 U.S. 300, 307–08 (1919) (holding that the Sherman Act “does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal” and the right to “announce in advance the circumstances under which he will refuse to sell”).

of the Nation's resources."¹⁹⁷ By restricting the purpose and value of NIL deals to those unilaterally deemed acceptable by the CSC, it deprives schools, athletes, advertisers, and boosters of a free market place; takes allocation of athlete and booster resources out of the free market and into the hands of administrators; and does so with no discernible benefit to consumers and significantly more restrictions than competitive balance on the playing field requires.

E. Potential Plaintiffs: What Litigation Does the House Settlement Stop and What Litigation Does It Not Stop?

Of course, in addressing potential litigation challenging NIL Go, one must first address the elephant in the room: the protections for the new system baked into the *House* Settlement. The *House* lawsuit alleged that NCAA rules prohibiting students from profiting from their NIL violated federal antitrust laws.¹⁹⁸ Yet the *House* Settlement explicitly permits NCAA rules that continue to prohibit NIL deals with associated entities that do not meet the NCAA's chosen criteria, a clear horizontal agreement to limit compensation available to college athletes.¹⁹⁹ These types of restraints are permissible in professional leagues only because of the statutory and nonstatutory labor exemptions that permit and protect collective bargaining.²⁰⁰ That path is, for a variety of reasons, not clearly possible or probable in the current college sports athletic environment.²⁰¹

197 *NCAA v. Alston*, 594 U.S. 69, 73 (2021).

198 Third Cons. Amend. Class Action Compl., at ¶ 7, *House v. NCAA*, No. 20-cv-03919, 2025 WL 1675820 (Sept. 26, 2024), Dkt. 533-1.

199 *House* Settlement, *supra* note 4, at art. 4, § 3. The pure salary cap question—that is, schools banding together through the *House* Settlement to establish a ceiling for how much they are permitted to pay the players—is also an obvious horizontal agreement in restraint of trade and thus a potential antitrust problem. See *supra* note 81 and accompanying text (discussing horizontal agreements). See also *Law v. NCAA*, 134 F.3d 1025 (10th Cir. 1998) (holding an NCAA rule imposing a cap on so-called restricted earnings coaches in college basketball violated antitrust law).

200 See The Norris-LaGuardia Act, 29 U.S.C. § 101 et seq.; section 6 of the Clayton Act, 15 U.S.C. § 17; and section 20 of the Clayton Act, 29 U.S.C. § 52 exempt labor unions from the Sherman Act's prohibition of restraints of trade. They serve the express goal of "restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151. There is also a "judicially crafted, nonstatutory labor exemption that serves to accommodate the conflicting policies of the antitrust and labor statutes in the context of action between employers and unions." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 254 (1996) (Stevens, J. dissenting). "[T]he implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions." *Id.* at 237.

201 See, e.g., *Wood v. NBA*, 809 F.2d 954, 959 (2d Cir. 1987) ("We may further assume that were [the salary cap, college draft, and prohibition of player corporations] agreed upon by the NBA teams in the absence of a collective bargaining relationship with a union representing the players, they would be illegal and plaintiff would be entitled to relief.") A path to collective bargaining in college sports may be hypothetically possible through creative positioning (see Joseph Sabin et al., *'Entertaining' a New College Athlete Unionization Structure*, 34 J. LEGAL ASPECTS SPORT 26 (2024)), but is undeniable that both practical and legal challenges stand firmly in the way. For one, neither side seems particularly interested in collective bargaining, with unionization efforts among athletes existing only in isolated efforts. See, e.g., *Nw. Univ.*, 362 NLRB 1350 (2015); Amanda Christovich, *'We Want to Be Paid': Inside Dartmouth Men's Basketball's Historic Union Effort*, FRONT OFF. SPORTS (Mar. 9, 2024), <https://frontofficesports.com/we-want-to-be-paid-inside->

With college athletes lacking a true collective bargaining arrangement, the *House Settlement* takes a different path, relying on class action settlement terms, release clauses, and collateral estoppel to try to ensure that the college sports industry's new path is protected from legal challenge moving forward.²⁰² Yet it is unquestionable that relying on class action settlement release clauses does not provide anything close to the same level of legal insulation as a collective bargaining agreement or legislative antitrust exemption, leading everyone from journalists,²⁰³ scholars,²⁰⁴ and the Justice Department,²⁰⁵ to point out the potential weak spots in the *House Settlement* moving forward. Indeed, the order approving the settlement did not declare them valid under section 1 of the Sherman Antitrust Act. Judge Wilken instead simply declined to engage in a Rule of Reason analysis

dartmouth-mens-basketballs-historic-union-effort/; Daniel Libit, *UAB Commitment to Athletes. org Draws Attention — and Scrutiny*, SPORTICO (Apr. 30, 2024), <https://www.sportico.com/leagues/college-sports/2024/uab-athletes-org-commitment-jim-cavale-1234777345/>. Similarly, school personnel are seemingly only interested in collective bargaining if they can do so without athletes becoming employees. See, e.g., Shehan Jeyarajah, *Notre Dame AD Calls for Collective Bargaining Rights for College Athletes: 'I Think It's Worth Considering'*, CBS SPORTS (Oct. 17, 2023), <https://www.cbssports.com/college-football/news/notre-dame-ad-calls-for-collective-bargaining-rights-for-college-athletes-i-think-its-worth-considering/>; Seth Emerson, *Collective Bargaining in College Sports: Is It a Third Rail or an Inevitability?*, THE ATHLETIC (N.Y. TIMES) (May 29, 2025), <https://www.nytimes.com/athletic/6389566/2025/05/29/collective-bargaining-college-sports-danny-white/>. But see Ross Dellenger, *Could Collective Bargaining Be the Answer for College Sports? Some ADs Are Ready to Say the Quiet Part Out Loud*, YAHOO! SPORTS (June 30, 2025), <https://sports.yahoo.com/college-football/article/could-collective-bargaining-be-the-answer-for-college-sports-some-ads-are-ready-to-say-the-quiet-part-out-loud-120029195.html> (demonstrating that while some are still pushing for nonemployee collective bargaining, some—most notably Tennessee athletic director Danny White—are more accepting of a reality where college athletes are employees). With nonemployee collective bargaining being both not supported under the law and functionally problematic (see Sam C. Ehrlich & Neal C. Ternes, *The Paradox Of 'Non-Union Unions': The Risks of Extending Antitrust Immunities Without Labor Law's Protections*, 62 AM. BUS. L.J. 95, 97–112 (2025) (discussing the legal and practical problems with nonemployee collective bargaining while using college sports as a case study)) and even employee collective bargaining likely foreclosed due to wide variances in which states allow and do not allow public sector employee bargaining (see Karen Weaver, *Can College Athletes Unionize Within a Conference? State Laws Will Dominate Until After The 2024 Election*, FORBES (Oct. 27, 2024), <https://www.forbes.com/sites/karenweaver/2024/10/27/can-college-athletes-unionize-within-a-conference-state-laws-will-dominate-until-after-the-2024-election/>), college athlete collective bargaining seems off the table—at least for now.

202 See generally Scott White, Sam C. Ehrlich, & Ryan Rodenberg, *Regulating College Sports and Collateral Estoppel*, 103 TEX. L. REV. ONLINE 202 (2025) (contemplating the reach and scope of the *House Settlement's* release clause through the lens of collateral estoppel).

203 See, e.g., Pete Thamel & Dan Murphy, *Why an NCAA Antitrust Settlement Will Leave Lots of Questions Unanswered*, ESPN (May 16, 2024), https://www.espn.com/college-football/story/_/id/40158775/ncaa-house-antitrust-settlement-billions-dollars-unanswered-questions; Eric Prisbell, *After House Settlement Filing, a Deep Dive into an Unsettled State of Play*, ON3 (July 30, 2024), <https://www.on3.com/nfl/news/after-house-v-ncaa-settlement-filing-a-deep-dive-into-an-unsettled-state-of-play/>.

204 See, e.g., generally Edelman & Carrier, *supra* note 2.

205 Statement of Int. of United States of America at 9, *In re College Athlete NIL Litigation*, No. 20-cv-03919, 2025 WL 1675820 (N.D. Cal. Jan. 17, 2025), Dkt. No. 595 [hereinafter DOJ Brief] (“All parties agree that even if the Court approves the Proposed Settlement under Rule 23, the Salary Cap Rule is not immune from future antitrust scrutiny by a potential party that is not bound by its terms.”).

of the agreement,²⁰⁶ finding that sort of adjudication irrelevant to the settlement approval process.²⁰⁷ And let it not be said that stakeholders are unaware of these issues, as clearly evinced through their continued lobbying to Congress to protect the settlement's terms through federal legislation.²⁰⁸

Judge Wilken was clear in her opinion and order granting final approval of the settlement that she does not believe the release clause in the settlement applies to claims challenging the implementation of terms of the injunctive relief portion of the settlement, including the revenue-sharing cap and its anticircumvention measures.²⁰⁹ However, the NCAA likely will not see it that way. Indeed, they have already signaled in a letter to the Department of Justice that they may seek to use collateral estoppel as an affirmative defense against any challenges to the revenue-sharing cap.²¹⁰ Such a strategy may have limited success—in the words of Judge Wilken, the NCAA “may make these arguments but that does not mean they will be successful.”²¹¹ But the risk must be addressed regardless.²¹²

Even if the settlement agreement does not release any future claims by athletes based on implementation of the injunctive relief terms, the settlement does give Judge Wilken's courtroom (and her appointed special master, Magistrate Nathanael Cousins) exclusive jurisdiction “to resolve all disputes that may arise concerning compliance with, the validity of, interpretation or enforcement of the terms and conditions of this Injunctive Relief Settlement.”²¹³ Additionally, the agreement provides

206 See *supra* notes 93–95 and accompanying text (discussing Rule of Reason analysis).

207 *In re College Athlete NIL Litig.*, No. 20-cv-03919, 2025 WL 1675820, at *25 n.8, *28 n.10, *29 n.13, *37 (N.D. Cal. June 6, 2025).

208 Daniel Libit, *House v. NCAA May Be Settled, but Congress Is Not*, SPORTICO (June 12, 2025), <https://www.sportico.com/leagues/college-sports/2025/congressional-hearing-house-v-ncaa-bilirakis-trahan-1234856306/>. As discussed *supra* note 42, the SCORE Act represents Congress's latest and furthest effort to do so.

209 *In re College Athlete NIL Litig.*, 2025 WL 1675820, at *27.

210 DOJ Brief, *supra* note 205, at 10 (“The NCAA, however, has taken the position that it may use the Proposed Settlement in the future as a defense to antitrust liability in a case brought by a future plaintiff seeking to achieve more fulsome protection for the free and fair market opportunities of student athletes than the Proposed Settlement affords.”).

211 *In re College Athlete NIL Litig.*, 2025 WL 1675820, at *37.

212 Indeed, it would not be the first time the NCAA has tried to lump even completely unrelated antitrust litigation within the *House* Settlement's terms. In March 2024, the NCAA invoked collateral estoppel as an affirmative defense in their answer to the complaint in *Brantmeier v. NCAA*—a case challenging NCAA rules barring athletes from receiving prize money from external competitions in their sports. Answer to Complaint at 42–43, *Brantmeier v. NCAA*, No. 24-cv-00238 (M.D.N.C. June 26, 2024). See White, Ehrlich, & Rodenberg, *supra* note 202, at 214–15. The NCAA even sought to consolidate *Brantmeier* and an athlete eligibility rule case, *Bewley v. NCAA*, with *House* in the Northern District of California, but was unsuccessful. *In re Coll. Athlete Comp. Antitrust Litig.*, 730 F. Supp. 3d 1378, 1380 n. 1 (J.P.M.L. 2024) (noting that the NCAA considered *Brantmeier* and *Bewley* related cases). See also *Bewley v. NCAA*, No. 23-cv-15570, 2024 WL 113971 (N.D. Ill. 2024) (denying preliminary injunction to athletes who had been barred from college sports after receiving NIL-related compensation while attending a high school-level basketball academy).

213 *House* Settlement, *supra* note 4, at art. 6, § 1(b). See also Notice of Intent to Appoint Magistrate Judge Nathanael Cousins as Special Master, *In re College Athlete NIL Litigation*, No. 20-cv-03919 (N.D. Cal. June 9, 2025), Dkt. No. 981 (appointing Magistrate Judge Cousins as a special master

that any such disputes asserted on behalf of athletes “shall be prosecuted exclusively by Class Counsel.”²¹⁴ And even for issues where Hagens Berman and Winston & Strawn wish to challenge CSC actions like they did with the CSC’s categorical exclusion of NIL collective deals under the “valid business purpose” provision,²¹⁵ the settlement provides a process for challenges specific to adopted rules related to settlement circumvention—a category of rules that very likely would include the rules discussed throughout this article.²¹⁶ This process necessarily involves arbitration and the special master, making any sort of private litigation likely to draw a motion to compel arbitration.²¹⁷

As such, antitrust actions by the athletes themselves face a difficult path at the outset. But the athletes are not the only parties involved in the promulgation of rules restricting their third-party NIL deals. Indeed, two categories of third parties whose interests have been potentially affected by the revenue-sharing cap come to mind.

The first is the government. In the waning days of the Biden administration, the Justice Department submitted a statement of interest to the *House* docket arguing that the settlement merely “replaces an agreement among competitors to cap compensation for use of college athletes’ NIL at \$0 with an agreement among competitors to cap compensation at 22% of average revenue” and thus “raise important questions about whether the settlement is fair, reasonable, and adequate.”²¹⁸ While the Trump administration did not pick up this attack once taking office,²¹⁹ they could at a later date, and a state Attorney General could make a similar case in litigation. States leading challenges to objectionable rules in college sports is hardly unprecedented; antitrust litigation led by state Attorneys General achieved injunctive relief that forced the NCAA to significantly loosen its restrictions on athlete transfers²²⁰ and abolish rules prohibiting athletes from negotiating NIL deals prior to enrollment.²²¹ Indeed, a statement issued by the Attorneys General of Tennessee, New York, Ohio, Florida, and the District of Columbia in opposition to the SCORE Act argued that the act’s enshrinement of the *House* Settlement “attempts to shield the NCAA from accountability by precluding States from challenging how its new College Sports Commission determines what constitutes

charged with overseeing disputes concerning the injunctive relief).

214 *House* Settlement, *supra* note 4, at art. 6, § 1(c).

215 *See supra* note 48 and accompanying text.

216 *House* Settlement, *supra* note 4, at art. 6, § 3.

217 *Id.*

218 DOJ Brief, *supra* note 205, at 5–8.

219 They did not rescind the brief, but they did not take Judge Wilken up on her offer to speak at the final approval hearing. *See* Order Regarding Hearing on Motion for Final Approval of Proposed Settlement at 2, *In re* College Athlete NIL Litig., No. 20-cv-03919 (N.D. Cal. Mar. 4, 2025), Dkt. No. 723 (noting “Objector the United States” as one of the only objectors the court will call upon during the hearing; no representative for the United States appeared or otherwise spoke at the hearing).

220 *State of Ohio v. NCAA*, 706 F. Supp. 3d 583 (N.D. W.Va. 2023).

221 *State of Tennessee v. NCAA*, 718 F. Supp.3d 756 (E.D. Tenn. 2024).

acceptable third-party NIL payments under the vague ‘reasonable range of compensation’ and ‘valid business purpose’ standards in the new third-party NIL compensation system.”²²²

But while the Justice Department and the states may not feel it necessary to get involved, a third group exists that could certainly feel that their interests are trampled in some regard by the settlement’s revenue share cap: the boosters and collectives identified as “Associated Entities and Individuals” within the settlement terms.²²³ These groups are specifically targeted—both by the settlement itself and by later-issued (and since revoked) CSC guidance²²⁴—with their NIL deals subjected to a stringent clearinghouse prior restraint where their prospective business partner athletes risk losing eligibility if they move forward with a deal that the clearinghouse rejects.²²⁵ And the door is wide open to a claim by these affected entities, as Judge Wilken made clear in a footnote in her final approval order that not only was she declining to opine on the legality of the cap itself, but also that “the question of whether the third-party Associated Entity NIL provisions violate the Sherman Act has not and will not be adjudged.”²²⁶

Even with the “Associated Entities and Individuals” term making the range of NIL deals narrower than it was in the original settlement,²²⁷ including everyone who has ever been a member of an NIL collective or a school’s booster club, the range of affected deals is still quite broad.²²⁸ This, correspondingly, makes the list of potential parties potentially harmed by NIL Go broad as well. And while one might argue that these entities can avoid CSC ire by simply engaging in deals that are within a “reasonable range of compensation” and for a “valid business

222 Skrmetti et al., *supra* note 42, at 3. For discussion of the SCORE Act, *see supra* note 42.

223 *House Settlement*, *supra* note 4, at art. 1, § 1(c).

224 *See supra* notes 47–48 and accompanying text.

225 *See* Ross Dellenger, *Do College Football Coaches Think New Enforcement Arm Will Work? LSU’s Brian Kelly: ‘It Is Not a Slap on the Wrist’*, YAHOO! SPORTS (Feb. 24, 2025), <https://sports.yahoo.com/college-football/article/do-college-football-coaches-think-new-enforcement-arm-will-work-lsus-brian-kelly-it-is-not-a-slap-on-the-wrist-200619854.html> (“Deals rejected for a second time are referred to the CEO and enforcement staff and are then processed through an appeals system via court-overseen arbitration. . . . Athletes who lose arbitration cases and still accept compensation in the rejected deal are deemed ineligible.”).

226 *In re College Athlete NIL Litig.*, 2025 WL 1675820 at *25 n.8.

227 The “Associated Entities and Individuals” term did not exist in the original settlement agreement; the original agreement instead simply used “Boosters (individually or collectively) of a Member Institution,” defining “booster” by incorporating by reference NCAA Bylaws 8.4.2, 13.02.16, and 13.02.16.1. *See* Settlement Agreement at art. 1, § 1(c), art. 4, § 3(a), *In re College Athlete NIL Litig.*, No. 20-cv-03919 (N.D. Cal. July 26, 2024), Dkt. No. 450-3. Such a broad definition—and an lack the right to appeal through neutral arbitration (rather than to the NCAA)—was objectionable to Judge Wilken, and the parties amended the settlement accordingly. *See* Pl. Supp. Br. in Support of Motion for Preliminary Settlement Approval at 1, *In re College Athlete NIL Litigation*, No. 20-cv-03919 (N.D. Cal. Sept. 26, 2024), Dkt. No. 534.

228 *House Settlement*, *supra* note 4, at art. 1, § 1(c)(a–b) (including any “individual who is or was a member, employee, director, officer, owner, or agent of” an entity that exists “in significant part” to either “promot[e] or support[] a particular Member Institution’s intercollegiate athletics program or student-athletes; and/or creating or identifying NIL opportunities solely for a particular Member Institution’s student-athletes”).

purpose" (i.e., not pay-for-play), that goes against the very nature of many of these individuals' and entities' interests (they want to continue to serve their favored schools by incentivizing the most talented athletes to go there) and the very purpose of the Sherman Act, free and open competition. Importantly, these boosters were not parties to the *House* litigation, nor were they class members. Thus, they may not be bound by the *House* Settlement's arbitration provisions and could initiate their own lawsuits challenging the settlement's legality—namely, its restraints on their ability to participate in the market for college athlete's NIL.²²⁹ One quoted personnel director stated definitively that "[i]f you tell a booster or business owner they can't give a star player \$2 million, there will be lawsuits."²³⁰

As such, it is clear that the CSC's authority will be tested—and tested soon. And whether that authority is properly given or properly used is not the only potential legal issue that may soon face the CSC. After all, the CSC and NIL Go model do not just introduce a new compliance framework for college sports. They also shift that compliance model into a new age of *algorithmic pricing coordination and enforcement*—an area where the CSC does not stand alone.

IV. CONCLUSION

It is crystal clear that the CSC and the NCAA were prepared for the inevitable legal challenges of their new revenue-sharing system. They hired experienced lawyers with management experience in professional sports, built out a complex enforcement apparatus, and attempted to preempt legal risk by embedding arbitration clauses, waiver agreements, and state-law workarounds into the very structure of the settlement.

But the clarity of their own exposure does not insulate their institutional partners. On the contrary, general counsels at universities now face the difficult task of navigating this new compliance regime in a legal environment where algorithmic price coordination—particularly when backed by enforcement threats and group pressure—sits squarely in the crosshairs of regulators and plaintiffs' attorneys. And if NIL Go is ultimately found to be an illegal hub-and-spoke conspiracy, universities may not be able to hide behind the settlement's structure or point fingers at the CSC—they may instead find themselves as spokes held liable for participating in the wheel.

For general counsel at participating institutions, the most immediate risk is not just litigation—it is embedded liability within the everyday administration of NIL deals. By signing settlement participation agreements, compelling athletes to submit contracts to NIL Go, and enforcing the CSC's determinations internally, universities are no longer passive observers of a centralized compliance model. They are active participants. Each decision to approve, deny, or discipline based on an algorithmic "reasonable range of compensation" determination could be framed as evidence of a coordinated scheme—particularly if enforcement is

229 A Sherman Act claim is just one of many that might be available to boosters. There are a number of state law claims that they could make, including tortious interference with a contract and state unfair competition laws.

230 Williams, *supra* note 44.

shown to align across institutions or was undertaken in reliance on confidential data circulated through the CSC. Even absent a formal agreement between schools, plaintiffs could plausibly argue that the structural pressure and mutual commitments among member institutions amount to a horizontal understanding with market-restraining effects.

The full legal implications of NIL Go—and of algorithmic compliance more generally—are still unfolding. What is clear, however, is that the convergence of sensitive pricing data, centralized enforcement, and algorithm-driven decision-making presents novel risks that extend well beyond traditional NCAA compliance models. For now, the CSC and its affiliated vendors remain the focal point of those concerns. But the broader use of algorithmic pricing and benchmarking tools in college sports—whether in NIL administration, scholarship allocation, or internal budget modeling—may eventually draw similar scrutiny.²³¹ University general counsels would be well advised to treat NIL Go not as an isolated development but as an early example of a compliance landscape increasingly shaped by opaque logic and shared data.

231 Although this article has focused primarily on the centralized enforcement architecture created by Deloitte, NIL Go, and the CSC, another potential algorithmic antitrust concern may lie in the institutional-level tools as well: the GM software tools that help athletic departments determine how to allocate their own revenue-share budgets. These companies offer software products that use data from opt-in peer institutions to generate athlete-specific compensation recommendations—which perhaps may even be more fitting the RealPage litigation model. *See, e.g., Basepath Introduces New Technology: Basepath General Manager*, BASEPATH (June 6, 2024), <https://basepath.com/basepath-introduces-new-technology-basepath-general-manager/> (advertising the software as providing insights on “fair market value” using “aggregated NIL contract data”); *Help: NIL Benchmarks*, TEAMWORKS GENERAL MANAGER, <https://help.teamworks.com/generalmanager/s/article/NIL-Benchmarks> (last visited June 25, 2025) (“General Manager’s new NIL Benchmarks leverages de-identified NIL transaction data—not estimates or self-reported numbers. Our NIL Benchmarks are based on actual dollars paid through Teamworks and Basepath—the most widely used NIL platforms in college athletics. This makes it the most accurate and reliable NIL market data available.”). It is not believed that these platforms are designed to enforce any sort of compliance with price fixing—which may very well position the developers and their users outside of any antitrust risk. *See Gibson v. Cendyn Group*, No. 23-cv-00140, 2024 WL 2060260 (D. Nev. 2024). *See also supra* notes 172–75 and accompanying text. However, the fact they employ competitively sensitive nonpublic data to give pricing recommendations is still potentially problematic should the antitrust landscape shift in the future. Full identification of these risks is better suited for future research when more information is known, both on how these software tools are proliferated and operated and on how future courts will treat the sharing of nonpublic competitively sensitive data for pricing recommendations (rather than pricing fiats) moving forward.

NIL AND VOID:
A Legal Analysis of College Athletes'
Broadcast Rights of Publicity as Created by
the House Settlement

JAMES NUSSBAUM*

Abstract

The landscape of collegiate athletics continues to change. For the first time, colleges and universities are able to compensate athletes directly for their names, images, and likenesses (NILs) including as used in broadcasts. However, the legal justification for payments for such "broadcast NIL" payments is thin and therefore appears to be an attempt to preserve the ill-fated concept of amateurism.

* Partner and chair of the higher education practice group at Church Church Hittle + Antrim. He completed his Bachelor of Arts in economics and political science from Northwestern University and his J.D. from the Indiana University Robert H. McKinney School of Law. James can be contacted at jnussbaum@cchalaw.com.

TABLE OF CONTENTS

INTRODUCTION.....	133
I. NCAA AMATEURISM AND RIGHTS OF PUBLICITY	134
II. EVOLUTION OF RIGHTS OF PUBLICITY LAW RELATED TO PERFORMANCES AND BROADCASTS	136
A. THE FIRST AMENDMENT DOES NOT PROTECT THIRD PARTIES' BROADCASTS	136
B. THE FIRST AMENDMENT DOES NOT PREEMPT COLLEGE ATHLETES' RIGHTS OF PUBLICITY CLAIMS FOR USE OF THEIR NIL IN VIDEO GAMES	137
C. BROADCAST NIL IS NOT A RIGHT FOR COLLEGE ATHLETES	139
III. BNIL AND THE HOUSE SETTLEMENT	142
IV. CONCLUSION.....	142

INTRODUCTION

Many American colleges and universities have rich histories and traditions that date back hundreds of years. One of the longest-standing and most widely known of all collegiate traditions has been the adherence of collegiate athletics to the principle of amateurism, or the idea that college athletes cannot be compensated for their athletic performance. Over the last decade, numerous current and former student-athletes have sought to chip away at the tradition of amateurism, both through the legal system and in the court of public opinion.

On June 6, 2025, Judge Claudia Wilken of the Northern District Court of California granted final approval of a settlement agreement in *In re: College Athlete NIL Litigation* (the House Settlement).¹ The plaintiffs in *House* challenged NCAA (National Collegiate Athletic Association) and athletics conference rules restricting and prohibiting college athlete compensation for the use of their name, image, or likeness (NIL), including in broadcasts.² NIL, however, is not a legally cognizable right, but rather an NCAA-created reworking of athletes' rights of publicity.³

The House Settlement included a framework related to the future use of student-athletes' rights of publicity, including those related to compensation for participation in broadcast athletics events.⁴ The House Settlement created a new label for rights of publicity related to broadcasts: broadcast NIL or BNIL. However, the House Settlement does not disturb the long-standing prohibition on colleges and universities compensating athletes directly for their participation in athletics.⁵ Instead, the settlement's framework provides that compensation from colleges and universities directly to athletes must be in exchange for the use of their rights of publicity. In other words, higher education institutions may directly compensate athletes for their athletics participation indirectly. Further, such compensation is subject to a "cap" calculated as a percentage of average revenue of specific high-level athletics departments (the House Settlement Cap).⁶ Finally, some third parties may only compensate athletes for use of their rights of publicity if the amount paid

1 *In re: College Athlete NIL Litigation*, Opinion and Order Granting Final Approval to Settlement, No. 979, N.D. Cal., June 6, 2025. *In re: College Athlete NIL Litigation* was the consolidation of three different antitrust cases (*House v. NCAA*, *Hubbard v. NCAA*, and *Carter v. NCAA*) brought by student-athletes alleging antitrust violations by the NCAA. To avoid confusion with *In re: Student-Athlete Name & Likeness Licensing Litigation*, this article will refer to *In re: College Athlete NIL Litigation*, as *House* or the House Settlement. Notably, the allegations in *Carter v. NCAA* focused on restrictions on pay-for-play unrelated to NIL, yet the case was still consolidated and settled with the other cases related to NIL specifically.

2 *In re: College Athlete NIL Litig.*, No. 4:20-cv-03919, at 1 (N.D. Cal. June 6, 2025).

3 NCAA, *2024–2025 NCAA Division I Manual* 47 (2025).

4 *In re: College Athlete NIL Litig.*, at 1.

5 *Id.* at 12.

6 *Id.* at 11.

to the athlete is for a valid business purpose and within a reasonable range of compensation as determined by a third party administrator, Deloitte.⁷

The House Settlement allows colleges and universities to pay athletes to ultimately license broadcasts of athletics competitions the athletes participate in but not for participation in those athletics competitions. While this seems nonsensical on its face, an analysis of the jurisprudence surrounding athletes' rights of publicity in athletics broadcasts demonstrates that the athletes may not even have a legal right to the broadcasts in which they participate. Accordingly, this article will analyze the legal basis for compensating college athletes for their rights of publicity in athletics broadcasts and will address whether BNIL can preserve the concept of amateurism.

I. NCAA AMATEURISM AND RIGHTS OF PUBLICITY

The right to publicity has long been a convoluted and evolving legal concept, marked by inconsistent interpretations across jurisdictions, differing state statutes and rationales, and uncertainty about its scope and application. Publicity rights originally stemmed from the broader concept of the right to privacy, famously described by Samuel Warren and Louis Brandeis in their 1890 *Harvard Law Review* article concerning the "right to be let alone."⁸ While Warren and Brandeis laid the groundwork for protections against unauthorized publication of private facts and images, in 1953, the Second Circuit advanced this concept by recognizing that individuals have not only the right to control the commercial use of their identity but also to profit from it. Judge Jerome Frank coined the term "the right to publicity" in the landmark case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, which he articulated as an intellectual property right to one's public persona.⁹

The NCAA has long limited participation in its events to amateur athletes, issuing strict penalties to athletes found to have violated this principle. However, what constitutes "amateur" has evolved over time.¹⁰ Decisions regarding amateurism are not always as simple as the binary determination of whether the athlete is compensated for participation in athletics. *Bloom v. NCAA* demonstrates how the definition of amateurism can be applied expansively, especially as related to rights of publicity.¹¹

Jeremy Bloom was recruited to play football at the University of Colorado beginning in the fall of 2002. At the time of his recruitment, Bloom competed professionally, became a world champion skier, and entered into paid endorsement and entertainment agreements. Bloom was concerned that these agreements might interfere with his ability to play NCAA-sanctioned football. Through the

7 *Id.* at 47.

8 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

9 202 F.2d 866, 868 (2d Cir. 1953).

10 For an in-depth review of this evolution, see Eric Moyen & John R. Thelin, *College Sports: A History* (2024).

11 93 P.3d 621, 625 (Colo. App. 2004).

University of Colorado, he asked the NCAA to waive the applicability of rules restricting athletes from receiving compensation from such agreements. The applicable rule stated,

Subsequent to becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.¹²

The NCAA denied Bloom's requests, and he filed suit seeking declaratory and injunctive relief from the relevant NCAA amateurism rules.¹³

In other words, according to the NCAA, Bloom was no longer an amateur, and therefore was prohibited from participating in NCAA athletics, because he had profited from his NIL. The NCAA made this determination, even though the value of Bloom's NIL was derived from his success as a skier and unrelated to his potential as a collegiate football athlete because it was not "independent of athletics ability."¹⁴ The court denied Bloom's requests for relief and succinctly stated, "The clear import of the bylaws is that, although student-athletes have the right to be professional athletes, they do not have the right to simultaneously engage in endorsement or paid media activity and maintain their eligibility to participate in amateur competition."¹⁵ Ultimately, the Colorado Court of Appeals agreed with the trial court that the legitimate purpose of the NCAA bylaws was to preserve the "clear line of demarcation between intercollegiate athletics and professional sports."¹⁶

The case stands as an example of how the NCAA created a national standard that prohibited college athletes from profiting from common law and state law rights of publicity. While rights of publicity are not always clear and consistent, the NCAA's prohibition on monetizing rights of publicity has been.¹⁷

12 NCAA, *supra* note 3, at 50.

13 Bloom argued that he was a third-party beneficiary of a contract between the NCAA and its members, that the NCAA's restrictions were arbitrary and capricious, and that the restrictions constituted unconscionable restraints on trade. *Bloom*, 93 P.3d at 622.

14 NCAA, *supra* note 3, at 49.

15 *Bloom*, 93 P. 3d at 626.

16 *Id.*

17 While unrelated to rights of publicity, the NCAA has faced other attacks to its amateurism rules that ultimately led to the House Settlement. Most notably, in 2021, the U.S. Supreme Court decided *National Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 106, 141 S. Ct. 2141, 2165, 210 L. Ed. 2d 314 (2021) and concluded that the NCAA's rules prohibiting colleges and universities from providing educational benefits to athletes violated antitrust law.

II. EVOLUTION OF RIGHTS OF PUBLICITY LAW RELATED TO PERFORMANCES AND BROADCASTS

A. *The First Amendment Does Not Protect Third Parties' Broadcasts*

How rights of publicity interact with the constitutional requirements of the First Amendment is not clear and differs depending on statute and jurisdiction. In 1977, the Supreme Court for the first and, to date, only time addressed the interplay of the First Amendment and rights of publicity; specifically, whether the First Amendment immunized a media provider from damages for allegedly infringing on a performer's state law right of publicity.¹⁸ The plaintiff, Zacchini, was a performer of a "human cannonball" act at a county fair in Ohio, producing the show himself for the interested public to observe.¹⁹ After being asked not to film the performance, a freelance reporter for the defendant recorded the entire fifteen-second act, which was then featured later that night in its entirety on a news broadcast.²⁰ Zacchini brought suit, alleging that the broadcaster showed and commercialized the film of his act without his consent.²¹

The Court reasoned that the broadcasting of Zacchini's entire act posed a substantial threat to the economic value of his performance. The Court reasoned that broadcasting the entire performance was different from simply showing Zacchini's picture or telling a story about the performance and that Zacchini's right of exclusive control over the publicity given to the performance was fundamental to Zacchini's ability to earn a living as an entertainer.²² The Court acknowledged another consideration for protecting Zacchini's right of publicity: the economic incentive for him to make the required investment for producing a performance of interest to the public.²³ Therefore, the Court concluded, protecting producer's rights would encourage productions that would ultimately benefit the public only if those production rights could not be usurped by broadcasters via the First Amendment.²⁴ Indeed, Zacchini was not seeking to prevent any broadcast of his performance; he wanted to be compensated for the right to such broadcast.²⁵

In 2011, the Seventh Circuit Court of Appeal applied *Zacchini* to reject the theory that coverage and broadcast are identical.²⁶ In *Wisconsin Interscholastic*, the Wisconsin Interscholastic Athletic Association (WIAA) sought a declaratory judgment stating that it had the right to grant exclusive licenses for broadcasting

18 *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977).

19 *Id.* at 563.

20 *Id.* at 564.

21 *Id.*

22 *Id.*

23 *Id.* This rationale underlies copyright laws that encourage production of works of benefit to the public. *Id.* at 577.

24 *Id.* at 577.

25 *Id.* at 578.

26 *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co., Inc.*, 658 F.3d 614, 616 (7th Cir. 2011).

its athletics tournaments. Gannett, a newspaper company, had streamed entire games without obtaining consent or paying a fee to the WIAA for licensing rights for the broadcasts.²⁷ Gannett argued that WIAA's status as a state actor prohibited it from entering into exclusive contracts with private companies for the purpose of broadcasting entire events online to raise revenue.²⁸ The trial court entered summary judgment for WIAA, and Gannett appealed.

The court rejected Gannett's argument. First, the court established that WIAA was the creator and disseminator of the content at issue.²⁹ Next, the court drew two conclusions from *Zacchini* for this case: It distinguished between the media's First Amendment right to "report on" an event and its lack of a right to broadcast an "entire act" while also making clear that the producer of entertainment is entitled to charge a fee in exchange for consent to broadcast.³⁰ Simply put, "the First Amendment does not give the media the right to appropriate, without consent or remuneration, the products of others."³¹ The court emphasized that WIAA's policy did not prohibit media coverage of its events, impose excessive fees for access, or require prepublication review of content—factors that, if present, might have altered the constitutional analysis.³² The Seventh Circuit Court of Appeals ultimately affirmed the grant of summary judgment in WIAA's favor.³³

Both *Zacchini* and *Wisconsin Interscholastic* stand for the proposition that producers of broadcasts have certain rights related to their broadcasts, including a right to benefit from their broadcasts. However, neither case creates an independent right of publicity for the use of one's participation in a broadcast, that is, a BNIL right.

B. The First Amendment Does Not Preempt College Athletes' Rights of Publicity Claims for Use of Their NIL in Video Games

In the late 2000s, courts around the country began hearing cases related to the use of college athletes' likenesses in popular media platforms such as broadcasts and video games. One of these cases began when Ed O'Bannon, a former basketball student-athlete at UCLA, discovered a virtual version of himself in a college basketball game. O'Bannon neither consented to the use of his likeness in the game, nor did he agree to any terms of compensation; he subsequently brought suit against the game's developer in federal court.³⁴

While the gravamen of O'Bannon's complaint in *O'Bannon v. National Collegiate Athletic Ass'n* rested on the NCAA's amateurism rules, which prevented college

27 *Id.* at 615.

28 *Id.* at 616.

29 *Id.* at 624.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 629.

34 See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (summarizing procedural history of the previous cases).

athletes from being compensated for their NIL, and the fact such rules are an illegal restraint on trade under the Sherman Act,³⁵ the Ninth Circuit Court of Appeals briefly addressed student-athletes' right of publicity. The NCAA argued that any right-of-publicity claim arising from the use of NIL in sports video games would be preempted by the Copyright Act and the First Amendment.³⁶ But the court declined to consider the NCAA's arguments, reasoning that such a conclusion was improper for a case hinging on an antitrust violation inquiry.³⁷ After concluding that the plaintiffs had established injury in fact as a result of the NCAA rules foreclosing the market for their NILs in video games, the Ninth Circuit clarified the holding would not reach "the thornier question[] of whether participants in live TV broadcasts of college sporting events have enforceable rights of publicity"³⁸

O'Bannon avoided the First Amendment implications of student-athletes' right of publicity, specifically choosing not to address whether broadcasts create rights of publicity. But two years prior, the Ninth Circuit Court of Appeals directly addressed the matter in a case balancing a video game developer's First Amendment protection with a former athlete's right to publicity over the use of their NIL.³⁹

In a series of lawsuits relating to the aforementioned suit filed by Ed O'Bannon, former college quarterback Samuel Keller brought suit against Electronic Arts, a video game developer, when he discovered an identical, virtual avatar of himself on an NCAA game.⁴⁰ Similar to how it treated O'Bannon, Electronic Arts did not attempt to license or even ask for Keller's consent to use his NIL in the game.

In response to the lawsuit, Electronic Arts raised four affirmative First Amendment defenses, asking the court to balance its constitutional rights with Keller's right to publicity under California common and statutory law.⁴¹

First, the Ninth Circuit determined that Electronic Arts had no First Amendment protections under California's "transformative use" test because the game depicted Keller in the performance of the same activity for which he was known in real life—playing football—taking place in depictions of actual football stadiums that are

35 *See id.* at 1067 (arguing compensation rules foreclosed market for athletes' NILs in video games and therefore violated Sherman Act because, absent NCAA's compensation rules, video game makers would have negotiated with student-athletes for right to use their NILs).

36 *Id.* at 1068. In a footnote, the Ninth Circuit addressed the First Amendment preemption claim by referring to a previous case that held the "[NCAA] games at issue ... do not sufficiently transform [student-athletes'] identities to escape a right of publicity claim." *Id.* at 1068 n.13 (quoting *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013)).

37 *Id.* at 1069 ("[T]he NCAA's argument about the Copyright Act, even if correct, is irrelevant to whether the plaintiffs lack standing.").

38 *Id.* at 1067.

39 *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

40 *Id.* at 1272.

41 *Id.* at 1273 ("[Defendant] raises four affirmative defenses derived from the First Amendment: the 'transformative use' test, the *Rogers* test, the 'public interest' test, and the 'public affairs' exemption.").

virtually identical to where the public saw Keller during his collegiate career.⁴² Second, the court rejected Electronic Arts' argument that the need to avoid consumer confusion was outweighed by the public interest in free expression.⁴³ Third, the court responded to Electronic Arts' state-law defenses: the common law defense protecting "publication and reporting" of newsworthy items, and the statutory defense to "broadcasts or accounts of public affairs."⁴⁴ The rationale behind both defenses is the substantial public interest in statistics, events, and people involved with sports. The court rejected this argument, concluding that Electronic Arts was not publishing and reporting data.⁴⁵ The fact that the virtual avatars did not include real names further supported the court's conclusion: A video game using collegiate athletes' NIL does not qualify for the same protection as a broadcast. Simply put, "it is a game, not a reference source."⁴⁶

C. *Broadcast NIL Is Not a Right for College Athletes*

The Ninth Circuit Court of Appeals' attempt to clear the air on BNIL was short lived. In the same series of litigation, the Northern District of California further complicated the BNIL question in 2014 when a group of current and former college athletes brought an antitrust class action suit against the NCAA.⁴⁷ The plaintiffs alleged the NCAA restrained competition in the "group licensing" market.⁴⁸ They alleged the current group licensing market allowed anticompetitive practices where broadcasters and videogame developers compete for group licenses to use athlete NIL on particular Division I football and basketball teams in live game broadcasts, archival footage, and videogames.⁴⁹ Plaintiffs specifically argued that the NCAA restrains competition by preventing Division I schools from offering their recruits a portion of the revenue they receive from football- and basketball-related broadcast and videogame licenses. Further, the plaintiffs also pursued compensation for the unauthorized use of student-athletes' NILs in broadcast footage and videogames.⁵⁰ Notably, the plaintiffs blurred the lines between broadcast licenses and licenses for video games, seeming to conflate a producer's ability to prohibit third parties from broadcasting its events with the individual participants' NIL rights for subsequent creations such as video games.

The Northern District of California first addressed plaintiffs' assertion that, absent NCAA restraints, the athletes would be able to assert right-of-publicity claims against broadcasters. Citing *Zacchini*, the court reasoned that the First Amendment does not guarantee media organizations an "unfettered right" to broadcast entire

42 *Id.* at 1276 (citing *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011)).

43 *Id.* at 1279–80 (explaining the *Rogers* test).

44 *Id.* at 1282.

45 *Id.*

46 *Id.* at 1283.

47 *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126 (N.D. Cal. 2014).

48 *Id.* at 1134.

49 *Id.*

50 *Id.*

sporting events without considering the athletes' rights of publicity.⁵¹ The court further found that absent NCAA restrictions, the student-athletes would have an economic interest in being able to sell licenses for the rights to broadcast their games, thereby countering the broadcaster's ability to "undermine" the athletes' economic interests.⁵² The decision noted that the student-athletes' economic interests are "determined by the value their athletic performances would have in an unrestrained market—not by their value in a market from which they have been allegedly excluded."⁵³

Referring to *Wisconsin Interscholastic*, the court concluded that the First Amendment does not guarantee media organizations an unlimited right to broadcast entire collegiate sporting events.⁵⁴ The court could not reconcile that the First Amendment would allow the NCAA to restrict press access to college football and basketball games through exclusive licensing agreements but, at the same time, prohibit student-athletes from doing the same through right-of-publicity actions.⁵⁵ Based on *Zacchini*, the court stated that publicity rights of "promoters" and "participants" in sporting events are virtually equal under the First Amendment.⁵⁶ The court concluded that *Zacchini* and *Wisconsin Interscholastic* make clear that the First Amendment does not create a right to broadcast entire athletic performances without obtaining a license or consent from all parties who hold valid ownership rights.⁵⁷ The implication is, of course, that being without NCAA restrictions on student-athlete compensation, the athletes would have ownership rights in the broadcasts they participate in, and broadcasters would need to obtain licenses or consent directly from the athlete participants. Therefore, under the rationale of this court, college athletes could sell group licenses to use their NILs in live or recorded full broadcasts of entire games.⁵⁸

However, where the Northern District of California's opinion painted an optimistic picture for future student-athletes, *Marshall v. ESPN Inc.* rejected such a framework.⁵⁹ Further, *Marshall* seems to have more accurately applied the relevant case law in determining that there is not a recognized college athlete BNIL right.

The lawsuit in *Marshall* started as a putative class action brought by current and former student-athletes seeking recovery from several athletic conferences,

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.* at 1142 ("[I]f the First Amendment did guarantee such a right, then it would cast doubt on the NCAA's ability to issue exclusive licenses to specific broadcasters.").

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* at 1145. The opinion did not conclude the same for broadcasts with highlights or partial clips from games. *Id.* ("[T]he Court can neither summarily adjudicate that the First Amendment precludes a market for clips and highlight footage nor can it conclude that, absent the challenged restraint, such a market would actually exist.")

59 111 F. Supp. 3d 815 (M.D. Tenn. 2015).

broadcasters, and licensing agencies who allegedly profited from the broadcast and use of the athletes' NIL without permission.⁶⁰ The court found no applicable authority for participants in sporting events having a common law right to publicity in broadcasts.⁶¹ The sole exception, the court pointed out, was the Northern District of California's ruling from 2014. Choosing to limit the scope of that ruling, the court concluded that "[t]he only value that case has ... is that there *might* be a right of publicity under Minnesota law for sports broadcast, itself a dubious proposition given a more recent interpretation of that state's caselaw."⁶² The court further stated that the Northern District of California's opinion as it related to whether the First Amendment protected broadcasts from rights-of-publicity claims was "clearly *dicta*."⁶³

Marshall then took another jab at the applicability of the Northern District of California's opinion, reasoning that, based on *Zacchini* and *Wisconsin Interscholastic*, just because the First Amendment does not guarantee unlimited broadcast rights does not mean that it also establishes a right to publicity by athletic participants when entire games are broadcast.⁶⁴ In other words, where the First Amendment may act as a shield for producers against third-party attempts to broadcast their events, it does not act as a sword for participants in the events who wish to create a BNIL right. The primary difference between *Zacchini* and *Marshall*, according to the court, is that the plaintiff in *Zacchini* was the performer *and* producer—a "one-man show"—which provided him the right to prohibit third-party broadcasts under the law so he could produce a performance of interest to the public.⁶⁵ Inferring that *Wisconsin Interscholastic* was not applicable here because it involved a violation of an exclusive licensing agreement, the court borrowed some of its language: "*Zacchini* makes clear that the producer of entertainment is entitled to charge a fee in exchange for consent to broadcast; the First Amendment does not give the media the right to appropriate, without consent or remuneration, the products of others."⁶⁶

These cases emphasize that courts are primarily interested in compensating producers for their product, that is, the broadcast. The cases are not concerned with compensating the performers in broadcasted events, but rather the events' producers because the producers are orchestrating the performance for the interested public.⁶⁷ The courts distinguish broadcasting from reporting to ensure the

60 *Id.* at 820.

61 *Id.* at 825–26 (citing cases from decisions in Minnesota, Florida, and California).

62 *Id.* at 826.

63 *Id.*

64 *Id.* at 828 ("[J]ust as with all cases, *Zacchini* and *Wisconsin Interscholastic* must be read in context and, when so read, are inapposite.").

65 *Id.* at 828–29 ("It is a mistake ... to read *Zacchini* as supporting a right of publicity by anyone who performs in an event produced by someone else.").

66 *Id.* (quoting *Wis. Interscholastic Athletic Ass'n v. Gannett Co., Inc.*, 658 F. 3d 614, 624 (7th Cir. 2011)).

67 The court agreed with the Northern District of California on commercial speech; broadcasting sporting events does not merely propose a commercial transaction; rather it depicts and distributes a real event in which the public takes interest. The court then countered plaintiffs' claims about the likelihood of confusion for false endorsement claims, finding it "implausible" to infer an athlete

producer of the broadcast benefits from its own production while protecting First Amendment rights to reports on newsworthy events. The *Marshall* opinion firmly stated there is no common law right of publicity for college athletes appearing on broadcasts in virtually all jurisdictions in the United States.

III. BNIL AND THE HOUSE SETTLEMENT

As demonstrated by *Marshall* and the vast majority of applicable case law, college athletes do not have a right to BNIL. Nevertheless, the parties in the House Settlement allocated \$1,815,000,000 to compensate former students for the past use of their BNIL.⁶⁸

The injunctive portion of the House Settlement provides that institutions that opt in may provide two new categories of benefits to student-athletes: (1) payments in exchange for the use of their NIL and (2) “compensation” in the form of “direct benefits worth up to 22% of the Power Five schools’ average athletic revenues each year.”⁶⁹ Because the direct benefit amount is calculated as a proportion of athletics revenues, it is being colloquially referred to as “revenue share.” The House Settlement is silent on what consideration the athletes offer in exchange for the revenue share payments.

This may prompt the question, what consideration do the athletes provide for these revenue share payments? Per NCAA rules, the consideration cannot be athletes’ participation in athletics contests.⁷⁰ The parties to the House Settlement might argue that the consideration is the athletes’ BNIL. This would seem to make sense because the vast majority of college athletics revenue is derived from broadcast agreements. But as the legal analysis above demonstrates, these rights are not cognizable. Indeed, the NCAA and defendant conferences have repeatedly argued that rights of publicity related to broadcasts are not cognizable. Furthermore, schools may (and likely will) choose not to compensate all of their athletes with revenue share payments, meaning that some would be compensated for their BNIL and others would not.

The House Settlement’s silence on revenue share consideration seems intended to thread the needle of compensating athletes while preserving the NCAA’s amateurism model. However, to the extent the silence is filled with BNIL, the legal basis for such an argument is thin at best. Accordingly, the model will likely not withstand judicial scrutiny and is unsustainable without additional legislative action.

IV. CONCLUSION

Forty years ago, the Supreme Court stated, “The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports.”⁷¹ Now,

is endorsing a product when, for example, an advertisement is shown while they are at the free throw line.

68 *In re: College Athlete NIL Litig.*, No. 4:20-cv-03919, at 11 (N.D. Cal. June 6, 2025).

69 *Id.* at 8.

70 NCAA, *supra* note 3, art. 12.

71 NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

the NCAA and defendant conferences in the House Settlement have agreed to pay nearly \$2 billion for former-athletes' BNIL, a right that is not clearly recognized by the law. Further, colleges and universities can share a percentage of revenues, including broadcast revenue, directly with student-athletes. Yet again, the "NCAA [has] couch[ed] its arguments for not paying student athletes in innocuous labels."⁷² Whether it is with NIL, BNIL, revenue share, or any other label, the fundamental quid pro quo between higher education institutions and students participating in athletics is most closely analogous to a producer compensating a performer. Accordingly, the NCAA and its member institution should prepare for a landscape where that reality is recognized and regulated in compliance with all applicable law.

72 NCAA v. Alston et al., Nos. 20–512, 20–520 at *3 (U.S. June 21, 2021).

THE COLLEGE ATHLETE–EMPLOYEE: FLSA and the End of Amateurism

SCOTT D. SCHNEIDER* AND RACHEL E. ROLF**

Abstract

As the legal and economic premises of National Collegiate Athletic Association (NCAA) amateurism collapse, Division I college athletics has reached an inflection point: At least some scholarship athletes—especially in revenue sports—may be deemed employees. This article uses the Fair Labor Standards Act (FLSA) as the clearest vehicle for assessing what that shift would mean in practice. Antitrust litigation, name, image, and likeness reforms, and the House v. NCAA settlement have changed who can pay athletes and how; the unresolved question is whether and to what extent athletic participation will be treated as work under wage and hour laws—how to define compensable time (training, travel, “voluntary” activities), calculate overtime, and design lawful compensation structures.

Drawing on the Third Circuit’s decision in Johnson v. NCAA, the article develops a workable framework for (1) determining employee status under the FLSA, (2) identifying the relevant employer(s) in the fragmented governance structure of college sports under joint-employment principles, and (3) operationalizing compliance inside athletic departments that have never been built to run timekeeping and payroll for athletes. It then identifies a major downstream consequence: classifying athletes as employees helps clarify Title IX treatment of direct institutional payments by situating those payments within Title IX’s employment-compensation framework rather than the proportionality rules governing athletic financial aid.

The article concludes that athlete–employee status under the FLSA is not only doctrinally plausible but increasingly difficult to avoid given the commercial realities of modern college sports. While the compliance burdens are substantial, the employment frame offers a more legally defensible—and administrable—structure for athlete compensation at the moment the “student-athlete” construct can no longer do the doctrinal work the industry demands.

* Scott Schneider, J.D. is the founder and owner of Schneider Education & Employment Law in Austin, Texas. He is also an adjunct professor at the University of Texas School of Law. Email: scott@eduemplaw.com.

** Rachel Rolf, J.D. is an Assistant Professor of Business at Peru State College and Counsel at Schneider Education & Employment Law. Email: rrolf@peru.edu; rachel@eduemplaw.com.

TABLE OF CONTENTS

INTRODUCTION.....	147
I. THE COLLAPSE OF AMATEURISM	147
II. EMPLOYEE STATUS UNDER THE FLSA	151
III. WHO IS THE EMPLOYER? THE FRAGMENTED STRUCTURE OF COLLEGE SPORTS.....	154
A. THE UNIVERSITY'S ROLE.....	156
B. THE CONFERENCE'S ROLE.....	157
C. THE NCAA'S ROLE.....	158
D. MEDIA AND CORPORATE PARTNERS.....	159
E. PARALLELS IN OTHER INDUSTRIES.....	161
IV. FLSA COMPLIANCE: WHAT WOULD IT LOOK LIKE?.....	162
A. WORK HOURS ACCOUNTING.....	163
B. OVERTIME AND MINIMUM WAGE CONSIDERATIONS.....	165
C. EXEMPTIONS AND SPECIAL CHALLENGES.....	168
D. COMPLIANCE INFRASTRUCTURE.....	170
V. CONSIDERATIONS AND IMPLICATIONS FOR EMPLOYEE STATUS UNDER FLSA.....	172
A. TITLE IX IMPLICATIONS OF ATHLETE COMPENSATION	173
B. LEGAL AND PRACTICAL IMPLICATIONS ON OTHER EMPLOYMENT LAWS	175
C. FEDERAL LEGISLATION	175
VI. CONCLUSION.....	176

INTRODUCTION

As the legal scaffolding of amateurism collapses, National Collegiate Athletic Association (NCAA) Division I college athletics appears to be rapidly moving toward an employment model for at least some of its athletes. This article takes that shift as a starting point and focuses narrowly on the Fair Labor Standards Act¹ (FLSA) to illustrate the legal and factual complications that arise if/when athletes are treated as employees.

Among the statutes that could shape the athlete–employment relationship, the FLSA offers the most direct vehicle for assessing what employee status would mean in practice. If athletes are covered, institutions would confront an array of compliance questions—whether minimum wage and overtime provisions apply, how to calculate compensable hours for practice, travel, and training, and whether athletics scholarships can be credited toward wage obligations.

This article proceeds in five parts. Part I traces the collapse of the amateurism model through case law and policy shifts. Part II examines the emerging legal framework for athlete–employment status under the FLSA. Part III analyzes the fragmented structure of college sports to identify potential employers under joint-employment principles. Part IV explores the practical challenges of FLSA compliance in the athletics space, if athletes are deemed employees. Part V considers one perhaps unintended consequence of recognizing athletes as FLSA employees: reframing (and in some respects simplifying) a recurring Title IX question regarding the treatment of direct payments to male and female athletes by schools using institutional dollars in the wake of the *House v. NCAA*² settlement agreement as well as touches on the interplay with other employment laws and future legislative initiatives.

I. THE COLLAPSE OF AMATEURISM

For most of the last century, the NCAA’s model of “amateur” college athletics rested on a fundamental premise: Studentathletes are students first, not employees.³ The very term “student-athlete” was coined in the 1950s as a deliberate legal defense against employee classification.⁴ Walter Byers, the NCAA’s first executive director, admitted the term was designed to “offset any tendencies for state agencies or other governmental departments to consider a grant-in-aid holder to be an employee.”⁵ For decades, courts and the public largely accepted the romantic idea that athletics

1 Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2022).

2 *House v. NCAA*, No. 4:20-cv-03919-CW, 2025 WL 3751003 (N.D. Cal. June 27, 2025) (order granting final approval of settlement).

3 See Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69, 79–82(2021); NCAA DIVISION I MANUAL § 12.01.2 (2020).

4 WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69–71 (1995).

5 *Id.*

scholarships and educational opportunity were ample compensation for a student-athlete's participation in intercollegiate athletics and that the "revered tradition of amateurism" justified strict prohibitions on athlete pay.⁶

However, as college sports morphed into a multibillion-dollar enterprise,⁷ the claim of amateurism began to erode. In *NCAA v. Board of Regents*, the Supreme Court, in dicta, famously acknowledged amateurism as defining college sports' uniqueness.⁸ Yet by 2015, Judge Claudia Wilken, sitting on the federal bench of the Northern District of California, observed in *O'Bannon v. NCAA* that the NCAA itself lacked any consistent definition of amateurism over time.⁹ Rules had evolved to allow myriad forms of compensation to athletes (Olympic bonuses, stipends for cost-of-attendance, etc.), undermining the NCAA principle that college athletes must remain entirely uncompensated to be eligible to participate as amateurs. The reality, according to Judge Wilken, had become that amateurism is whatever the NCAA says it is at any given moment, often carved out when convenient to preserve the college sports machine.¹⁰ *O'Bannon*, in turn, opened the door for further antitrust challenges of NCAA rules.

A watershed moment came with *NCAA v. Alston*.¹¹ In *Alston*, the Supreme Court unanimously affirmed lower court decisions enjoining certain NCAA rules limiting education-related benefits on antitrust grounds.¹² Writing for the majority, Justice Gorsuch noted that the NCAA's reliance on the offhand comment in *Board of Regents* as a full-throated endorsement of its unfettered authority to place restrictions on athlete compensation was misplaced. In noting that NCAA amateurism rules do not enjoy any special immunity from the law, Justice Gorsuch observed that college sports are "a massive business" fueled by lucrative multimedia contracts and with coaches, colleges, and conferences reaping enormous profits.¹³ In a blistering concurrence, Justice Kavanaugh went further: "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers

6 See *Alston*, 594 U.S. at 92 (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984); *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

7 Christopher Palmieri, *The Billion Dollar Industry That Has Never Paid Its Money-Makers: The NCAA's Attempt at Compensation Through Names, Images and Likeness*, 37 *TOURO L. REV.* 2391 (2021).

8 See *Bd. of Regents*, 468 U.S. at 102 ("In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like.").

9 See *O'Bannon*, 7 F. Supp. 3d at 1000 (N.D. Cal. 2014) ("[T]he NCAA does not consistently adhere to a single definition of amateurism.").

10 *Id.*; See also TAYLOR BRANCH, *THE CARTEL: INSIDE THE RISE AND IMMINENT FALL OF THE NCAA* (2011).

11 594 U.S. 69 (2021).

12 *Id.* at 107. The athletes also challenged the NCAA's restrictions on pay-for-play compensation in the courts below where the courts determined that those rules continued to have a pro-competitive justification and were not barred under anti-trust law. The athletes did not appeal this adverse ruling to the Supreme Court.

13 *Id.* at 79-80.

a fair market rate. The NCAA is not above the law.”¹⁴ This pronouncement—“the NCAA is not above the law”—became a rallying cry, for those seeking to challenge NCAA rules, including those restricting athlete compensation. Many interpreted Justice Kavanaugh’s concurrence to be an invitation to sue the NCAA.

Almost immediately, the *Alston* decision unleashed new challenges and reforms. In July 2021, under pressure from the looming application of newly enacted state laws designed to allow athletes to profit from their name, image, and likeness (NIL) and still reeling from the unanimity of the *Alston* Court’s refusal to give deference to its rules, the NCAA abandoned its long-standing prohibition on athletes monetizing their NIL in deals involving third parties operating separately from the schools.¹⁵ The NIL era rapidly expanded athletes’ economic rights in the free market: College players could suddenly sign third-party endorsement deals, earn appearance fees, and otherwise profit from their fame—freedoms utterly incompatible with old amateurism ideals—provided schools were not issuing the payments. Shortly after *Alston*, in 2022, numerous college athletes were reported to hold NIL deals topping one million dollars.¹⁶ Lucrative NIL deals were not limited to male athletes. Gymnasts Livvy Dunne and Suni Lee were both reported to have an NIL valuation in excess of one million dollars in 2022.¹⁷ NIL was also reported to influence student-athlete transfer decisions.¹⁸ Top college athletes today function much like professional free agents in a commercial market, making the label “amateur” ring even more hollow.

Challenges to long-held views of employment law soon followed the success of antitrust in challenging the NCAA’s position. In *Johnson v. NCAA*,¹⁹ a groundbreaking case, the Third Circuit held that college athletes could be determined to be employees of their institutions for purposes of the FLSA. The court devised a fact-specific test (discussed below) and pointedly rejected the NCAA’s position that the “tradition” of unpaid play should automatically exempt athletes from coverage under employment laws.²⁰ The Third Circuit noted that the NCAA’s once-“revered” tradition of amateurism was by now “frayed” and insufficient to categorically bar athlete–employee status.²¹ This finding seemingly rebuked earlier decisions like the Seventh Circuit’s 2016 *Berger* case, in which the court had affirmed the district court’s reliance inter alia on NCAA amateurism as a reason

14 *Id.* at 112 (Kavanaugh, J., concurring).

15 NCAA, *Interim Name, Image and Likeness Policy* (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

16 Oliver Hodgkinson, *Top 10 NIL Deals in 2022: Ohio State and Alabama Players at the Forefront of CFB’s Financial Revolution*, COLL. SPORTS NETWORK (Dec. 21, 2022), <https://collegefootballnetwork.com/top-10-nil-deals-in-2022/>.

17 SI.com, *The Biggest NIL Earners in Women’s Sports from 2022* (Dec. 22, 2022), <https://www.si.com/college/2022/12/22/biggest-nil-deals-womens-sports-cavinder-twins-bueckers-dunne>.

18 Hodgkinson, *supra* note 16.

19 108 F.4th 163 (3d Cir. 2024).

20 *Id.* at 174–75.

21 *Id.* at 175.

to dismiss athletes' wage claims under the FLSA.²² In so ruling, the court looked beyond the U.S. Department of Labor's prior interpretation that interscholastic athletics, primarily for the benefit of participants, are extracurricular activities generally excluded from the FLSA.²³ Instead, the *Johnson* court indicated there is need "for an economic realities framework that distinguishes college athletes who 'play' their sports for predominately recreational or noncommercial reasons from those whose play crosses the line into work protected by the FLSA."²⁴ In short, *Johnson* blew past the old dogma and treated the question of athlete pay as one of economic reality grounded in common-law agency principles, not labels.²⁵ For the first time, a federal appellate court opened the door for players to claim minimum wage and overtime protections under the FLSA.

The implications of *Johnson* are significant. It reflects a growing divergence in how courts analyze whether—and when—college athletes may qualify as "employees" under the FLSA. Earlier decisions in the Seventh and Ninth Circuits²⁶ dismissed similar wage-and-hour claims at the pleading stage, relying heavily on the educational context of intercollegiate athletics, the NCAA's traditional amateurism framework, and related administrative guidance. *Johnson*, by contrast, rejected categorical treatment and directed a fact-specific economic-realities inquiry into whether particular athletes' activities constitute compensable work.

This divergence increases the likelihood of further appellate development—and potentially Supreme Court review—of the circumstances under which college athletes can be treated as employees under the FLSA. Even without a definitive ruling from the Court, *Johnson* shifts leverage in practice: It makes it more plausible that wage-and-hour claims will survive dismissal, proceed to discovery, and create meaningful exposure and settlement pressure for the NCAA, conferences, and member institutions. The legal scaffolding supporting the traditional amateurism model is crumbling on multiple fronts.

Most recently, the *coup de grâce* for the old model arrived via a pair of class-action antitrust settlements, including *House v. NCAA*. In June 2025, Judge Wilken (of *O'Bannon* and *Alston* fame) approved a \$2.8 billion settlement resolving claims that the NCAA and major conferences had illegally suppressed athlete compensation, including revenue sharing and the use of athlete NIL.²⁷ For NCAA Division I institutions who opted into the settlement, not only will thousands of athletes receive payments for past damages, but moving forward schools are now permitted to pay their athletes directly up to an amount capped in the aggregate at the same amount for all NCAA Division I schools covered by the Agreement.

22 *Berger v. NCAA*, 843 F.3d 285, 291–92 (7th Cir. 2016).

23 U.S. DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK § 10b03(e), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf (last visited Jan. 13, 2026).

24 *Johnson*, 108 F.4th at 182 (citing the concurring opinion of J. Hamilton in *Berger*, 843 F.3d at 294).

25 *Id.* at 167.

26 *Id.*; *Dawson v. NCAA*, 932 F.3d 905, 910–11 (9th Cir. 2019).

27 *House v. NCAA*, No. 4:20-cv-03919-CW, 2025 WL 3751003 (N.D. Cal. June 27, 2025) (order granting final approval of settlement).

Put directly, the NCAA has formally abandoned its ban on direct pay from schools to athletes for a class of athletes. As of July 1, 2025, big-time college programs can write checks to players (beyond scholarships) for the use of their NIL or brand endorsement without fear of NCAA sanctions. This marks a historic pivot. What was once verboten—paying college athletes without regard to cost of attendance or related limitations—is now not only allowed but effectively compelled by competition: Schools that can afford it will rush to pay the maximum to attract talent. While pay for play is still purportedly prohibited, and third-party payments through associated entities must go through the College Sports Commission and show fair market value, the *House* settlement thus cements what *Alston* and NIL began: the collapse of the amateurism model as both a legal doctrine and a cultural ethos.

Collectively, these developments have dismantled the legal foundations of the traditional amateurism model and placed Division I athletics at a critical regulatory inflection point, particularly for institutions that have opted into the *House* settlement. For those institutions, it is increasingly difficult to maintain that athletes participate solely for educational or recreational purposes; the law now treats their athletic labor as economically significant within a commercial enterprise. As a result, universities that long characterized their athletes as students rather than workers must now confront the possibility that participation in intercollegiate athletics may trigger obligations under federal employment statutes.

The sections that follow examine those questions in detail, focusing on how the FLSA would apply if certain college athletes are deemed employees, which entities may qualify as their employer or joint employers, and the practical challenges of complying with wage-and-hour requirements in the collegiate athletics context.

II. Employee Status Under the FLSA

When analyzing whether college athletes are “employees,” different bodies of law have used slightly different tests. Here, we focus exclusively on the test under the FLSA. The FLSA is the New Deal-era federal law guaranteeing minimum wage and overtime pay to covered workers. It defines “employee” in sweeping terms as “any individual employed by an employer” and defines “employ” as “to suffer or permit to work.”²⁸ Courts have noted that this is “the broadest definition [of employee] that has ever been included in any one act.”²⁹ In evaluating employee status for FLSA purposes, courts look to the “economic realities” of the relationship—examining the totality of circumstances to discern whether, as a matter of economic reality, the worker is dependent on, and working for the benefit of, the putative employer.³⁰

28 29 U.S.C. § 203(e)(1) (defining “employee” as “any individual employed by an employer”); 29 U.S.C. § 203(g) (defining “employ” as “to suffer or permit to work”).

29 *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945)

30 *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985); *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961).

In the context of unpaid internships or trainees, courts have developed multifactor tests (like the Second Circuit's *Glatt* test³¹) to distinguish an employee from someone primarily receiving education or training. The *Glatt* test balances a list of nonexhaustive factors, including, for example, compensation expectations, training akin to an educational environment, ties to a formal education program and academic credit, duration, and displacement of other employees, to determine whether it is the intern or the employer who is the primary beneficiary of the relationship.³²

In *Johnson v. NCAA*, however, the Third Circuit found those traditional intern/trainee tests "not sufficiently analogous" to college sports.³³ Judge Restrepo, writing for the court, crafted a bespoke test tailored to the "sui generis" nature of NCAA athletics.³⁴ In this way, *Johnson* is similar to prior decisions in *Berger* and *Dawson*, where the courts declined to apply *Glatt*'s multifactor test due to the unique nature of student-athlete status.³⁵

Under *Johnson*, "college athletes may be employees under the FLSA when they: (a) perform services for another party, (b) 'necessarily and primarily for the [other party's] benefit,' (c) under that party's control or right of control, and (d) in return for express or implied compensation or in-kind benefits."³⁶ Each prong reflects a core aspect of an employment relationship. Notably, the test explicitly acknowledges that compensation may be "in-kind"—a direct nod to athletic scholarships (tuition, room, board) as a form of payment. In applying this test, the court emphasized looking past the NCAA's traditional rhetoric: the fact that the NCAA long insisted unpaid status is "the defining feature" of college sports was deemed a circular assertion, not a legal barrier.³⁷ Economic reality, not the label of "amateur," would control.³⁸

Under *Johnson*'s framework, the strongest employee-status case is likely to involve Division I football and men's basketball players at Power 4 institutions.³⁹

31 *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016) (establishing the "primary beneficiary" test for determining whether unpaid interns are employees under the FLSA).

32 *Id.*

33 *Johnson v. NCAA*, 108 F.4th 163, 180 (3d Cir. 2024).

34 *Id.* at 177.

35 *Berger v. NCAA*, 843 F.3d 285, 291 (7th Cir. 2016); *Dawson v. NCAA*, 932 F.3d 905, 911 (9th Cir. 2019).

36 *Johnson*, 108 F.4th at 180.

37 *Id.*

38 *Id.* at 180–81.

39 Notably, in his concurring opinion in *Berger*, Judge Hamilton wrote, "I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and FBS football. In those sports, economic reality and the tradition of amateurism may not point in the same direction. Those sports involve billions of dollars of revenue for colleges and universities. Athletic scholarships are limited to the cost of attending school. With economic reality as our guide, as I believe it should be, there may be room for further debate, perhaps with a developed factual record rather than bare pleadings, for cases addressing employment status for a variety of purposes." 843 F.3d at 294.

These athletes plainly perform services—they train, practice, and compete for the institution, providing entertainment content that attracts spectators and lucrative media contracts. Their services are “primarily for the benefit” of their universities (and of the NCAA and conferences): Big-time programs generate tens of millions in revenue and immeasurable publicity for their institutions.⁴⁰ Schools capitalize on athlete performance to fill stadiums, secure conference affiliation, sign billion-dollar broadcast deals, and even bolster nonathlete enrollment and alumni engagement.⁴¹ The control element is also manifest: Coaches and athletic departments exercise strong influence over athletes’ schedules, training, and even personal lives (dictating practice regimes, game plans, curfews, social media policies, etc.).⁴² And finally, athletes do receive compensation or benefits—athletic scholarships worth tens of thousands of dollars, plus additional stipends, academic support, gear, meals, and now direct payments. Indeed, *Johnson* recognized that an athletic scholarship can count as an “implied compensation” under the FLSA’s test.⁴³ In sum, the top-tier scholarship athlete in a revenue sport looks very much like an employee under the FLSA’s broad lens: providing a service under supervision for the enterprise’s benefit, in exchange for remuneration (albeit in noncash form to date).

It bears noting that prior to *Johnson*, other courts had reached the opposite result—but largely without grappling with these facts. The Seventh Circuit in *Berger*⁴⁴ and the Ninth Circuit in *Dawson*⁴⁵ dismissed FLSA claims by college athletes, essentially treating the NCAA’s concept of amateur status as dispositive. The Seventh Circuit leaned on the notion that any compensation is antithetical to the “revered tradition of amateurism,” invoking the Supreme Court’s language in *Board of Regents*.⁴⁶ The Ninth Circuit affirmed the dismissal of claims that student-athletes were employees of the PAC-12 and NCAA, noting that “the revenue generated by college sports does not unilaterally convert the relationship between student-athlete and the NCAA into an employment relationship.”⁴⁷

40 NCAA, *2023 NCAA Division I Revenue Report*, https://ncaaorg.s3.amazonaws.com/research/Finances/2023RES_DI-RevExpReport_FINAL.pdf (last visited Feb. 28, 2026). (showing that many Division I football and men’s basketball programs generate annual revenues in the tens of millions of dollars, along with significant media exposure and institutional branding benefits).

41 Daniel C. Hickman & Andrew G. Meyer, *Does Athletic Success influence Persistence at Higher Education Institutions? New Evidence Using Panel Data*, 35 *CONTEMP. ECON. POL’Y* 658 (2017), <https://doi.org/10.1111/coep.12208>; Grace E. Meadows, Thesis, *Athletic Success and Its Influence on Freshman Enrollment* (2020), https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1333&context=senior_theses.

42 NCAA, *GOALS Study of the Student-Athlete Experience 18–20* (2020) https://ncaaorg.s3.amazonaws.com/research/goals/2020AWRES_GOALS2020con.pdf (finding that coaches and athletic staff strongly influence student-athletes’ daily schedules, practice and training commitments, and social media activity).

43 *Johnson*, 108 F.4th at 180.

44 *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016).

45 *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019).

46 *Berger*, 843 F.3d at 293–94 (relying on the “revered tradition of amateurism” and quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)).

47 *Dawson*, 932 F.3d at 910.

Again, *Johnson* expressly rejected these approaches, calling the NCAA's amateurism defense a "frayed tradition" that cannot preempt the economic-reality inquiry. The Third Circuit's divergence from its sister circuits sets the stage for potential Supreme Court intervention to harmonize the law. If that happens, the broad statutory text of the FLSA, the unmistakably commercialized reality of college sports, and the new direct-compensation regime suggest that *Johnson's* reasoning could prevail over the older, formalistic view.

In sum, the legal landscape has shifted. Evolving practices and recent case law now indicate that the question may no longer be *if* certain college athletes could be considered employees, but rather which athletes, for whom, and under what conditions. Division I scholarship athletes—particularly in the major revenue sports—have the strongest claim to employee status because their on-field labor is the core product universities market and monetize, driving media-rights, ticketing, and sponsorship revenue primarily for the institutions' benefit. They are also subject to pervasive coach- and department-directed control, and both expect and receive participation-linked remuneration (full grants-in-aid, cost-of-attendance stipends, academic awards, meals/gear, and newly permitted revenue sharing), squarely aligning with the FLSA's economic-reality markers of benefit, control, and compensation.

In *Johnson*, the court acknowledged that playing intercollegiate sports will not always equate to work.⁴⁸ Student-athletes who participate in nonrevenue sports and/or outside of NCAA Division I athletics may have more difficulty establishing their services are necessarily and primarily for the institution's benefit due to the disparity in monetization of those sports and programs. These student-athletes may also be more likely to choose to participate in intercollegiate athletics for recreational or noncommercial purposes, including as a vehicle to fund their education. Nonetheless, it may be more difficult to differentiate the performance of services, level of control exercised by the institution, and in-kind or implied compensation received by these student-athletes. Fact-specific inquiries may lead to varying results; however, it is likely at least some student-athletes will be found to be employees. This variability matters operationally because it creates a foreseeable "mixed-status" regime—where some athletes are treated as employees and others are not—raising difficult compliance, governance, and equity questions.

This sets the stage for the next inquiry: Given that some college athletes will be deemed employees, who exactly is their employer in the labyrinthine structure of modern college athletics?

III. WHO IS THE EMPLOYER? THE FRAGMENTED STRUCTURE OF COLLEGE SPORTS

Whether a university, an athletic conference, the NCAA, or even a broadcast network qualifies as an "employer" turns on the FLSA's expansive conception of joint employment and the fact-intensive economic-realities inquiry courts apply in wage-and-hour cases. Although courts articulate this inquiry through various

⁴⁸ *Johnson*, 108 F.4th at 177.

factor formulations, the statute defines an “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee,”⁴⁹ and courts therefore look beyond formal labels to examine the degree to which each putative employer meaningfully participates—directly or indirectly—in directing the work performed and in structuring the compensation or benefits tied to that work, and whether the entity derives more than an incidental benefit from it.⁵⁰ This analysis is familiar rather than novel; courts routinely apply it in franchise relationships, staffing arrangements, and platform-based work.⁵¹ When applied to college athletics, the framework reveals differing degrees of control and benefit across institutional actors: Universities and affiliated athletic entities are the strongest candidates to satisfy the standard; conferences frequently present a colorable case for joint employment; and the NCAA and media partners occupy more attenuated—but not categorically excluded—positions.

Recent structural innovations complicate this “who is the employer” inquiry by introducing additional, sometimes for-profit intermediaries that may receive revenues, execute NIL contracts, or otherwise sit between athletes and the traditional university athletic department. For example, the University of Utah has announced the creation of a new for-profit entity—Utah Brands & Entertainment—structured to manage and monetize key athletics-related revenue streams in partnership with private equity (Otro Capital), raising the prospect that a nonuniversity affiliate could become a beneficiary of, and participant in, the athlete labor market.⁵²

Likewise, other institutions have pursued corporate restructuring designed to increase flexibility and isolate business risk—such as the University of Kentucky’s conversion of its athletics operation into a limited-liability company (Champions Blue LLC).⁵³ To the extent these affiliated or restructured entities participate in setting compensation terms, conditioning payments on athletic performance or availability, managing NIL or revenue-sharing flows, or otherwise influencing how and when athletic services are performed, they become directly relevant to the FLSA’s economic-realities and joint-employment analysis rather than merely incidental corporate arrangements.

At the same time, the post-*House* compliance architecture is formalizing a parallel ecosystem of compensation and review—through the College Sports Commission’s revenue-sharing framework and evolving guidance on NIL deals involving collectives—so that “associated entities” and other third-party payors

49 29 U.S.C. § 203(d).

50 See, e.g., *Falk v. Brennan*, 414 U.S. 190, 195 (1973); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71–72 (2d Cir. 2003).

51 See, e.g., *Antenor v. D&S Farms*, 88 F.3d 925, 932–33 (11th Cir. 1996); *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 139–41 (4th Cir. 2017).

52 Dan Wetzel, *Beware, College Sports, Private Equity Has Arrived*, ESPN (Dec. 11, 2025), https://www.espn.com/college-sports/story/_/id/47267088/utah-private-equity-college-sports-otro-capital.

53 *Univ. of Ky. Bd. of Trs., PR 6: Creation of Champions Blue, LLC as an Affiliated Corporation of the University of Kentucky* (Apr. 25, 2025), <https://www.uky.edu/trustees/sites/www.uky.edu.trustees/files/PR%206%20Creation%20of%20Champions%20Blue%2C%20LLC%20.pdf>.

may increasingly exercise practical leverage over athlete compensation and (indirectly) athlete behavior through contract terms and market discipline.⁵⁴

These arrangements may be motivated in part by governance, finance, and liability-management objectives, but under the FLSA's economic-realities and joint-employment principles, courts are likely to look past formal separations and ask whether the new entities (and the university) codetermine key terms of the athletes' work or compensation and jointly benefit from that work. Put differently, inserting a payor, affiliate, or "collective" between athletes and the institution may not eliminate employer status; it may instead expand the list of plausible joint employers.

Even in these emerging models, the university typically remains the anchor employer because it recruits, enrolls, and directs athletes' day-to-day athletic services; the more realistic question is whether affiliated entities, collectives, conferences, or other counterparties have accumulated enough control and benefit to be treated as additional joint employers alongside the school.

A. The University's Role

The athlete's university⁵⁵ is the most obvious employer candidate. The school recruits and admits the athlete, provides the scholarship (the primary form of compensation), and dictates the athlete's day-to-day obligations through its athletic department. Coaches—who are university employees—determine athletes' training schedules, performance standards, and ongoing status on the team. The university sets the academic requirements that athletes must meet to remain enrolled and in good standing, and in combination with NCAA rules, those standards determine whether an athlete is eligible to compete. The university also provides tutoring, medical care, and nutrition—akin to an employer providing support to its workforce. These services are significant not as employee "benefits," but as indicia of institutional supervision and integration—mechanisms through which the university manages athlete availability, performance, and risk in a manner consistent with directing ongoing work. In essence, if an athlete is effectively "hired" when recruited and given a scholarship, it is the university that issues that financial aid and scholarship agreement (essentially an offer letter or one-year contract, renewable annually—much like an employment contract). The university also would be the entity paying any wages directly and the entity that benefits most directly from the athlete's endeavors (in the form of wins, revenue, and institutional prestige). Thus, under virtually any test, the university's athletic department "looks, acts, and benefits" like the primary employer of the athlete.⁵⁶

54 Brandon Marcello, *College Sports Commission Sends Participation Agreement as NIL Rules Take Shape*, CBS SPORTS (Nov. 19, 2025), <https://www.cbssports.com/college-football/news/college-sports-commission-nil-rules-regulations>.

55 Some universities operate their athletic enterprises through separately incorporated but university-controlled affiliates. For purposes of this article, these affiliates are treated the same as the universities themselves, as the close integration of management, control, and operations would likely render the two entities joint employers under prevailing standards.

56 *Johnson v. NCAA*, 108 F.4th 163, 180–81 (3d Cir. 2024) (emphasizing universities' control over

Indeed, in the *Johnson* litigation, the plaintiff athletes specifically named both their universities and the NCAA as defendants, alleging each was their employer for wage-and-hour purposes. The NCAA and schools, for their part, did not dispute that schools exercise a substantial degree of control; instead, they argued that no athletes are employees at all due to the principle of amateurism (an argument the Third Circuit rejected). Going forward, if courts declare that athletes are employees, every school will have to assume the full panoply of employer responsibilities for its player employees—tasks like tracking hours and paying wages, which we address in Part IV.

B. The Conference's Role

Less obvious, but highly significant, is the role of the athletic conference. Conferences are collections of universities that agree to follow common rules and compete in a league structure. They orchestrate competition by setting season schedules, organizing championship tournaments, negotiating television contracts for conference games, and imposing additional rules or standards on member schools.⁵⁷ A conference's influence on athletes' "working conditions" can be substantial. For example, a conference might schedule a football game on a Thursday night (per a TV agreement)—thereby dictating that athletes travel midweek, miss additional classes, and play with short rest. This scheduling control directly affects the time and strain on the athletes, much as an employer sets a work schedule for employees. Conferences may also enact rules on practice limits, medical protocols, or disciplinary policies that member schools must enforce, indirectly controlling how athletes train and behave. In some instances, a conference can sanction an athlete or school for rule violations (for example, suspending a player for a game due to a fight or declaring a player ineligible for academics). These powers resemble those of an employer exercising disciplinary authority.

In short, the concept of joint employment could encompass conferences. A conference does not hire individual athletes directly or set their pay, but it arguably controls some conditions (scheduling, eligibility rules) and is deeply involved in the enterprise that benefits from the athletes' labor. Notably, the conference shares in revenue generated by the games the athletes play (through TV deals, merchandising, etc.).⁵⁸ Under this joint-employer analysis, a conference could well be found to meaningfully participate—directly or indirectly—in setting how, when, and under what constraints athletes perform athletic services alongside the school.

athletes, the services athletes perform for the universities' benefit, and the in-kind compensation athletes receive).

57 See generally, John Eckert, *Student-Athlete Contract Rights in the Aftermath of "Bloom v. NCAA"*, 59 VANDERBILT L. REV. 1083, 1091 n. 37 (2006) (noting that "conferences negotiate their own television contracts for football and distribute these funds among member schools").

58 Knight Comm'n on Intercollegiate Athletics, *Conference Revenue Distribution for FY 2022* (showing that conferences distribute hundreds of millions in shared revenue from television contracts, postseason games, and merchandising to member schools), https://www.knightcommission.org/wp-content/uploads/2023/09/cla_financial_projections_report_2023.pdf (last visited Feb. 17, 2026).

C. *The NCAA's Role*

The NCAA is a step further removed from the athletes, yet it has historically exercised the most sweeping control over players and institutions through its bylaws and enforcement power. The NCAA sets overarching rules that govern athlete eligibility, amateur status (until recently), recruiting, practice limits, transfer procedures, and more.⁵⁹ For decades, NCAA rules strictly prohibited any pay beyond scholarships, capped the value of scholarships, and dictated that athletes could not profit from their own NIL. The NCAA also enforces academic standards and can punish athletes or teams for violations. In effect, the NCAA has acted as a national governing human resources (HR) department—albeit one that (until now) set rules to ensure athletes were not treated or paid as traditional employees.

With amateurism rules waning, the NCAA still imposes substantial conditions on the context of athletes' work. For example, the practice hour limits (the twenty-hour rule) come from NCAA bylaws.⁶⁰ The NCAA mandates that athletes take a minimum number of credit hours and make progress toward a degree to remain eligible, effectively tying their "employment" to an academic performance metric.⁶¹

The question is whether this rulemaking and oversight role makes the NCAA itself an "employer" for legal purposes or merely a regulatory body, as determined by the court in *Dawson*.⁶² The NCAA does not issue scholarships—the schools do that. It does not handle day-to-day supervision—coaches do. It currently does not directly pay athletes (aside from small per diems or prize money during championships)—again, schools handle all financial aid. On the other hand, the NCAA indirectly benefits immensely from the athletes' labor: It controls lucrative championship events (for example, March Madness, which earns the NCAA nearly a billion dollars annually),⁶³ and it long profited from licensing athletes' NIL in video games and other products (as litigated in *O'Bannon*). It is also arguably the architect of the entire business model. Under the FLSA's broad definition, an entity that "acts directly or indirectly in the interest of an employer in relation to an employee" is also deemed an employer.⁶⁴ One could argue the NCAA acted "indirectly in the interest" of universities in maintaining a workforce of unpaid

59 MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 619–22 (5th ed. 2019) (describing the NCAA's comprehensive regulation of student-athletes' eligibility, recruitment, compensation, and playing seasons).

60 See NCAA, 2024–25 DIVISION I MANUAL, §§ 17.1.7.1 (twenty-hour rule), 14.4.3.1 (progress-toward-degree requirements), <https://web3.ncaa.org/lstdbi/reports/getReport/90008>.

61 *Id.* (setting limits on countable athletically related activities and requiring athletes to make academic progress toward a degree).

62 *Dawson v. NCAA*, 932 F.3d 905, 11 (9th Cir. 2019).

63 Brian Roberts, *Indiana vs. Oregon and the NCAA March Madness Money-Making Machine*, *Forbes* (Mar. 13, 2025), <https://www.forbes.com/sites/brianroberts/2025/03/13/indiana-vs-oregon-and-the-ncaa-march-madness-money-making-machine/> (noting that in fiscal year 2022-23 the NCAA generated about \$1.28 billion in revenue, with approximately \$1 billion coming from March Madness).

64 29 U.S.C. § 203(d) (defining "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee").

athletes by centrally enforcing the rules that kept them unpaid. Now that direct pay is allowed, if athletes are employees of their schools, the NCAA might still be seen as a co-employer to the extent it continues to set terms and conditions (practice limits, eligibility requirements, etc.) that govern the employment.

The counterargument is that the NCAA functions more like a regulator or trade association than an actual employer. It does not hire or fire individual athletes—apart from determining eligibility—and its rules are at least one step removed from the direct coach–player relationship. As one commentator has put it in a different context, extending joint-employer status to the NCAA “stretches traditional doctrine beyond its limits.”⁶⁵

Nonetheless, from the athletes’ perspective, including the NCAA as a joint employer in litigation makes strategic sense. The NCAA has deep pockets and sets uniform rules affecting all athletes—obtaining a judgment or injunction against the NCAA can ensure industry-wide change, whereas suing one school at a time might yield only limited relief. In *Johnson*, the athletes did name the NCAA as a defendant, and the Third Circuit pointedly did not rule it out; it remanded for the lower court to apply the new test, implicitly leaving open the possibility that in some circumstances athletes might prove an employment relationship with the NCAA itself. In short, while the NCAA’s employer status is debatable, it remains a prime target in athletes’ efforts to enforce labor rights across the entire college sports landscape.

D. Media and Corporate Partners

Perhaps the most novel question is whether media companies (broadcast networks like ESPN, Fox, CBS) or major corporate sponsors could be deemed employers of college athletes. At first blush, this idea seems far-fetched—athletes have no contract with ESPN, and broadcasters do not directly manage players as an employer would. However, consider the influence broadcasters wield. Television networks pay conferences and the NCAA billions of dollars for the rights to broadcast games.⁶⁶ In doing so, they effectively purchase access to the athletes’ labor output (the games) and often have a say in scheduling. For instance, TV networks dictate that a game kicks off at 8:00 p.m. for prime time, or that short-turnaround games occur on weeknights to fill TV slots.⁶⁷ These decisions impose working conditions on the players: A late-night game means players “work” (play) past midnight and travel home in the early morning, causing greater fatigue and missed classes. A network might also influence postseason expansions (more

65 See Matthew B. Tinley, *The NCAA as Joint Employer? Let’s Be Real*, 18 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 115, 122–23 (2022) (arguing that extending joint employer status to the NCAA stretches traditional doctrine beyond its limits).

66 See *Current College Sports Television Contracts*, BUS. OF COLL. SPORTS (Mar. 19, 2024), <https://businessofcollegesports.com/current-college-sports-television-contracts/> (describing multibillion-dollar television agreements between major networks and the NCAA and athletic conferences, including the NCAA men’s basketball tournament and Power Five conference media rights deals).

67 See Ben Huddleston, *Breaking down the CFB TV selection process*, Sports Media Watch (Nov. 3, 2024), <https://sportsmediawatch.com/2024/11/college-football-tv-selection-process-explained> (last visited Feb. 28, 2026).

games equal more TV content)—meaning athletes have to play additional games (that is, work more hours) to accommodate TV-driven tournament growth.

Under a joint-employer analysis, the question would be, Do these networks exercise sufficient control over the terms and conditions of the players' work? Scheduling and game timing may be relevant indicia of influence, but they are typically contractual and indirect and therefore weaker markers of control than the kinds of indicia courts often emphasize in FLSA joint-employment analysis—such as supervision of day-to-day work, control over pay practices and records, and authority over hiring, firing, or discipline. For that reason, absent unusual facts demonstrating a broadcaster's direct involvement in supervision or compensation practices, broadcaster influence is more likely to matter downstream—through indemnity provisions, allocation of labor-compliance costs in media-rights agreements, and contractual mechanisms that shift responsibility for wage-and-hour exposure—than through a successful showing that the broadcaster itself is a joint employer.

The NBC/Olympics analogy underscores the intuition: Broadcast leverage over scheduling rarely supplies the kind of employer-like control that wage-and-hour doctrine typically demands. If broadcast agreements and game operations incorporate regularly scheduled commercial breaks, that shapes how the game (and the players' effort) is structured. If a network insists on moving a football game to a Wednesday night, that effectively changes the players' work schedule for that week. One could argue this resembles situations in which a downstream business sets a worksite schedule that materially constrains how services are performed—an arrangement that, in some contexts, has supported joint-employment findings. Here, the network's control is somewhat indirect and exercised through agreements with conferences, but it undeniably affects athletes' working hours and conditions.

There is an intuitive reluctance to call a broadcaster an "employer" of talent it does not directly manage—for example, we do not generally call NBC an employer of Olympic athletes, even though NBC pays for broadcast rights and influences event scheduling for viewer-friendly times. Typically, the legal link is missing: The network does not hire or fire players, does not set their pay, and does not discipline them (aside from perhaps indirectly influencing league discipline for conduct that might tarnish a broadcast). Media companies thus might be one step further removed than even the NCAA in terms of direct control.

That said, if college athletes gain employee status, media companies will undoubtedly be part of the conversation. One can imagine a scenario where a creative plaintiffs' attorney includes ESPN as a defendant in an overtime lawsuit, alleging it was a joint employer because its TV scheduling directives caused athletes to work uncompensated late-night hours beyond the usual limits. Even if such a theory is untested, the mere potential could prompt media companies to seek indemnification clauses in their contracts with conferences (requiring the schools/conference to shoulder any labor costs or legal liabilities for the athletes). In essence, while a broadcaster-as-employer theory would be pushing the boundaries, the entanglement of media in setting the conditions of athletes' "work" means it cannot be entirely dismissed.

E. Parallels in Other Industries

The fragmented nature of college sports governance invites analogies to other complex work arrangements. These comparisons are illustrative only; the governing question remains the FLSA's fact-specific economic-realities inquiry into whether particular entities meaningfully participate in directing the work and structuring compensation and whether they derive more than incidental benefit from it:

- **Gig Economy Platforms:** Companies like Uber or DoorDash connect workers with end-users and set many terms of work via algorithms, even while claiming not to “employ” the drivers or couriers. Courts and legislatures have wrestled with whether such platforms are employers.⁶⁸ College sports has a similar platform quality: The NCAA or conferences connect the labor (athletes) with consumers (fans) under a unified brand, while denying any employment relationship. In some jurisdictions, gig economy companies have been deemed employers (or been required to assume employment obligations) when their control over workers is high.⁶⁹ Similarly, if the NCAA's or a conference's control over athletes is found to be pervasive, they too might be saddled with employer duties despite the formal denials.
- **Franchise Systems:** In franchise arrangements, joint employment can arise if the corporate franchisor exercises pervasive control over its franchisees' workers (for example, dictating even small details of hiring, scheduling, etc.).⁷⁰ The NCAA's control over minutiae of athletes' experience (for example, limiting hours of practice or types of benefits athletes may receive) could be viewed as akin to a franchisor's control over franchisee operations. If that control is sufficiently detailed, the franchisor (NCAA) may be treated as a joint employer of the franchisee's workers (the university's athletes).
- **Staffing Agency Models:** Often a staffing agency and its client are considered joint employers—the agency hires and pays the worker, but the client directs the daily work.⁷¹ Analogously, a university could

68 See *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141–43 (N.D. Cal. 2015); *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 5 (Cal. 2018); CAL. LAB. CODE, §§ 2775–2787(2025).

69 See *Vega v. Postmates Inc.*, 475 F. Supp. 3d 251, 269–70 (S.D.N.Y. 2020) (holding that Postmates couriers could be employees under New York labor law due to the company's high degree of control over performance); see also *People v. Uber Techs., Inc.*, No. CGC-20-584402, 2020 WL 5440305 (Cal. Super. Ct. Aug. 10, 2020) (California court granted preliminary injunction requiring Uber and Lyft to classify drivers as employees under AB 5 due to their control over driver work).

70 See *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 140–42 (4th Cir. 2017) (explaining that joint employment can arise where multiple entities “codetermine the key terms and conditions of a worker's employment”); see also *In re Domino's Pizza, Inc.*, 163 F. Supp. 3d 153, 165–67 (S.D.N.Y. 2016) (denying motion to dismiss joint employer claims against franchisor for allegedly exercising control over franchisee employees' training, uniforms, and scheduling).

71 See *Castaneda v. Ensign Grp., Inc.*, 229 Cal. Rptr. 3d 187, 199–200 (Ct. App. 2018) (recognizing that staffing agencies and their clients may be joint employers when both exercise control over the worker); see also *Torres-Lopez v. May*, 111 F.3d 633, 639–40 (9th Cir. 1997) (finding joint employment where farmworkers were formally hired by one entity but the grower directed

be seen as the “staffing agency” (enrolling the athlete and providing the scholarship/wages), while the conference or NCAA is the client directing the “what, when, where” of the work (scheduling games, setting eligibility rules, etc.). In this analogy, the NCAA and conferences are the ultimate beneficiaries directing the work, much as a worksite employer directs a temp agency’s employees.

Each analogy is imperfect, but all reinforce a core legal principle: When multiple entities codetermine the terms of a person’s work and all benefit from it, the law can treat all of them as employers responsible for compliance. In the college sports context, this means universities almost certainly are employers, and there are colorable arguments that conferences and the NCAA (and maybe even others like media partners) are joint employers of the athletes. It is quite conceivable that courts or regulators will find, for example, that a Power 4 conference and its member schools jointly employ football players—the school controls the local, day-to-day aspects, the conference controls broader aspects (scheduling, league rules), and both reap financial rewards.

Notably, in the *Johnson* case itself the athletes lumped the NCAA together with the schools in their FLSA wage claim. Similarly, in *Dawson*, athletes pursued claims against the athletic conference and NCAA.⁷² This shows that athlete advocates are already pursuing multientity responsibility under wage laws. If multiple entities are deemed employers, they would each have legal obligations to the athletes. For instance, under the FLSA, joint employers are jointly and severally liable⁷³—meaning an athlete could recover unpaid wages from the NCAA or a conference even if the school was primarily responsible for payroll. The risk and responsibility thus may not stop at the campus gates. The entire collegiate sports apparatus—from the campus to the conference office to NCAA headquarters, and even out to the broadcast studio—might be viewed collectively as the “employer” of the college athlete.

Recognizing this helps pinpoint who must be prepared to adapt to comply with employment laws. The following part assumes that college athletes (at least in the revenue sports in top divisions) are to be treated as employees and examines what it would actually look like for universities—and potentially conferences and other stakeholders—to comply with the FLSA’s wage and hour requirements. In doing so, we confront the looming, underexplored issue that hangs over the end of amateurism: How do you implement employment law in an environment built entirely around an amateur model?

IV. FLSA COMPLIANCE: WHAT WOULD IT LOOK LIKE?

Assume that courts mandate that college athletes are employees entitled to minimum wage and overtime under the FLSA. This part explores the practical,

their day-to-day work and benefited from their labor).

72 *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019).

73 *See, e.g., Falk v. Brennan*, 414 U.S. 190, 195 (1973); *Antenor v. D&S Farms*, 88 F.3d 925, 937–38 (11th Cir. 1996); *cf.* 29 C.F.R. § 791.2(a) (2019) (rescinded 2021).

nuts-and-bolts aspects of FLSA compliance in the college sports context. How do you record work hours for an athlete? What counts as “work”—practices, games, training-table meals, travel, mandatory study halls? Would athletes be paid by the hour, by salary, or in some other way? Are there existing FLSA exemptions that could apply to them? What new infrastructure would universities need to implement, and how costly would compliance be? We delve into each of these questions below.

A. *Work Hours Accounting*

The FLSA requires that employers keep records of an employee’s work hours and pay at least the minimum wage for all hours worked (and overtime pay for hours over forty in a week for nonexempt employees).⁷⁴ For college athletes, tracking “work hours” is a novel challenge because historically their time commitment has been regulated only by NCAA bylaws, not by a time clock. Currently, NCAA Bylaw 17 imposes the well-known twenty-hour rule, which nominally limits “countable athletically related activities” to twenty hours per week in-season (and eight hours per week in the off-season), with at least one day off per week.⁷⁵ However, this rule has loopholes. Only certain activities count toward the twenty-hour limit: practices, team meetings, and competitions (with each game counted as three hours no matter its actual length⁷⁶). Many other activities are explicitly excluded from the twenty-hour cap: for example, weightlifting and conditioning sessions outside of formal practice; “voluntary” workouts where coaches are not present; time spent in training-room rehab or traveling to games; and any nonphysical meetings like study halls or compliance meetings.⁷⁷ In reality, a dedicated athlete’s weekly time commitment far exceeds twenty hours. The NCAA’s own surveys (cited in litigation) found athletes in some sports reporting thirty, forty, even fifty hours per week devoted to their sport.⁷⁸ The “voluntary” sessions are often voluntary in name only—players know that not participating could hurt their standing with the coach, so these activities are de facto required. Travel can consume entire days, yet under the twenty-hour rule, a road game might only count as three hours for the week.⁷⁹

From an FLSA standpoint, many—and potentially most—of these hours could qualify as compensable “hours worked.” The law defines work broadly as any

74 See 29 U.S.C. §§ 206(a), 207(a)(1), 211(c); 29 C.F.R. § 516.2(a) (2024).

75 NCAA, 2023–24 NCAA DIVISION I MANUAL §§ 17.1.7.1 (twenty-hour weekly limit during playing season), 17.1.7.2 (eight-hour weekly limit outside playing season), and 17.1.7.4 (one required day off per week).

76 *Id.* § 17.1.7.3.2.

77 *Id.* § 17.02.1.

78 NCAA, *GOALS Study of the Student-Athlete Experience* (2016), <https://www.ncaa.org/news/2016/1/14/third-goals-survey-findings-unveiled.aspx>.

79 NCAA, 2023–24 NCAA Division I Manual § 17.1.7.3.1 (providing that the time spent in competition counts as three hours toward the weekly limit, regardless of actual duration, and excluding travel time).

time spent predominantly for the employer's benefit and under its control.⁸⁰ If a coach or trainer requires an athlete's presence—be it a weightlifting session, a film study meeting, a team meal, or a bus trip—that is likely time under the employer's control. Even so-called “voluntary” workouts could be deemed work if, in reality, they are expected as part of team participation (courts will look past superficial labels to the substance—if missing a “voluntary” session results in lost playing time or other repercussions, it is not truly voluntary).⁸¹ Notably, employee status would not dilute institutional control over athletes; it would formalize and, in many respects, expand it by converting informal expectations into legally enforceable work obligations. Travel time that is for the benefit of the team (for example, riding the team bus or plane to an away game) typically is compensable work time under FLSA rules, especially if it cuts across normal hours.⁸² In short, the vast majority of time athletes dedicate to their sport—on-field and off-field—would likely be compensable hours under the FLSA.

This presents a compliance challenge. Most college athletes in season easily exceed forty hours of work per week if one counts everything they do for their sport. A 2015 lawsuit against UNC and the NCAA highlighted athletes often spending more than fifty hours/week on sports during the season.⁸³ If an athlete works, say, fifty hours in a week, the FLSA would mandate that ten of those hours be paid at the overtime rate of time-and-a-half. Thus, tracking hours is not just an administrative formality—it is critical for calculating overtime owed, as discussed more fully below.

One point to consider, some state labor laws impose even stricter requirements, such as higher minimum wages or daily overtime thresholds (for instance, California requires overtime pay for more than eight hours worked in a single

80 See *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (“[W]ork or employment [under the FLSA] means physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.”); see also *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005) (emphasizing that “work” includes all activities “controlled or required by the employer and pursued for the benefit of the employer”).

81 See, e.g., *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026–27 (10th Cir. 1993) (holding that “voluntary” training was compensable work under the FLSA when employees were led to believe that attendance was expected and nonattendance would have adverse consequences); Wage & Hour Div., U.S. Dep’t of Labor, *Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)* (July 2008), <https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked> (stating that time spent in “voluntary” programs is compensable if participation is required or if non-participation results in adverse consequences).

82 See 29 C.F.R. § 785.39 (2024) (“Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee’s workday. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days.”); see also 29 C.F.R. §§ 785.33–785.41(2024) (regulations governing when travel time is compensable under the FLSA).

83 Plaintiff’s Complaint, *McCants v. NCAA*, No. 1:15-cv-00176 (M.D.N.C. Mar. 17, 2015), ¶¶ 57–61 (alleging that UNC football and basketball players routinely spent more than fifty hours per week on athletically related activities during the season).

day).⁸⁴ Schools in those states would have to comply with applicable state-law protections as well.

B. Overtime and Minimum Wage Considerations

Under the FLSA, the federal minimum wage is \$7.25/hour, though many states and localities require higher rates.⁸⁵ Employers must pay at least this rate for all hours worked. For a college athlete, at first glance paying minimum wage for, say, thirty hours a week of practice (~\$218/week at \$7.25) seems trivial given the revenues involved. However, we must remember two things: (1) Athletes currently receive scholarships covering tuition, room, board—would those be counted as wages or not? (We address that shortly; generally, they likely cannot be counted as “wages” for FLSA purposes.) And (2) overtime pay at time-and-a-half is required for hours over forty per week for nonexempt employees.⁸⁶

As noted, many college athletes in season would easily exceed forty hours in some weeks if we count all their commitments. If an athlete logs fifty hours in a week, the FLSA mandates that ten of those hours be paid at the overtime rate (1.5 × pay). This significantly increases weekly compensation. For example, if an athlete were paid \$10/hour, forty hours yields \$400 and the additional ten hours of overtime yields \$150, totaling \$550 for that week. Even at minimum wage, ten hours of overtime would add about \$109 on top of the \$290 base for forty hours. In short, overtime could substantially boost the pay owed to athletes during busy weeks.

Under the existing statutory scheme, most college athletes would likely be classified as “nonexempt” employees, meaning they are entitled to overtime pay. Nonexempt status is the default under the FLSA unless a specific exemption applies (such as the executive, administrative, or professional exemptions for certain white-collar jobs, among others).⁸⁷ It is obvious that athletes are not executives or administrators. Could they be “professionals”? The FLSA’s professional exemption generally covers jobs requiring advanced knowledge in a field of science or learning (for example, doctors, lawyers) or creative professionals (artists, writers) in some cases.⁸⁸ Athletes do not fit the learned professional category, and while one might

84 CAL. LAB. CODE § 510(a) (West 2024) (“Eight hours of labor constitutes a day’s work. Any work in excess of eight hours in one workday . . . shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee.”).

85 29 U.S.C. § 206(a)(1) (establishing the federal minimum wage at \$7.25 per hour); *see, e.g.*, WASH. REV. CODE § 49.46.020 (2024); MO. REV. STAT. § 290.502 (2025).

86 29 U.S.C. § 207(a)(1) (“[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation . . . at a rate not less than one and one-half times the regular rate at which he is employed.”).

87 29 U.S.C. § 213(a)(1) (exempting from FLSA coverage “any employee employed in a bona fide executive, administrative, or professional capacity”); *see also* 29 C.F.R. Pt. 541 (2024) (defining and interpreting the “white-collar” exemptions, including duties tests and salary thresholds).

88 29 C.F.R. § 541.301(a) (2024) (“The term ‘employee employed in a bona fide professional capacity’ . . . shall mean any employee . . . [w]hose primary duty is the performance of work requiring advanced knowledge . . . in a field of science or learning . . . or work that is original and creative in a recognized field of artistic endeavor.”).

argue they are highly skilled, the exemption for creative professionals is meant for work involving invention, imagination, or talent in an artistic field—sports performance has not been treated as such for overtime purposes.⁸⁹ Moreover, the white-collar exemptions (professional, executive, etc.) require the employee to be paid on a salary basis above a certain threshold (currently about \$684/week). In short, even if schools attempted to classify athletes as exempt professionals, they would fail both the duties and salary tests.

A possible exception is that lawmakers could create a special exemption for college athletics. This could take the form of expressly exempting student-athletes from the definition of employee, thereby removing the applicability of the FLSA, or creating a new exemption category for student-athletes to exempt them from minimum wage and/or overtime requirements. Indeed, certain professional sports roles have been exempted in limited ways—for example, there is an FLSA exemption for employees of seasonal amusement or recreational establishments (like summer baseball teams),⁹⁰ and in 2018 Congress explicitly exempted minor league baseball players from minimum wage/overtime via the *Save America's Pastime Act*.⁹¹ College sports, though, currently have no such exemption.

Schools thus face paying not just \$7.25 for each hour, but \$10.88 for each overtime hour beyond forty (if using the federal minimum wage as base). Realistically, schools might pay a higher base wage anyway—paying the bare minimum could be seen as unseemly given the revenue athletes produce, and many state laws or university policies might effectively push the rate up.

One big question, Would athletes be paid hourly or salaried? Schools might be tempted to pay athletes a flat stipend or “salary” per semester or year, mirroring the way scholarships are awarded. But under the FLSA, simply paying a fixed amount does not eliminate minimum wage or overtime obligations for nonexempt employees.⁹² For example, if a school paid \$20,000 for the academic year, it would still need to ensure that amount covers all hours worked at no less than the applicable minimum wage, plus an overtime premium for hours over forty in a workweek. If the effective hourly rate fell below the minimum wage or overtime hours were unpaid, the school would be in violation. One permissible approach for nonexempt employees on a fixed salary is the “fluctuating workweek” method, in which the salary covers all straight-time hours and overtime is paid at a half-

89 See 29 C.F.R. § 541.302(a) (2024) (defining the creative professional exemption as applying to work “requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor” such as “music, writing, acting, and the graphic arts”); see also *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 (3d Cir. 1994) (noting that the creative professional exemption is narrowly construed and applies only to artistic or creative fields as defined in the regulation).

90 29 U.S.C. § 213(a)(3) (exempting from minimum wage and overtime provisions “any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if ... it does not operate for more than seven months in any calendar year ...” or meets certain revenue tests).

91 *Save America's Pastime Act*, Pub. L. No. 115-141, div. S, tit. II, § 201, 132 Stat. 348, 1127 (2018) (codified at 29 U.S.C. § 213(a)(19)).

92 See 29 C.F.R. § 778.113(a) (2024)

time rate. However, that method has strict prerequisites⁹³—including a clear mutual understanding between employer and employee—and may be difficult to implement or explain in the college athletics context.

Perhaps a more plausible approach would be to pay athletes an hourly wage and have them log hours like part-time employees. They might even literally clock in for practice and clock out after training or treatment sessions. While that image seems antithetical to the culture of sports, it might be what compliance necessitates. Some have suggested a compromise: Pay athletes a stipend per game or per week that approximates expected hours, rather than an hourly wage. But if actual hours exceed the expectation, the law requires additional pay—a stipend cannot legally excuse underpayment if the hourly tally runs high.

A creative compliance idea floated in discussions is to credit the value of the athletic scholarship toward the wage requirement.⁹⁴ For example, if tuition is \$30,000 per year and housing/meal benefits add another \$15,000, a school might argue that the athlete already receives \$45,000 in participation-linked remuneration. Could the school count that value toward its minimum wage obligation under the FLSA? Under current law, tuition assistance is unlikely to qualify as a wage credit, and the FLSA's limited in-kind credit mechanism generally applies only to "board, lodging, or other facilities" furnished in defined circumstances—not to education benefits valued at sticker price.⁹⁵ At the same time, *Johnson* underscores why the scholarship matters analytically: It treated athletic scholarships as potentially relevant in-kind remuneration when assessing whether athletes may be employees under an economic-realities framework.⁹⁶ But recognizing an in-kind benefit as evidence of compensation for employee-status purposes is distinct from allowing an employer to offset statutory wage-and-hour obligations with tuition benefits.⁹⁷ Absent a statutory or regulatory change, schools therefore could not simply assert that "our players already receive \$45,000 in value, so minimum wage and overtime are satisfied"; they would need to pay cash wages (or restructure the scholarship into taxable wages, which would raise separate tax and financial-aid complications).⁹⁸

93 See 29 C.F.R. § 778.114 (2024) (outlining the fluctuating workweek method and its requirements, including a fixed salary, clear mutual understanding, and payment of additional half-time for hours over forty).

94 See Amber Stoner, *The State of College Play-For-Pay*, Palisades Hudson Fin. Grp. (Sept. 2024), <https://www.palisadeshudson.com/2024/09/the-state-of-college-play-for-pay/> (discussing whether schools might credit scholarships toward FLSA wage obligations and noting that such an approach is likely impermissible under current law).

95 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.27–531.36 (2024).

96 *Johnson v. NCAA*, 108 F.4th 163, 178–80 (3d Cir. 2024)

97 *Cf. Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (economic realities control; noncash benefits may be relevant to employment status but do not displace statutory protections).

98 29 U.S.C. §§ 206–207.

C. Exemptions and Special Challenges

We have touched on the likely absence of any perfectly fitting exemption for athletes under the FLSA. A few specific possibilities (and challenges) deserve mention:

- **Seasonal Amusement or Recreational Establishment Exemption:** The FLSA exempts employees of certain “amusement or recreational establishments” that either (1) operate for no more than seven months in a calendar year, or (2) meet an alternative receipts test.⁹⁹ Could a college athletic department qualify as such an establishment? Probably not. While an individual sport may have a defined competitive season (for example, football operates four to five months), athletic departments operate year-round, fielding teams in multiple sports and conducting off-season training, recruiting, and other activities. Courts have also construed “amusement or recreational establishment” narrowly, typically applying it to businesses whose primary function is providing recreation to the public (for example, summer camps, amusement parks, golf courses).¹⁰⁰ A university’s core mission is education, not recreation, and it is unlikely to be classified as an “amusement or recreational” business for FLSA purposes. Accordingly, this exemption is unlikely to apply in any broad way to collegiate athletics.
- **Unpaid Intern/Student Trainee:** Courts sometimes analyze unpaid internships or student training programs under a classification framework—not as an exemption from the FLSA, but as a means of determining whether an employment relationship exists in the first instance. Under that approach, often described as the “primary beneficiary” test, the question is whether the individual is the primary beneficiary of the relationship or whether the putative employer derives the predominant benefit from the work performed.¹⁰¹ That framework, however, has limited applicability to Division I college athletics. Unlike internships or academic training programs—where the work is typically short term, closely tied to a curriculum, and structured primarily for educational benefit—revenue-generating college sports involve sustained, highly supervised labor that is integral to a commercial enterprise. As the Third Circuit recognized in *Johnson*, treating such athletic participation as analogous to unpaid training risks collapsing a fact-intensive economic-realities inquiry into a categorical assumption untethered from the modern structure and scale of college sports.
- **Student Employees in Other Contexts:** The FLSA does not have a blanket exemption for students. In general, “an employment relationship will

99 29 U.S.C. § 213(a)(3); see also 29 C.F.R. § 779.23 (2024) (defining “establishment” as a “distinct physical place of business”).

100 See, e.g., *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594–95 (11th Cir. 1995) (minor league baseball team qualified only because it met the receipts test).

101 See, e.g., *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016).

generally exist with regard to students whose duties are not part of an overall educational program and who receive some compensation."¹⁰² Some on-campus jobs (like resident advisors or work-study positions) have special rules or exclusions,¹⁰³ but generally work-study students are paid at least minimum wage. The difference is those roles are discrete jobs with limited hours, whereas an athlete's "work" is of a different character and scale.

The Department of Labor's *Field Operations Handbook* (FOH) has historically suggested that participation in interscholastic athletics is generally not "work" under the FLSA where the activity is primarily recreational and for the benefit of the participant.¹⁰⁴ The FOH, however, is nonbinding agency guidance, not a regulation, and reflects assumptions about amateur sports that predate the commercialization and direct compensation now characteristic of Division I athletics.

Critically, the FOH's analysis rests on the premise that athletic participation is noncommercial and predominantly educational or recreational in nature. That premise is increasingly difficult to sustain for revenue-generating college sports in the post-*Alston*, post-*House*, and post-NIL landscape, where athletic labor is tightly supervised, monetized, and integral to institutional business operations. As the Third Circuit recognized in *Johnson*, reliance on generalized agency guidance cannot substitute for a fact-specific economic-realities inquiry where the underlying assumptions no longer match the structure of the enterprise.

In addition to these exemption issues, several *special challenges* would accompany the shift to employment status:

- **Student vs. Employee Tensions:** Consider when team commitments conflict with academics—historically this has been viewed as a student-life balance issue. As employees, could this become an employment law issue? Likely not directly under FLSA (missing class for a game is not an FLSA issue per se). Studying for class is for the student's benefit, not the employer's, so it would not count as work time. Schools certainly would not want to pay athletes for hours spent in the library. However, there is a blurry line: Mandatory "study hall" sessions orchestrated by the athletic department for the purpose of keeping athletes eligible could arguably be seen as partially for the employer's benefit (ensuring the athlete remains eligible to play). It is doubtful that would be treated as compensable time, but it is a gray area that could prompt disputes. Schools might respond by dropping mandatory study halls or making

102 U.S. DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK § 10b24(b), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf.

103 *See, e.g.*, Wage & Hour Opinion Letter, 1994 WL 1004845 (Jan. 21, 1994) (concluding that RAs receiving housing/board and modest stipends were not employees for FLSA purposes); See 29 C.F.R. § 519.14(a) (2024) (excluding student-learners in certain programs from some FLSA provisions)

104 *See* U.S. DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK § 10b03(e), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf (last visited Jan. 13, 2026). (describing interscholastic athletics as generally nonwork).

them clearly voluntary (and truly voluntary) to avoid any argument that those hours are work time.

- **International Athletes:** If treated as employees, most international students on F-1 visas would be violating their visa status by “working” beyond the limited on-campus employment allowed. F-1 student visa rules permit only very limited work (and usually only if related to studies or as part of practical training).¹⁰⁵ Paying international athletes a wage could jeopardize their immigration status.¹⁰⁶ Congress or immigration authorities would likely need to adjust visa rules to allow international athletes to be paid legally, or else many international players might become ineligible (or face visa revocation) when classified as employees. This is a significant complication that observers have noted¹⁰⁷ and would need a solution outside of the FLSA (likely through immigration policy tweaks).

D. Compliance Infrastructure

Transitioning to an employment model means athletic departments must adopt the trappings of HR compliance that other university units use. Key components of the necessary compliance infrastructure include the following:

- **Time-Tracking Systems:** Schools would need a reliable method to record athletes’ hours worked, ranging from paper timesheets verified by supervisors to ID-based facility access logs to mobile applications that require athletes to check in for required activities. Given the volume and variety of athletic activities—and the informal nature of some, such as rehabilitation sessions or activities labeled “voluntary”—accurate tracking would be operationally complex. Institutions may need additional compliance personnel to monitor, verify, and reconcile reported hours. While coaches may resist the administrative burden such systems impose, effective supervision and verification would be necessary to avoid institutional exposure for unrecorded or off-the-clock work.
- **Payroll Systems:** Athletes would need to be integrated into the university’s payroll infrastructure. Many large universities already employ thousands of students in campus roles, so paying students per se is not novel. Paying scholarship athletes, however—potentially on a year-round basis and with overtime calculations—would be new. Institutions would need to establish pay periods, process wages through standard payroll systems, and administer required tax withholding. Wages paid to athletes would be taxable compensation, in contrast

¹⁰⁵ 8 C.F.R. § 214.2(f)(9) (2025).

¹⁰⁶ *Id.*

¹⁰⁷ Catherine Haight, *Leveling the Playing Field: Why DHS Must Act Now to Protect International Student-Athletes*, HAIGHT LAW BLOG, <https://haightlaw.com/leveling-the-playing-field-why-dhs-must-act-now-to-protect-international-student-athletes/> (last visited Feb. 17, 2026).

to scholarship amounts used for qualified tuition and fees, which are generally tax favored. Universities would also need to administer any lawful deductions, such as garnishments, and—if applicable under institutional policy, collective bargaining, or benefits eligibility rules—dues or benefit premiums.

- **Reclassification of Scholarships:** Institutions may reassess how athletic scholarships are structured alongside wage payments. One option could be to combine partial scholarships with hourly wages to cover the balance of an athlete's participation-related compensation. However, as discussed above, scholarships are unlikely to function as wage credits under existing FLSA rules, and any allowable in-kind credits (for example, for board or lodging) are narrow and administratively constrained. Another theoretical option would be to replace scholarships entirely with wages, but doing so would raise significant tax, financial-aid, and recruiting implications. More plausibly, schools would retain scholarships in their current form—particularly to cover tuition, which remains central to recruiting and is generally tax favored—and layer cash wages or stipends on top to compensate athletic work. That approach would require careful coordination between athletics, payroll, and financial-aid offices to account for interactions with need-based aid, cost-of-attendance stipends, and other aid formulas, and to avoid inadvertently disadvantaging athletes through increased taxable income or aid displacement.
- **Overtime Management:** University HR departments would need to monitor whether athletes are routinely working overtime and may adopt internal controls to manage predictable overtime exposure. For example, athletic leadership could require advance approval for required activities that would push an athlete's weekly hours beyond forty or establish scheduling guidelines to limit routinely mandated hours absent specific justification. Coaches might be required to obtain approval—potentially including budgetary sign-off—for training camps or other intensive periods that would generate recurring overtime. Over time, institutions could formalize internal policies governing practice and activity limits as part of wage-and-hour compliance. Unlike the NCAA's twenty-hour rule, which is rooted in student-welfare and competitive-equity considerations, such policies would be designed to align institutional practices with employment-law obligations. As a byproduct, clearer limits on required athletic time could also reinforce athlete well-being.
- **Time Off and Breaks:** The FLSA does not require employers to provide rest breaks or days off, though many states impose additional requirements. In jurisdictions with meal-period laws, athletes who work extended shifts may be entitled to meal breaks, and failures to provide or document those breaks can result in statutory penalties. Institutions will therefore need to consider how existing athletics policies—such as the NCAA rule requiring at least one day off per week—interact with employment-law obligations. In many respects,

those rules dovetail: Employers may provide days off without difficulty. However, if an athlete performs required activities on a designated off-day—for example, mandatory rehabilitation or treatment—that time may constitute compensable work. Clear internal policies would be necessary, such as limiting athletic activities on designated off days absent approval by medical or athletics staff and requiring that any approved activity be logged and compensated. Compensatory time off in lieu of overtime is generally unavailable in the private sector and permitted only in limited circumstances for public employers, meaning institutions cannot simply offset overtime with a later day off without still satisfying applicable overtime requirements.

- **Hiring/Firing and Onboarding:** Treating athletes as employees would require institutions to incorporate them into standard onboarding processes, including completion of work-authorization and tax-withholding forms and enrollment in payroll systems. International athletes would raise additional complexities, as employment eligibility would depend on immigration status and work-authorization rules; in some cases, participation as an employee may be limited or require alternative visa pathways or policy changes beyond athletics governance.
- **Discipline and Separation:** Employee status would also materially alter how athletic departments approach discipline and separation. Under current practice, a coach may remove a player from the team or decline to renew a scholarship for performance or conduct reasons, subject to NCAA and institutional rules. If athletes are employees, separation decisions—whether framed as removal from the roster, termination of paid work, or nonrenewal of an employment relationship—would implicate employment-law constraints. Depending on institutional policy, contract terms, collective-bargaining arrangements, or public-sector due-process requirements, schools may need to adopt more formal disciplinary and documentation procedures than athletics departments historically employ.

Other Consequences: Employee classification could also trigger collateral consequences, including potential eligibility for unemployment insurance under state law and the availability of grievance or dispute-resolution mechanisms. While at-will employment principles would still apply in many settings, termination decisions perceived as arbitrary, retaliatory, or inconsistent with stated policies could give rise to statutory or contractual claims. Over time, the athlete-institution relationship would begin to resemble an employment relationship not only with respect to compensation, but also in matters of onboarding, supervision, discipline, and separation—requiring significant cultural and procedural adjustments within athletic departments.

V. CONSIDERATIONS AND IMPLICATIONS FOR EMPLOYEE STATUS UNDER FLSA

There are a number of related considerations and implications of student-athletes being considered employees under the FLSA. Employee status under the

FLSA raises questions about Title IX¹⁰⁸ compliance, legal and practical implications of employee-status under other federal and state laws, and the heightened potential for federal legislation in this space.

A. *Title IX Implications of Athlete Compensation*

One potential implication of recognizing athletes as employees under the FLSA is that it may reframe (and in some respects narrow) the Title IX question that surfaced after *House* regarding institution-funded direct payments to athletes. The *House* settlement ushered in a new era of direct payments and revenue-sharing to athletes. Because those payments disproportionately favor football and men's basketball players,¹⁰⁹ schools have faced uncertainty over whether they should be treated as "athletic financial assistance" subject to the proportionality rule in 34 C.F.R. § 106.37(c)(1), or instead as compensation governed by Title IX's employment provisions, 34 C.F.R. § 106.54. Employee classification would strengthen the argument that institution-funded payments should be analyzed under the compensation framework—requiring the absence of sex-based pay discrimination while permitting differences grounded in nonsex factors such as market dynamics or role-specific demands—rather than as scholarship-like aid requiring proportional allocation.

Under Title IX, institutions must provide nondiscriminatory athletic opportunities and administer athletics-related financial assistance without sex-based disparity. The implementing regulations draw an important distinction between (1) athletic financial assistance and (2) employee compensation. For student "financial assistance," 34 C.F.R. § 106.37(c)(1) provides that athletic scholarship and grant-in-aid dollars must be awarded in a manner substantially proportionate to male and female participation rates; as a practical illustration, if women comprise roughly sixty percent of a school's varsity athletes, the Office of Civil Rights generally expects women to receive roughly sixty percent of the institution's total athletic scholarship dollars. By contrast, Title IX's employment provisions, set forth in 34 C.F.R. § 106.54, prohibit sex-based distinctions in compensation: a recipient "shall not make or enforce any policy or practice which, on the basis of sex, makes distinctions in rates of pay or other compensation." Pay differentials may be permissible where supported by sex-neutral factors (such as experience, market conditions, or role-specific responsibilities), provided the institution is not using sex as a basis for setting compensation. In short, the financial-aid rules emphasize participation-based proportionality, while the employment rules emphasize nondiscriminatory compensation practices rather than proportional allocation.

This distinction has concrete consequences. By classifying athletes as employees rather than students receiving "aid," payments to them would be reviewed under

108 Title IX of the Education Amendments Act of 1972 (20 U.S.C. §1681 et seq.)

109 *House v. NCAA*, No. 4:20-cv-03919, slip op. at 6–10 (N.D. Cal. June 6, 2025); Dan Murphy, *Judge Approves \$2.8 Billion Settlement, Clearing Way for Colleges to Pay Athletes*, ESPN (June 6, 2025), https://www.espn.com/college-sports/story/_/id/45467505/judge-grants-final-approval-house-v-ncaa-settlement.

34 C.F.R. § 106.54. As one commentator has explained, treating revenue-sharing or NIL pay as wages “takes wage payments outside the purview of Title IX’s equal opportunity requirement for athletes,” placing them instead within Title IX’s employment framework.¹¹⁰ Courts have recognized this principle in analogous contexts. In *Stanley v. USC*,¹¹¹ for example, the Ninth Circuit rejected a female basketball coach’s claim that she was entitled to the same salary as the men’s coach. The court held that Title IX and the Equal Pay Act forbid sex-based wage disparities but do not require schools to ignore revenue generation, promotional responsibilities, or other nonsex-based factors in setting salaries. The same reasoning would allow schools to pay football and men’s basketball players more than athletes in other sports, provided the rationale is grounded in market or sport-specific realities rather than sex.

In January 2025, the Department of Education’s Office for Civil Rights issued a memo stating that NIL payments made by institutions should be treated as athletic financial aid and thus subject to the proportionality mandate of 34 C.F.R. § 106.37.¹¹² By that logic, school-funded NIL or revenue-sharing pools could not be disproportionately allocated to male athletes without violating Title IX. But in February 2025, the Department rescinded this guidance as “overly burdensome” and unsupported by statutory text. The Acting Assistant Secretary for Civil Rights emphasized that Title IX “says nothing about how revenue-generating athletics programs should allocate compensation among student athletes,” explicitly disavowing the proportionality requirement.¹¹³

In the absence of clear rulemaking or judicial consensus, institutions remain in limbo. If athletes are not employees, schools may be forced to treat direct payments like scholarships, with proportional allocation required. If athletes are employees, however, the question is likely clearer: Payments are “compensation to employees” under 34 C.F.R. § 106.54, not “financial assistance” under 34 C.F.R. § 106.37. This shift has practical and legal significance. Schools could defend revenue-weighted compensation schemes by pointing to sex-neutral rationales—market demand, time commitments, or injury risks—without fear that Title IX compels dollar-for-dollar proportionality. Conversely, if athletes remain nonemployees, revenue-sharing in its current form may invite constant litigation over proportional aid.

110 See, e.g., Deborah L. Brake, *College Athletes as Employees: Implications for Title IX and (Un)Equal Pay*, U. CHI. L. REV. ONLINE (Feb. 12, 2025), available at: <https://lawreview.uchicago.edu/online-archive/college-athletes-employees-implications-title-ix-and-unequal-pay> (last visited Feb. 17, 2026).

111 178 F.3d 1069 (9th Cir. 1999).

112 See U.S. Dep’t of Educ., *Office for Civil Rights, Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities* (Jan. 16, 2025), <https://calmatters.org/wp-content/uploads/2025/02/ocr-factsheet-benefits-student-athletes.pdf>.

113 U.S. Dep’t of Educ., *Office for Civil Rights, OCR Rescinds Biden 11th Hour Guidance on NIL Compensation* (Feb. 12, 2025) (press release), <https://www.ed.gov/about/news/press-release/us-department-of-education-rescinds-biden-11th-hour-guidance-nil-compensation> (quoting Acting Assistant Secretary for Civil Rights Craig Trainor describing the guidance as “overly burdensome” and lacking “credible legal justification,” and stating that Title IX “says nothing about how revenue-generating athletics programs should allocate compensation”).

In short, employee status would not only reshape wage-and-hour obligations under the FLSA; it would also likely narrow and clarify a pressing Title IX ambiguity in the post-*House* landscape. To the extent institution-funded athlete payments are treated as employee compensation rather than athletics financial assistance, those payments are more naturally evaluated under Title IX's employment provisions, which prohibit sex-based distinctions in compensation while permitting differences grounded in sex-neutral considerations such as market conditions and role-specific demands. On that understanding, reclassification would reduce the force of arguments that Title IX compels participation-based proportionality for institution-funded pay pools—though it would not eliminate Title IX risk in an unsettled area. What begins as an FLSA reclassification thus carries a potential compliance dividend: It may temper the proportionality mandate that could otherwise destabilize emerging models of athlete compensation.

B. Legal and Practical Implications on Other Employment Laws

As noted in Part II, employment and labor laws have varying tests to determine whether someone is an employee. A discussion of each of these laws and the associated test is beyond the scope of this article; however, it is important to note that the erosion of amateurism, adoption of revenue sharing, and a determination that a student-athlete is an employee under the FLSA may trigger renewed scrutiny of student-athlete employee status under other federal and state laws. Issues relating to collective bargaining, work authorization, equal pay, religious and disability accommodations, unemployment, workplace safety, retirement, taxation, and more may come into play. This would have both legal and practical implications for student-athletes and institutions that vary between states and among private and public institutions. For example, Division I student-athletes currently have access to robust medical care in accordance with NCAA legislation and guidelines.¹¹⁴ A determination that a student-athlete is an employee for state workers' compensation purposes would subject the care to applicable state workers' compensation statutes and could impact an athlete's experience with medical care and services. The complexity associated with student-athlete employee status goes far beyond the FLSA and is worthy of additional study and consideration.

C. Federal Legislation

The implications and complexity of the end of amateurism and potential employee status highlight the need for federal legislation in this space. A number of bills relating to reform of collegiate athletics have been introduced in the 119th Congress, including, for example, the SCORE Act,¹¹⁵ Restore College Sports Act,¹¹⁶ and Student Athlete Fairness and Enforcement (SAFE) Act.¹¹⁷ Pending federal legislation is a moving target, and no bill has garnered adequate support to pass

114 NCAA, NCAA SPORTS MEDICINE HANDBOOK, (2025), https://ncaaorg.s3.amazonaws.com/ssi/publications/SSI_SMHB.pdf.

115 H.R. 4312, 119th Cong. (2025–26).

116 H.R. 2663, 119th Cong. (2025–26).

117 S. 2932, 119th Cong. (2025–26).

thus far. Nonetheless, thoughtful, comprehensive legislation is important to guide some of the more challenging issues associated with student-athlete employment. The NCAA and institutions may be generally aligned on pertinent issues, but the perspectives, motivations, and interests of student-athletes may vary widely. Legislation should balance the rights and interests of the parties, not merely seek to preserve the outdated notion of amateurism. Thoughtful consideration of the breadth of pertinent legal issues, including the considerations under the FLSA explored in this article, and practical impact on institutions and student-athletes is critical. Detailed analysis regarding future legislation is beyond the scope of this article, but should consider, among other things, the applicability of the plethora of federal labor and employment laws, the need for consistency across states and among public and private institutions, and unique issues that pertain to certain groups of student-athletes, such as international students.

VI. CONCLUSION

The collapse of amateurism is no longer theoretical. *O'Bannon*, *Alston*, *Johnson*, and most recently *House* have all pushed the enterprise to a tipping point. The next question is not whether college athletes will be paid but under what legal framework—and with what collateral consequences for institutions.

The FLSA provides the clearest lens for evaluating what employee status entails: minimum wage, overtime, hours tracking, payroll systems, and a host of compliance obligations. These are not trivial burdens, but they are also familiar terrain for universities that already employ thousands of students, staff, and faculty. In some respects, athlete employment could professionalize athletic departments, rationalize time commitments, and inject long-needed labor protections into a multibillion-dollar industry.

At the same time, reclassification carries ripple effects beyond wage and hour law. One perhaps unintended consequence is clarifying how Title IX applies to direct athlete compensation. As the *House* settlement underscored, treating revenue-sharing dollars as “financial aid” risks importing the strict proportionality mandate of 34 C.F.R. § 106.37, creating near-insoluble conflicts when payments flow predominantly to football and men’s basketball. Recognizing athletes as employees shifts those payments into Title IX’s compensation framework, 34 C.F.R. § 106.54, where the rule is equal pay for equal work—not proportional dollars across the sexes. In that way, the FLSA analysis doubles as a Title IX solution, providing institutions with a clearer compliance path at the very moment when uncertainty is greatest.

The transformation of the “student-athlete” into the “athlete-employee” is disruptive, but it also offers coherence. It aligns the legal reality with the economic one: Many athletes are workers in a commercial enterprise, and institutions are their employers. The task ahead is to design policies or legislation that honor both the rights of those athletes and the educational mission of their universities. If colleges embrace this shift with foresight—integrating FLSA compliance, clarifying Title IX obligations, and building transparent pay structures—the future of college sports can be more sustainable, equitable, and legally defensible than the amateur ideal it replaces.

IF SHARING REVENUE IS THE GOAL, TITLE IX SHOULD NOT APPLY TO HOUSE NIL AGREEMENTS

DARREN G. GIBSON*

Abstract

The Supreme Court's decision in National Collegiate Athletic Association v. Alston marked a shift in the history of intercollegiate athletics, effectively ending the era of the unpaid amateur student-athlete. As Justice Kavanaugh stated in his concurrence, "The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. . . . But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing." This history appeared to drive the justification and structure of the House Settlement. In approving the settlement, Judge Wilken recognized the settlement will "enable NCAA schools to share their athletic revenues with Division I college student-athletes for the first time in the history of the NCAA." This goal is being accomplished by allowing Division I schools to enter into name, image, and likeness (NIL) agreements directly with their student-athletes up to a cap of \$20.5 million per year across all programs.

An unresolved question is whether the Title IX regulations governing athletic scholarships apply to these NIL agreements. Some argue that schools are required to distribute NIL funds to male and female student-athletes equitably based on their respective participation rates, similar to the rules governing athletic scholarships. However, NIL agreements are commercial and compensatory in nature and fundamentally different from scholarships. Moreover, the vast majority of intercollegiate athletic revenue is generated by football and men's and women's basketball. If Title IX were to apply to NIL agreements, the remedial purpose of sharing revenue to address the concerns identified by Judge Kavanaugh in Alston would be severely hampered. Instead, the revenue-generating athletes would again be precluded from receiving just compensation for the use of their NIL to generate billions of dollars. Such a result is not required by Title IX, nor should it be. Rather, schools and their student-athletes should be able to enter into NIL agreements that recognize the revenue-generation and market reality of each particular sport by sharing revenue with those student-athletes whose NIL are actually used to generate that revenue.

* Mr. Gibson is a partner at Michael Best & Friedrich LLP in Austin, TX, and he is cochair of the firm's Higher Education Industry Group. Mr. Gibson would like to thank Giovanni Lewis, 2025 Summer Associate, Michael Best & Friedrich LLP, Austin, TX, and Malin Esrham, Associate, Michael Best & Friedrich LLP, Chicago, IL, for their assistance. This article would not have been possible without their support.

TABLE OF CONTENTS

INTRODUCTION.....	179
I. TITLE IX AND ITS REGULATIONS.....	180
A. 34 C.F.R. § 106.37(c).....	180
B. 34 C.F.R. § 106.41(c).....	181
II. COMMENTARY ON THE REGULATIONS	182
A. 1979 POLICY INTERPRETATION.....	182
1. <i>Athletic Financial Assistance</i>	182
2. <i>Other Athletic Benefits and Opportunities</i>	183
a. Compensation of Coaches.....	184
b. Publicity.....	185
c. Recruitment.....	185
d. Provision of Support Services.....	186
3. <i>Authority Section</i>	187
B. ADDITIONAL GUIDANCE AND THE BIDEN ADMINISTRATION FACT SHEET	187
C. TRUMP ADMINISTRATION'S RESCISSION OF OCR'S FACT SHEET.....	190
III. TITLE IX REGULATIONS GOVERNING ATHLETIC SCHOLARSHIPS AND BENEFITS SHOULD NOT APPLY TO NIL AGREEMENTS.....	190
A. NIL AGREEMENTS ARE NOT "FINANCIAL ASSISTANCE"	191
B. NIL AGREEMENTS ARE NOT "SCHOLARSHIPS AND GRANTS-IN-AID"	193
1. <i>NIL Agreements Are Neither a Scholarship nor a Grant-in-Aid</i>	193
2. <i>There Is a Common Understanding that NIL Revenue Is Different from Scholarships and Grants-in-Aid</i>	195
C. NIL AGREEMENTS SHOULD NOT BE CONSIDERED A "BENEFIT" UNDER 34 C.F.R. § 106.41(c)	196
IV. CONCLUSION.....	199

INTRODUCTION

For decades, the National Collegiate Athletic Association (NCAA) has restricted what compensation and benefits intercollegiate student-athletes are allowed to receive based on the model of the amateur student-athlete. However, in the past five years, the NCAA and intercollegiate athletics has experienced extraordinary challenges to historical norms, catalyzed by the Supreme Court's unanimous decision in *Alston v. NCAA*.¹ Following the Court's holding that certain of the NCAA's restrictions on educational benefits violate antitrust law, a host of changes have occurred in intercollegiate athletics. These changes have given rise to a myriad of legal questions across numerous areas of the law, including antitrust, labor, employment, and Title IX.

At the forefront of this new era are name, image, and likeness (NIL) agreements, which were first offered to student-athletes by third parties, including "collectives" founded by a schools' boosters, alumni, and supporters, that pooled donor money to create NIL opportunities for that schools' student-athletes. During the first few years of the post-*Alston* NIL era, third-party and collective NIL agreements, combined with the liberalization of transfer rules and the advent of the transfer portal, created an entirely new marketplace for athletic talent. Up to this point, the NCAA continued to prohibit NIL agreements or other compensation agreements directly between schools and student-athletes, beyond the traditional scholarship model, along with limited additional education-related payments (e.g., the \$5,980 annual *Alston* payments). This limitation did not last long.

On June 6, 2025, U.S. District Court Judge Claudia Wilken issued her order granting final approval of the settlement of multiple antitrust cases brought against the NCAA and the major conferences (known as the *House Settlement*, after the lead case).² Under the *House Settlement*, Division I schools are now allowed to enter into NIL agreements directly with their student-athletes, with the total amount of such NIL agreements not to exceed a \$20.5 million cap across a school's sports programs for the first year (2025–26), with the cap increasing thereafter based on the growth in athletic revenues for conference defendant member institutions. While the *House Settlement* and resulting NIL agreements have provided new economic opportunities for both student-athletes and institutions of higher education, they also have raised several legal concerns, many of which remain unresolved.

This article addresses the extent to which Title IX regulations apply to the NIL agreements between schools and student-athletes under the *House Settlement*. While Title IX regulations govern financial assistance and certain benefits and opportunities in college athletics,³ Judge Wilken expressly declined to address the

1 594 U.S. 69 (2021).

2 *In re College Athlete NIL Litigation*, Case No. 20-cv-03919 CW, 2025 WL 1675820 (N.D. Cal. June 6, 2025) (order granting final approval to settlement).

3 See 34 C.F.R. § 106.37(c) (2025); 34 C.F.R. § 106.41(c) (2025).

application of Title IX to the *House Settlement*.⁴ This article addresses the matter in two parts. First, the article summarizes the law and regulations relevant to the application of Title IX to NIL agreements as well as guidance on these regulations. Second, the article argues that the Title IX regulations governing athletic scholarships do not apply to NIL agreements between schools and student-athletes.

I. TITLE IX AND ITS REGULATIONS

Title IX of the Education Amendments of 1972 (Title IX) is a relatively brief statute that prohibits sex discrimination in federally funded educational institutions. The relevant prohibition states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,” except in specified exceptional circumstances.⁵ These exceptions include, among other things, admissions at institutions that traditionally admit only one sex, institutions with contrary religious tenets, military academies, fraternities and sororities, scholarships based on “beauty pageants,” and separate living facilities.⁶ Furthermore, the law makes clear that the definition of “program or activity” is to be interpreted broadly and includes “all operations of ... a college, university, or other postsecondary institution, or a public system of higher education.”⁷

While the statute does not directly address intercollegiate athletics or sports, Title IX’s implementing regulations address athletic programs at institutions of higher education and related financial assistance. The requirements are set forth in two primary sections of the Department of Education’s implement regulations—34 C.F.R. § 106.37(c) and 34 C.F.R. § 106.41(c).⁸

A. 34 C.F.R. § 106.37(c)

34 C.F.R. § 106.37 governs the provision of “financial assistance” to students and prohibits an institution from discriminating on the basis of sex by providing different amount or types of financial assistance, limiting eligibility for such assistance, or applying different criteria for such assistance.⁹ The section specifically addresses athletic scholarships and states, “To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.”¹⁰ Notably,

4 *In re College Athlete NIL Litigation*, 2025 WL 1675820, at *38 (order granting final approval to settlement).

5 20 U.S.C. § 1681(a).

6 *Id.*; 20 U.S.C. § 1686.

7 20 U.S.C. § 1687.

8 34 C.F.R. § 106.34(b)(5) (2025).

9 34 C.F.R. § 106.37(a)(1) (2025).

10 *Id.* § 106.37(c).

this subsection expressly applies only to “athletic scholarships or grants-in-aid.”¹¹ Beyond the language of the regulation itself, there is little other regulatory guidance as to what qualifies as athletic scholarships or grants-in-aid.

When examining the application of the Title IX regulations to NIL agreements between schools and student-athletes pursuant to the *House Settlement*, the question is whether NIL agreement would be considered “athletic scholarships or grants-in-aid” subject to this regulation. If so, NIL agreements would need to be awarded “in proportion to the number students of each sex” participating in intercollegiate athletics.

B. 34 C.F.R. § 106.41(c)

Section 106.41 specifically addresses athletics and includes a general prohibition against discrimination, which states,

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.¹²

34 C.F.R. § 106.41 further identifies ten factors (“among other factors”) that are to be examined in determining whether a school provides “*equal athletic opportunity* for member of both sexes,” including (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes, (2) provision of equipment and supplies, (3) scheduling of games and practice, (4) travel and per diem allowance, (5) opportunity to receive coaching and academic tutoring, (6) assignment and compensation of coaches and tutors, (7) provision of locker rooms, practice and competitive facilities, (8) provision of medical and training facilities and services, (9) provision of housing and dining facilities and services, and (10) publicity.¹³

The regulation further states that an unequal expenditure between male and female teams will not in and of itself constitute noncompliance with 34 C.F.R. § 106.41, but the Department of Education “may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.”¹⁴

For purposes of the analysis of NIL agreements between schools and student-athletes pursuant to the *House Settlement*, the only factor that appears directly relevant is “publicity,” which is addressed in more detail below, along with guidance related to recruiting, compensation of coaches, and support services.

11 *See id.*

12 34 C.F.R. § 106.41(a) (2025).

13 *Id.* § 106.41(c) (emphasis added).

14 *Id.*

II. COMMENTARY ON THE REGULATIONS

A. 1979 Policy Interpretation¹⁵

In 1979, the Department of Health, Education, and Welfare (HEW)—the precursor agency to the Department of Education—published a policy interpretation regarding Title IX and Intercollegiate Athletics (the “Policy Interpretation”),¹⁶ which set out to explain the application of HEW’s initial Title IX regulations, adopted in 1975,¹⁷ to intercollegiate athletics and provide institutions guidance regarding their compliance obligations. The Department of Education was created on October 17, 1979, and the Department of Education published modified Title IX regulations in 1980, including some revisions to the two primary regulations discussed above.¹⁸ However, the Policy Interpretation remains a key document in understanding the application of current Title IX regulations on intercollegiate athletics and athletics programs at recipient institutions.

The Policy Interpretation focuses on compliance in three areas: (1) athletic financial assistance, (2) other program benefits and opportunities, and (3) meeting the interests and abilities of male and female students. For the purposes of this article, only the first two sections, as well as the authority section of the Policy Interpretation, will be addressed. The third compliance area governs whether a school is offering sufficient participation opportunities for male and female athletes and does not directly pertain to NIL agreements.

1. Athletic Financial Assistance

34 C.F.R. § 106.37(c) and the original HEW regulation¹⁹ require institutions to award “athletic scholarships or grants-in-aid” to members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics. Tracking the language of the regulation, the Policy Interpretation states that compliance will be determined by a financial comparison of whether proportionately equal amounts of financial assistance are provided between men’s and women’s programs.²⁰ If there are substantially equal amounts or the disparity can be explained by “legitimate, nondiscriminatory factors,” then the institution will be in compliance with Title IX.²¹ The Policy Interpretation provides two examples of legitimate, nondiscriminatory factors, including (i) a difference in the cost of scholarships for in-state versus out-of-state students and (ii) reasonable decisions regarding awards appropriate for program development (e.g., spreading

15 U.S. Dep’t of Health, Educ., and Welfare, Off. for Civ. Rights, A Policy Interpretation: Title IX and Intercollegiate Athletics (1979 Policy Interpretation), 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation].

16 HEW was the precursor to the Department of Education, which was formed in 1979 as a separate federal agency.

17 45 C.F.R. §§ 86.37(c), 86.41(c) (2025).

18 34 C.F.R. §§ 106.37(c), 106.41 (2025).

19 45 C.F.R. § 86.37(c).

20 1979 Policy Interpretation, 44 Fed. Reg. 71,415 (Dec. 11, 1979).

21 *Id.*

scholarships for a new program over multiple classes). While these factors are not likely to be relevant to NIL agreements, the Policy Interpretation does not suggest these factors are the exclusive “legitimate, nondiscriminatory factors” for assessing compliance.

Notably, the Policy Interpretation does not address the definition or scope of “athletics scholarships and financial aid” in detail. However, in a parenthetical, the Policy Interpretation qualifies financial assistance to be “scholarship aid.”²² Further, while the Policy Interpretation states that financial assistance in “forms other than grants” is also required to be proportionately available, the examples of work-related aid and loans are distinguishable from NIL agreements, which are fundamentally different from work-related aid, such as federal work-study programs, or student loans.

Based on the express language of the regulations and the Policy Interpretation document, it does not appear that Title IX’s requirement of proportionate financial assistance applies to the NIL agreements between schools and student-athletes, which are not “athletic scholarships or grants in aid.” This should come as no surprise, since from the time of the adoption of the regulations until the *House Settlement*, such direct financial arrangements between schools and student-athletes were strictly forbidden by NCAA rules and would have been an affront to the notion of the amateur student-athlete that predominated collegiate athletes.

2. *Other Athletic Benefits and Opportunities*

34 C.F.R. § 106.41 requires universities to provide “equal athletic opportunities” for members of both sexes in their athletic programs. The regulation sets forth the ten factors cited above to assess compliance with this requirement. The Policy Interpretation states that these ten factors are not exclusive, and the Department may consider other factors.²³ In addition, an institution complies when the compared program components are “equivalent, that is, equal or equal in effect.”

However, even if there are differences in benefits and opportunities between men’s and women’s programs, an institution may still be in compliance so long as the differences are justified by legitimate, nondiscriminatory factors. For instance, the Policy Interpretation acknowledges that certain aspects of some sports, such as football, may cause components of men’s and women’s athletic programs to be unequal. These sports-specific aspects, such as the nature and replacement of equipment and rules of play, by their inherent nature, can create differences between men’s and women’s programs. However, so long as the sport-specific needs of women’s and men’s teams are all met equivalently, then these differences will not render an institution noncompliant with the equal opportunity requirement.²⁴

Likewise, the Policy Interpretation addresses another difference that is especially relevant to NIL revenue-sharing agreements. The Policy Interpretation recognizes that the operation of a competitive event in a single-sex sport may create imbalances

22 *Id.*

23 *Id.*

24 *Id.* at 71,416.

in the comparison of men's and women's programs. For many schools, this is often the case because sports like football and men's basketball draw in larger crowds, and thus the costs and support required for competitive events may be inequivalent as compared to other sports. The Policy Interpretation provides that in these instances, the differences would not violate Title IX so long as the level of support to men's and women's programs is based on sex-neutral criteria (i.e., projected attendance, staffing needs) and the institution does not limit the ability of women's athletic events to rise in appeal.²⁵ Thus, it is not always the case that discrepancies in resources allocated between men's and women's programs amount to noncompliance.

Although the Policy Interpretation addresses all ten factors listed in 34 C.F.R. § 106.41(c), the Policy Interpretation's discussion of four of the factors provides insight into the potential application of Title IX to NIL agreements: (1) compensation of coaches, (2) publicity, (3) recruitment, and (4) provision of support services.

a. Compensation of Coaches. Pursuant to 34 C.F.R. § 106.41(c), Title IX's equal opportunity requirement applies to the compensation of men's and women's coaches. The Policy Interpretation states, "[i]n general, a violation will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability."²⁶ Accordingly, Title IX's guarantee of equal opportunity for male and female athletes does not require that their coaches receive equal pay (although Title IX's application to employment and other employment discrimination statutes may require equal pay under certain circumstances). Furthermore, the Policy Interpretation recognizes that permissible, nondiscriminatory factors can affect the compensation of coaches, including "the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition," as well as an "outstanding record of achievement" that may justify an abnormally high salary.²⁷

As with other components of college athletics, nondiscriminatory factors specific to an individual sport or program can create an unequal balance in the compensation of coaches.²⁸ Where these nondiscriminatory factors represent valid differences in skill, effort, responsibility, or working conditions, they may justify differences in compensation.²⁹

These differences have also been recognized in litigation related to college coaches under applicable employment statutes. For example, Equal Pay Act cases that have addressed discrepancies in the compensation of coaches rarely result in

25 *Id.*

26 *Id.*

27 1979 Policy Interpretation, 44 Fed. Reg. 71,416 (Dec. 11, 1979).

28 *Id.*

29 *Id.*

a finding that coaches of different teams are engaged in work “requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”³⁰

Moreover, courts have recognized that “[u]nequal wages that reflect market conditions of supply and demand are not prohibited under the Equal Pay Act.”³¹ As one court recognized, “market factor increases in salaries may be necessary to maintain a strong coaching staff, even if the pay increases happen to be in areas which are dominated by men.”³²

b. Publicity. The Policy Interpretation highlights that recruitment must also be provided on an “equal opportunity” basis because recruitment practices often affect the overall provision of opportunities to male and female athletes.³³ Compliance will be determined based on whether coaches in men’s and women’s programs are provided substantially equal opportunities to recruit; whether financial and other resources for recruitment are equivalently adequate to meet the needs of each men’s and women’s athletic program; and whether differences in benefits, opportunities, and treatment afforded to prospective student-athletes of each sex have a disproportionately limiting effect on the recruitment of students of either sex.³⁴

To the extent that NIL agreements are considered recruitment resources, the Policy Interpretation does not suggest simple differences in amounts spent on such agreements between men’s and women’s programs constitutes a violation of the regulation. Rather, assuming NIL agreements do constitute recruitment resources, the disparity must be such that recruitment needs of each program cannot be met in an equivalent manner.

c. Recruitment. 34 C.F.R. § 106.41 also extends the equal opportunity requirement to the provision of publicity for men’s and women’s athletic programs. To assess compliance, the Policy Interpretation identifies factors such as the equivalence for men and women in the availability of information personnel, access to “other publicity resources,” and quantity and quality of publications and promotion of

30 See *Deli v. Univ. of Minn.*, 863 F. Supp. 958 (D. Minn. 1994) (holding that the job of gymnastics coach was not substantially equal to job of men’s basketball coach); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994) (holding that plaintiff did not prove that job of women’s basketball coach was substantially equal to that of men’s basketball coach); *Weaver v. Ohio State Univ.*, 71 F. Supp. 2d 789, 800–02 (S.D. Ohio 1998) (holding that women’s field hockey coach not equivalent position to men’s ice hockey coach).

31 *Weaver*, 71 F. Supp. 2d at 801 (citing *Stanley*, 13 F.3d at 1322); see also *Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 480 (8th Cir. 1984) (allowing market forces to justify disparity in faculty awards across disciplines); *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. State of Mich.*, 886 F.2d 766, 769 (6th Cir. 1989) (employer may follow the market rate, and that the failure to rectify traditional wage disparities that exist in the marketplace between predominantly male and predominantly female jobs is not actionable); *Stanley*, 13 F.3d at 1322 (“Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA.”).

32 *Weaver*, 71 F. Supp. 2d at 802.

33 1979 Policy Interpretation, 44 Fed. Reg. 71,417 (Dec. 11, 1979).

34 *Id.*

men's and women's programs.³⁵ The Policy Interpretation does not provide further guidance regarding publicity.

Information personnel and quantity and quality of publications and promotions are not directly tied to NIL agreements, and the more general "other publicity resources" was never intended to apply to NIL agreements, which were not contemplated at the time. However, "other publicity resources" could be used to describe NIL agreements, if the purpose of NIL agreements is to use the student-athletes' NIL rights to promote a particular program. While the *House Settlement* recognizes that NIL agreements between schools and student-athletes may also include institutional brand promotion, the settlement does not require that NIL agreements between schools and their student-athletes be primarily for "publicity" purposes. Unlike NIL agreements with collectives, NIL agreements between schools and their student-athletes are not subject to the requirement that the agreement have a "valid business purpose related to promotion or endorsement of goods or services" at rates comparable to those paid to nonstudent-athletes.³⁶ Rather, the *House Settlement* has recognized that student-athletes' NIL rights have monetary value to their respective schools, conferences, and the NCAA, as reflected by the \$2.7 billion damages award in the *House Settlement*. The *House* injunctive relief settlement simply authorizes schools to now pay their student-athletes for the value of those NIL rights, thereby creating a market for such rights. While an NIL agreement between a school and a student-athlete results in compensation going to the student-athlete in exchange for a license to use the student-athlete's NIL rights, it does not necessarily result in any specific publicity or promotion of a particular program by that student-athlete.

To the extent that NIL agreements are considered a form of publicity, 34 C.F.R. § 106.41(c) makes it clear that a simple difference in expenditure "will not constitute noncompliance," but rather the question is whether the school has failed to provide the necessary funds to provide *equality of opportunity* for each sex.

d. Provision of Support Services. Like recruitment and publicity, the provision of support services can also affect whether a school provides equal opportunities in athletics between both sexes.³⁷ According to the Policy Interpretation, compliance will be assessed by examining the amount of administrative support provided to men's and women's programs. Notably, the Policy Interpretation discusses support services with a focus on "administrative and clerical" support and makes no mention of financial support.³⁸

Accordingly, it would not appear that NIL agreements would qualify as "support services" under 34 C.F.R. § 106.41(c).

35 *Id.*

36 2025–2026 NCAA DIVISION 1 MANUAL, Bylaw 22.1.3. <https://ncaapublications.com/products/2025-2026-ncaa-division-i-manual>

37 1979 Policy Interpretation, 44 Fed. Reg. 71,417 (Dec. 11, 1979).

38 *Id.*

3. *Authority Section*

Finally, the authority section of the Policy Interpretation addresses some of the facts and comments from institutions that factored into HEW's interpretation of Title IX. Notably, the Policy Interpretation addresses commentary that revenue-producing sports, such as football, should be exempt from the equal opportunity requirements of Title IX.³⁹ In its discussion, HEW explicitly rejected this commentary and stated Title IX applies to any revenue-producing activity; therefore, football and other similar sports were not exempted.⁴⁰ However, the Policy Interpretation does provide that the unique circumstances of football, such as the unique size and costs of such programs, were taken into account.⁴¹ Further, the Policy Interpretation emphasizes there are characteristics common to most revenue-producing sports that could result in legitimate nondiscriminatory differences in expenditures.⁴² For example, the high costs spent on managing events attended by large numbers of people for these "revenue-producing" sports would be an acceptable, nondiscriminatory reason for differences between men's and women's programs.⁴³

B. *Additional Guidance and the Biden Administration Fact Sheet*

From 1979 until 2025, the Department of Education did not issue guidance providing direct insight into whether NIL agreements between schools and student-athletes would be covered by Title IX. This is not surprising, as those years were defined by the amateur student-athlete model until 2021 when the *Alston* court declined to find the amateurism model constituted a defense to antitrust liability (and Justice Kavanaugh further rejected the model in his concurrence).⁴⁴ While the Department of Education has issued guidance over the years regarding Title IX and athletics, virtually all of the guidance has addressed the Policy Interpretation's "three-part test" used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics to "effectively accommodate the interests and abilities of members of both sexes" under 34 C.F.R. § 106.41(c)(1).⁴⁵ The Department has also provided additional

39 *Id.* at 71,421.

40 *Id.*

41 *Id.* at 71,419.

42 *Id.* at 71,421.

43 *Id.*

44 *See Alston*, 594 U.S. at 101-02 (rejecting the NCAA's argument that the "amateurism" of college athletics is a fundamental product feature rendering college athletics rendering it immune from antitrust scrutiny); *Id.* at 110 (Kavanaugh, J., concurring) ("The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. ... [T]he NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes.").

45 *See, e.g.*, 1979 Policy Interpretation, 44 Fed. Reg. 71,418 (Dec. 11, 1979) (establishing three-part test); Dept. of Educ. Off. of Civ. Rts., Dear Colleague Letter and Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996); Dept. of Educ. Off. of Civ. Rts.,

guidance regarding compliance with the “substantially proportionate” requirement for athletics scholarships under 34 C.F.R. § 106.37(c),⁴⁶ but this guidance did not provide insight into whether NIL agreements would be subjected to 34 C.F.R. § 106.37(c).

However, in January 2025 during the final days of the Biden administration, and while the *House Settlement* was pending final approval, the Department of Education Office of Civil Rights (OCR) released a fact sheet discussing the implications of Title IX and NIL activities.⁴⁷ The fact sheet addresses equal opportunity requirements under Title IX in the context of NIL-related compensation and activities. Drawing heavily on the 1979 Policy Interpretation, the OCR reached two conclusions relevant to NIL.

First, OCR concluded the Title IX requirement of equivalent benefits, opportunities, and treatment under 34 C.F.R. § 106.41(c) applies to publicity and support services that may impact the student-athlete’s ability to secure NIL opportunities.⁴⁸ The fact sheet stated that schools have the obligation to provide equivalent publicity in the context of NIL activities. However, as with other components of Title IX, the fact that publicity is not equivalent between men and women does not inherently mean that the school is not in compliance, so long as the difference is a result of nondiscriminatory factors. For example, if a school’s athletic department were to assist athletes in obtaining and negotiating NIL agreements, then such support would need to comply with Title IX. Moreover, OCR did *not* conclude that NIL agreements, themselves, are a form of publicity or support services subject to the equivalency requirement of 34 C.F.R. § 106.41(c).

Second, OCR did conclude compensation from a school for use of a student-athlete’s NIL qualifies as financial assistance subject to the proportionality requirement of 34 C.F.R. § 106.37(c).⁴⁹ The fact sheet states, “Compensation provided by a school for the use of a student-athlete’s NIL constitutes athletic financial assistance under Title IX because athletic financial assistance includes any financial assistance and other aid provided by the school to a student-athlete that is connected to a student’s athletic participation; it is not limited to scholarships or grants.”⁵⁰

Contrary to the expressly language of the rule, OCR concluded 34 C.F.R. § 106.37(c) applies to far more than “athletics scholarship and grants-in-aid,”

Dear Colleague Letter and Guidance on Determining which Athletic Activities Can Be Counted for Purposes of Title IX Compliance (Sept. 17, 2008); Dept. of Educ. Off. of Civ. Rts., Dear Colleague Letter and Guidance on Accommodating Students’ Athletic Interests and Abilities: Standards for Part Three of the “Three-Part Test” (Apr. 20, 2010); Dept. of Educ. Off. of Civ. Rts., Support Equal Opportunity in School Athletic Programs, A Resource for Students and Families (Feb. 2023).

46 See, e.g., Dept. of Educ. Off. of Civ. Rts., Dear Colleague Letter: Bowling Green State University (1998).

47 U.S. Dep’t of Educ. Off. of Civ. Rts., Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities (Jan. 16, 2025) (rescinded).

48 *Id.* at 5–7.

49 *Id.* 7–8.

50 *Id.* 7.

including “any financial assistance and other aid provided by the school to a student-athlete that is connected to a student’s athletic participation.” OCR went on to claim that section 106.37(c) therefore includes “other types of compensation and financial assistance permitted to be provided by schools following a federal court injunction” (citing *Alston*) and “compensation from schools for use of a student-athlete’s NIL” (presumably referring to the *House Settlement*).⁵¹ OCR concluded, “When a school provides athletic financial assistance in forms other than scholarships or grants, including compensation for the use of a student-athlete’s NIL, such assistance also must be made proportionately available to male and female athletes.”⁵² In support of this position, OCR cited three sources.⁵³

First, OCR cited the Policy Interpretation’s statement that financial assistance covered by 34 C.F.R. § 106.37(c) could include work-related aid and loans. As stated above, work-related financial aid and loans to cover the cost of education are not equivalent to NIL agreements, which are unrelated to the cost of education and are not intended to cover the cost of education.

Second, OCR cited a letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights in the Department of Education under the second Obama administration, addressing whether an NCAA rule regarding cost-of-attendance scholarship awards would be used to circumvent Title IX. The letter states, without citing any authority, “[a]thletic financial assistance includes any financial assistance expenditures through the institution’s athletics program and any other aid that is connected to a student’s athletic participation.”⁵⁴ However, the letter then goes to conclude that cost-of-attendance scholarship awards are subject to 34 C.F.R. § 106.37(c). This final conclusion is not surprising, since the regulation covers “athletic scholarships.” However, the letter was written in the era of the amateur student-athlete and prior to NIL agreements. Accordingly, the letter does not support the fact sheet position that NIL agreements constitute a form of “athletic scholarships and grants-in-aid” under 34 C.F.R. § 106.37(c).

Third, OCR cited to schools’ reporting obligations under the Equity in Athletics Disclosure Act (EADA), 20 U.S.C. § 1092(e), and its implementing regulation, 34 C.F.R. § 668.47. Under the EADA regulations, “athletically related student aid” is defined as “any scholarship, grant, or other form of financial assistance, offered by an institution, the terms of which require the recipient to participate in a program of intercollegiate athletics at the institution.”⁵⁵ The EADA’s definition is broader than the use “athletics scholarships and grants-in-aid” found in 34 C.F.R. § 106.37(c). Moreover, the very document that the January 2025 Fact Sheet relies upon, the User’s Guide for the Equity in Athletic Disclosure Act, expressly states that the data schools report in the EADA portal “may not be the same as data used for determining compliance with other Federal or state laws, including Title IX of

51 *Id.* Notably, OCR did not expressly refer to the *House Settlement* in the Fact Sheet.

52 *Id.* 8. OCR also clarified that it does not consider third-party NIL agreements subject to 34 C.F.R. § 106.37(c).

53 *Id.* 7 n.26.

54 Letter from Catherine E. Lhamon to Marcia D. Greenberger and Deborah Slaner Larkin (Nov. 15, 2015), at 2.

55 34 C.F.R. § 668.41(a) (2025).

the Education Amendments of 1972.”⁵⁶ Again, the fact sheet’s reliance on EADA definitions to establish compliance standards for Title IX is misplaced.

C. Trump Administration’s Rescission of OCR’s Fact Sheet

On February 15, 2025, the OCR under the Trump administration rescinded the January 2025 Fact Sheet on NIL activities.⁵⁷ In its press release, OCR stated that the fact sheet created under the Biden administration lacked credible legal justification as “Title IX says nothing about how revenue-generating athletics programs should allocate compensation among student athletes.”

III. TITLE IX REGULATIONS GOVERNING ATHLETIC SCHOLARSHIPS AND BENEFITS SHOULD NOT APPLY TO NIL AGREEMENTS

With the order granting final approval of the *House* Settlement, institutions of higher education may for the first time directly compensate their student-athletes through NIL agreements. Under the injunctive relief portion of the *House* Settlement, the amount of funds that a school may spend on NIL agreements with student-athletes is capped based on twenty-two percent of the “Averaged Shared Revenue” generated by the conference defendants’ member institutions based on eight specific categories of revenue. Under the terms of the settlement, each institution is allowed to provide up to a total of \$20.5 million in NIL agreements to student-athletes per year, beginning in 2025–26, with that amount increasing approximately four percent per year.

Notably, various objectors to the *House* Settlement agreement (SA) challenged its fairness to female class members on the grounds that the settlement violates Title IX in two ways: “because the SA’s damages allocations favor male class members over female class members in violation of Title IX, and because the SA does not contain any provisions that require that benefits and compensation provided to class members pursuant to the Injunctive Relief Settlement be made in compliance with Title IX.”⁵⁸

As for the first argument, the court recognized that the “the objectors have cited no authority that Title IX applies to damages awards distributions or that damages distributions made by a claims administrator are subject to Title IX.”⁵⁹ In other words, the objectors failed to cite any law that would indicate that compensation to student-athletes for the historical use of their NIL rights by the NCAA, conference defendants, and member institutions was subject to Title IX. Moreover, the court

56 U.S. Dep’t of Educ., Off. of Postsecondary Educ., *User’s Guide for the Equity in Athletic Disclosure Act Web-Based Data Collection*, at 3 (Sept. 2023).

57 Press Release, U.S. Dep’t of Educ. Off. for Civ. Rts., U.S. Department of Education Rescinds Biden 11th Hour Guidance on NIL Compensation (Feb. 15, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-rescinds-biden-11th-hour-guidance-nil-compensation>.

58 *In re College Athlete NIL Litigation*, 2025 WL 1675820, at *38 (N.D. Cal. June 6, 2025) (order granting final approval to settlement).

59 *Id.*

noted that the damages model allocates more funds to class members who played Division I football and men's basketball on the basis that schools and conferences received far more revenues from those sports than from other sports during the class period.⁶⁰ Notably, the *House* Settlement is currently subject to an appeal on the basis that the damages distribution methodology violates Title IX, among other bases.⁶¹

As to the second argument regarding injunctive relief, the court stated,

There is nothing in the SA that would prevent or prohibit schools from distributing benefits and compensation pursuant to the Injunctive Relief Settlement in a manner that complies with Title IX. Further, the SA does not require class members to release claims arising out of Title IX in connection with the implementation of the Injunctive Relief Settlement. Thus, to the extent that schools violate Title IX when providing benefits and compensation to student-athletes pursuant to the Injunctive Settlement Agreement, class members will have the right to file lawsuits arising out of those violations.⁶²

As a result, student-athletes have the ability to challenge a school's methodology for distributing the \$20.5 million in NIL funds under Title IX through litigation.

In the event such litigation proceeds, there are likely two main arguments advanced in the debate of whether the Title IX regulations apply to NIL agreements and revenue sharing between institutions and student-athletes. In the first argument, proponents would likely contend that Title IX applies to NIL agreements as "athletic scholarships" under 34 C.F.R. § 106.37(c).⁶³ In the alternative, proponents may argue that Title IX applies to NIL agreement revenue sharing because NIL constitutes a "benefit" under 34 C.F.R. § 106.41.⁶⁴ While both arguments cite to the Title IX regulations, the arguments take the language of the regulations beyond their reasonable scope. Further, the arguments do not account for the commercial nature of NIL compensation or the purpose of the *House* Settlement.

A. NIL Agreements Are Not "Financial Assistance"

Individuals that advocate for Title IX's application to NIL revenue sharing argue Title IX applies because NIL compensation provided by institutions qualifies as financial assistance under 34 C.F.R. § 106.37(c).⁶⁵ Not only does this argument ignore the actual language of the regulation, but such interpretation is contrary to the common understanding of what constitutes financial assistance subject to Title IX.

60 *Id.* n.16.

61 *House, et al., v. Nat'l Coll. Athletic Ass'n, et al.*, Nos. 25-7461, 25-7467, 25-7469, 25-7824, and 25-7869, Ninth Circuit Court of Appeals. On February 4, 2026, the Ninth Circuit consolidated the pending appeals, and opening briefs by the appellants are due March 9, 2026.

62 *Id.* (internal citations omitted).

63 See Erin Buzuvis, *Title IX and Athlete Compensation in the Postamateurism Era*, 93 *FORDHAM L. REV.* 1579, 1594 (2025).

64 See *id.* at 1579, 1591–93.

65 34 C.F.R. § 106.37(c) (2024).

Notably, Title IX includes a general prohibition regarding discrimination in financial assistance, which has not been the focus of commentators. 34 C.F.R. § 106.37(a)(1) states a recipient shall not, “[o]n the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate.” This provision follows the “on the basis of sex” language found in the Title IX statute. Furthermore, the Supreme Court has recognized that this language prohibits “intentional sex discrimination.”⁶⁶ In 2001, the Supreme Court held in *Alexandre v. Sandoval* that there is no private right of action to enforce disparate-impact regulations under Title VI the Civil Rights Act, upon which Title IX is based.⁶⁷ While the Department of Education’s regulations may impose enforcement liability for disparate impact in certain specified circumstances, no federal appellate court has held that Title IX recognizes a private right of action to enforce disparate impact regulations under Title IX post-*Sandoval*.⁶⁸

Accordingly, if schools make decisions regarding allocation of NIL funds based on legitimate, nondiscriminatory reasons other than sex, such decisions should be defensible in a private Title IX action.⁶⁹ For example, if a school distributed its \$20.5 million in NIL funds to each program based on the proportionate amount of revenues generated by each program in the eight categories of revenue used to calculate the average shared revenue in the *House* Settlement, such a methodology may be defensible, as the methodology reflects both the stated revenue-sharing purpose of the *House* Settlement and the settlement’s methodology for calculating what revenue should be shared with student-athletes. While a given school’s football and men’s basketball teams may generate the largest portion of revenue by program, the school’s women’s basketball team and other programs (e.g., women’s volleyball) may generate significantly more revenue than many male programs (e.g., golf, tennis), and those higher-revenue women’s programs would therefore receive a greater share of the NIL agreement funds than the lower-revenue men’s programs.

Of course, if a school decided to offer NIL agreements only to male student-athletes without any legitimate, nondiscriminatory reason, such a decision would not be able to take advantage of the defense described above. Moreover, some commentators have argued “that a sports’ ability to generate revenue does not justify unequal treatment” under any circumstances.⁷⁰ Whether distribution of NIL

66 *Jackson v. Birmingham Bd. of Educ.*, 55 U.S. 167, 173 (2005) (recognizing prohibition of discrimination “on the basis of sex” gives rise to a private right of action for “intentional sex discrimination”).

67 532 U.S. 275, 280–81 (2001) (holding no private right of action to enforce disparate impact claims under Title VI).

68 *See, e.g., Poloceno v. Dallas Indep. Sch. Dist.*, 826 F. App’x 359, 363 (5th Cir. 2020) (“A plaintiff’s Title IX claim must be based on intentional discrimination, not disparate impact.”) (relying on *Sandoval*).

69 *See Stucky v. Dept. of Educ.*, 283 F. App’x 503, 506 (9th Cir. 2008) (affirming summary judgment of Title IX claim where defendant offered “legitimate, non-discriminatory reason for plaintiff’s disparate treatment”).

70 Erin Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O’Bannon*, 41 J. COLL. & UNIV. L. 297, 326 (2015) (citing cases); Buzuvis, *supra* note 64, at 1595 n.116.

funds based on revenue generation will be defensible is likely to be determined by the courts in future litigation.

B. NIL Agreements Are Not “Scholarships and Grants-in-Aid”

As discussed above, 34 C.F.R. § 106.37(c) applies to the provision of athletic scholarships and grants-in-aid in athletics, which must be allocated “in proportion to the number of students of each sex” that participate in athletics.⁷¹ Therefore, the regulation expressly applies *only* to funds provided as athletic scholarships or grants-in-aid. Because NIL revenue is neither of the two, the regulation does not apply.

1. NIL Agreements Are Neither a Scholarship nor a Grant-in-Aid

It is not enough to say that because NIL agreements are financial in nature and are administered by an institution, they necessarily qualify as financial assistance to a student-athlete to be covered by 34 C.F.R. § 106.37(c). Rather, for the regulation to apply, NIL agreements must be categorized as an athletic scholarship or a grant-in-aid.⁷² However, NIL agreements between a school and its student-athletes are inherently different from athletic scholarships and grants-in-aid, making such a classification unreasonable.

The first quality of an NIL agreement that distinguishes it is the fact that an NIL agreement is compensatory in nature.⁷³ While the regulation does not provide a definition for what constitutes an athletic scholarship or grant-in-aid, the NCAA provides a definition of what constitutes financial aid in its bylaws: “... funds provided to student-athletes from various sources to pay or assist in paying their **cost of education** at the institution.”⁷⁴

The NCAA Bylaws set forth permissible financial aid that includes Athletically Related Financial Aid and Institutional Financial Aid,⁷⁵ as well as other permissible external financial aid.⁷⁶ All these forms of financial aid are common in the fact that they are funds that must be provided to cover the cost of education. To date, athletic scholarships and financial aid granted by schools has been provided with the intent that such funds cover educational expenses,⁷⁷ including Alston payments.⁷⁸ This is

71 See also Tan Boston, *As California Goes, So Goes the Nation: A Title IX Analysis of the Fair Pay to Play Act*, 17 STAN. J. C.R. & C.L. 1, 25 (2021) (stating athletic scholarships amount to pay-for-play, which is prohibited for NIL compensation, and describing how NIL compensation may only be provided for intellectual property rights) (stating the regulations do not define athletic scholarships).

72 See 34 C.F.R. § 106.37(c) (2025).

73 Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1119 (2023).

74 2025–2026 NCAA DIVISION I MANUAL, Bylaw 15.02.4.

75 *Id.*

76 *Id.*, Bylaw 15.01.1 (includes financial aid from a person upon whom the student athlete is naturally or legally dependent, “financial aid awarded solely on bases having no relationship to athletics ability,” or “financial aid from an established and continuing scholarship program”).

77 Paula Lavigne & Dan Murphy, *Title IX Will Apply to College Athlete Revenue Share, Feds Say*, ESPN (July 16, 2024, 10:58 AM), https://www.espn.com/college-sports/story/_/id/40567726/title-ix-college-athlete-revenue-share-nil.

78 *Alston*, 594 U.S. at 74 (“the court struck down NCAA rules limiting the education-related benefits

where financial aid and NIL agreements differ. The compensation a student-athlete receives through an NIL agreement is wholly unrelated to covering the costs of student-athlete's educational expenses.⁷⁹ Rather, an NIL agreement is commercial in nature, and its compensatory scheme is based on payment for the schools' use of the student-athlete's NIL rights, not money provided to cover the costs of the student-athlete's education. NIL revenue sharing is a commercial transaction, not a scholarship and, thus, is not covered by 34 C.F.R. § 106.37(c).

The second quality of NIL compensation that distinguishes it from athletic scholarships and grants-in-aid is the lack of any limit on how much money may be provided to a student-athlete in an NIL agreement or any connection to educational expenses.⁸⁰ While the *House Settlement* does place an initial overall limit of \$20.5 million per year that an institution may share amongst its student-athletes, there is no limit as to how much an institution may give an individual athlete.⁸¹ Indeed, a school could theoretically spend its entire \$20.5 million cap on an NIL agreement with a single student-athlete. In contrast, the amount of financial assistance a student-athlete may receive is limited to the maximum cost of attendance that normally is incurred by students.⁸² Cost of attendance is comprised of the cost of tuition and fees, living expenses, books and supplies, transportation, and other expenses related to attendance at an institution.⁸³ Thus, whereas financial aid is limited to the maximum cost of education-related expenses, NIL agreements are only limited by the \$20.5 million cap.⁸⁴ And as commonly seen, student-athletes across the country are entering into NIL agreements that pay them amounts that far exceed the maximum for financial aid.

Finally, the nature of the consideration inherent to an NIL agreement distinguishes it from athletic scholarships and grants-in-aid.⁸⁵ As defined in the NCAA bylaws, Athletically Related Financial Aid is "awarded on any basis that is related to athletics ability, participation, or achievement."⁸⁶ An athletic scholarship is intended to cover the student-athlete's educational expenses, based on the cost of an education at the particular school, in exchange for their participation on the team. On the other hand, an NIL agreement recognizes that the school is paying for the right to use the student-athlete's rights to their NIL in exchange for sharing a portion of the revenue generated by the student-athlete's participation in intercollegiate athletics. NCAA Bylaw 22.02.1 defines Name, Image, and Likeness

schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships").

79 Andrew J. Haile, *Equity Implications of Paying College Athletes: A Title IX Analysis*, 64 B.C. L. REV. 1449, 1471 (2023).

80 Boston, *supra* note 74.

81 *Id.*

82 2025–2026 NCAA DIVISION I MANUAL, Bylaw 15.01.5.

83 *Id.*, Bylaw 15.02.2.

84 Boston *supra* note 74.

85 *Id.* at 25.

86 2025-2026 NCAA DIVISION I MANUAL, Bylaw 15.02.4.1.

Compensation as “compensation for the use of the individual’s name, image and likeness, which may be secured or compensated based, in whole or in part, on athletics skill or reputation. Name, image and likeness activities **may not be used to compensate a student-athlete for athletics participation or achievement.**”⁸⁷ Thus, while athletic scholarship may be used as an after-the-fact reward for participation and achievement (such as awarding a walk-on a scholarship after a successful season), NIL compensation is prohibited from being used to reward performance.⁸⁸ In short, compensation from an NIL agreement is fundamentally different from an athletic scholarship or a grant-in-aid.

2. *There Is a Common Understanding that NIL Revenue Is Different from Scholarships and Grants-in-Aid*

Furthermore, the language of various NIL legislation around the country further supports the conclusion that NIL compensation is separate and apart from financial assistance for educational purposes. Legislation allowing NIL compensation frequently includes language that defines NIL compensation as distinct from scholarships and other forms of financial aid tied to athletic participation.⁸⁹ For instance, in the Mississippi legislation permitting NIL compensation to student-athletes, the law explicitly states that NIL compensation “shall not mean any grant, scholarship ... tuition assistance or other form of financial aid provided to a student for pursuing a post-secondary education.”⁹⁰ Nebraska’s Student-Athlete Name, Image, or Likeness Rights Act defines “athletic grant-in-aid” as money given “for tuition, fees, room, board, and textbooks as consideration for participation ... and does not include compensation for the use of the student-athlete’s name, image, or likeness rights. ...”⁹¹ Likewise, Oklahoma law distinguishes NIL compensation from “athletic grant-in-aid” and states it shall not include compensation for the use of a student’s NIL.⁹² Such legislative efforts provide further support for the notion that NIL revenue sharing does not qualify as financial assistance as understood in the regulation.

Additionally, recent legislative action at the federal level further suggests that the perspective of NIL compensation as something separate from financial assistance is not limited to the states. On July 10, 2025, H.R. 4312, known as the SCORE Act, was proposed in the House of Representatives.⁹³ The proposed bill explicitly states that NIL compensation governed by the Act does not include

87 *Id.*, Bylaw 22.01.1 (emphasis added).

88 *Id.*; Boston, *supra* note 74.

89 *See, e.g.*, TEX. EDUC. CODE ANN. § 51.9246(d) (2025) (stating that scholarship, grant, or similar financial assistance awarded to a student athlete by an institution is not NIL compensation covered by the law); CAL. EDUC. CODE § 67456(d) (2024) (stating a scholarship is not NIL compensation).

90 MISS. CODE ANN. § 37-97-103 (2025).

91 NEB. REV. STAT. § 48-3602 (2024).

92 OKLA. STAT. § 70-820.22(1) (2024).

93 SCORE Act, H.R. 4312, 119th Cong. (2025) (as introduced in the House, July 10, 2025).

grants-in-aid, which includes athletic scholarships.⁹⁴ Thus, while not yet law, the SCORE Act further bolsters the notion that NIL compensation is commonly understood to be different than financial assistance.

C. NIL Agreements Should Not Be Considered a “Benefit” Under 34 C.F.R. § 106.41(c)

Under 34 C.F.R. § 106.41, an institution must provide equal benefits, treatment, and opportunities for members of both sexes in athletics. Individuals that argue for application of Title IX regulations to NIL revenue sharing argue that 34 C.F.R. § 106.41 applies both directly and indirectly. The indirect argument is premised on the regulation’s nonexhaustive list of benefits and proposes that NIL revenue sharing is sufficiently similar to the listed items such that it is covered.⁹⁵ Under the direct argument, proponents claim the NIL compensation provided by schools is encompassed within a few of the factors enumerated in the list and, thus, is directly addressed by the regulation.⁹⁶ Regardless, both arguments are unavailing because NIL compensation is distinct from the factors enumerated in 34 C.F.R. § 106.41(c).

As an initial matter, 34 C.F.R. § 106.41(c) focuses on “equal athletic opportunity” for both sexes, and it does not mandate equal funding or resources, regardless of context. Not surprisingly, 34 C.F.R. § 106.41 does not address monetary compensation for student-athletes. Again, the Title IX regulations were drafted in the era of the unpaid, amateur student-athlete when NIL agreements and other forms of compensation were not even contemplated. Thus, it should come as no surprise that the language of the Title IX regulations does not apply to NIL agreements between schools and their student-athletes.

In the regulation’s silence, the canon of interpretation, *noscitur a sociis*, serves as a guiding principle. Under the canon, it would only be reasonable to state that NIL compensation provided by institutions falls under an “other factor,” if it is substantially similar to the factors enumerated.⁹⁷ While proponents contend that NIL agreements are sufficiently similar to the benefits listed, such arguments ignore the distinguishing characteristics of NIL compensation that prevent it from reasonably falling within the contemplated scope of the regulation. NIL agreements compensate the student-athlete for the schools’ commercial use of the student-athlete’s NIL rights by sharing athletics revenue with the student-athlete via a commercial transaction. In contrast, the benefits enumerated in 34 C.F.R. § 106.41(c) are all commonly attached to education and intercollegiate athletics *opportunities* and are wholly unrelated to the commercial use of NIL rights by the school.

While NIL agreements arguably could be considered a form of “publicity,” the withdrawn 2025 Fact Sheet did not even make such an argument. The fact that a

⁹⁴ *Id.*

⁹⁵ See Buzuvis, *supra* note 64.

⁹⁶ See Buzuvis, *supra* note 64, at 1594.

⁹⁷ See *Yates v. United States*, 574 U.S. 528, 549 (2015) (Alito, J., concurring in the judgment) (stating that the *noscitur a sociis* canon instructs that when a statute contains a list, each word in that list presumptively has a “similar” meaning).

school pays a student-athlete a certain amount to license that student-athlete's NIL rights does not equate to a publicity expenditure, and it does not necessarily result in any publicity or promotion of a particular program or the institution. Indeed, there are no requirements that schools link NIL agreements and related payments to any promotion or publicity efforts by the student-athlete on behalf of the school (which is in direct contrast to the requirements for third-party NIL).⁹⁸

However, in one recent Title IX case governing pre-*House* claims, female student-athletes alleged the university engaged in unequal publicity of men's versus women's sports that resulted in alleged harm to women through unequal third-party NIL opportunities, and the court found such allegations relevant to the female student-athlete's claim that "male student-athletes get better treatment and benefits, opportunities, and income through" the university's NIL marketplace.⁹⁹ Thus, if courts consider direct NIL agreements between schools and student-athletes as a form of publicity, female student-athletes could argue the disparity between direct NIL agreements results in harm to female student-athletes in the form of decreased third-party NIL opportunities.

To the extent that NIL agreements are argued to be recruitment resources under 34 C.F.R. § 106.41(c), the Policy Interpretation indicates the disparity must be such that recruitment needs of each program cannot be met in an equivalent manner. However, the result of this analysis will depend on the NIL market and recruitment environment for each sport. For example, if School X decided to spend its entire \$20.5 million cap on NIL agreements for football and men's basketball only, while the other schools in its conference, spent on average \$500,000 on NIL agreements for women's basketball, it could be argued that School X's recruitment resources toward women's basketball cannot meet the needs of the program in an equivalent manner, since School X would presumably be unable to recruit women's basketball players at a level to be competitive with peer conference institutions without the available NIL funds.¹⁰⁰ But even in this scenario, there will also be plenty of men's teams that could be impacted as well. For example, School X's men's baseball, tennis, golf, and track and field teams would also be without any NIL funds, suggesting that limiting NIL funds to one or two sports does not necessarily result in intentional discrimination "on the basis of sex." Moreover, as the regulation makes clear, "[u]nequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates

98 2025–2026 NCAA DIVISION I MANUAL, Bylaws 22.1.3 (requiring associated third-party NIL agreements "are for a valid business purpose related to the promotion or endorsement of goods or services provided to the general public for profit, with compensation at rates and terms commensurate with compensation paid to similarly situated individuals with comparable name, image and likeness value who are not prospective student-athletes or student-athletes of the institution").

99 *Schroeder v. Univ. of Or.*, No. 6:23-CV-01556-MC, 2025 WL 1019760, *12 (D. Or. Apr. 4, 2025).

100 *See also* Dept. of Educ. Off. of Civ. Rts., Support Equal Opportunity in School Athletic Programs, A Resource for Students and Families (Feb. 2023) (citing the following as an example that could raise Title IX concerns: "A university provides funds for its coaches to recruit athletes for its men's football and basketball teams because it considers those teams to be 'flagship sports'" It provides no funds for coaches to recruit women athletes. As a result, the school has difficulty attracting women to participate in its athletic program.").

or sponsors separate teams will not constitute noncompliance with this section.”¹⁰¹

To the extent a court considers NIL agreements to be recruiting resources under 34 C.F.R. § 106.41(c), courts should treat such expenditures similar to coaching expenditures and salaries to identify whether legitimate, nondiscriminatory factors justify differences in NIL agreement amounts offered to recruits. When examining coaches' salaries, courts often concluded that higher marketability and revenue generation distinguished coaching positions of revenue-generating sports from nonrevenue generating sports because higher revenue generation came with more pressure and responsibility.¹⁰² For instance, in *Bartges v. University of North Carolina at Charlotte*, the court held that the role of the men's assistant basketball coach and the women's assistant basketball coach were not substantially equal work.¹⁰³ In its conclusion, the court stated that the marketability and revenue generation of the men's basketball team made the team of greater financial and promotional importance to the university.¹⁰⁴ As a result, the men's assistant basketball coach not only had more responsibility to promote the team and engage in public relations but also the role carried a greater pressure to produce winning teams. The court concluded that, while similarly engaged in the role of coaching, the men's assistant basketball coach and the women's assistant basketball coach were not engaged in equal work.¹⁰⁵ These same type of differences can apply to student-athletes across programs to justify differences in NIL agreements between football and women's tennis, for example, or for that matter, men's basketball and men's tennis. Moreover, the market value for the men's basketball player's NIL rights is likely (but not necessarily) much higher than a player on the men's or women's tennis team. For comparison purposes, sex-based distinctions in employment are expressly authorized by the Title IX regulations when sex is a bona fide occupational qualification and essential to the successful operation of the employment function concerned.¹⁰⁶

As NIL practices play out across intercollegiate athletics, markets will be created, and schools will likely use their NIL dollars to participate in those markets based on the individual priorities of that particular institution. Whether such decisions may give rise to Title IX claims based on recruitment resources remains to be seen. However, so long as the resources provided to men's and women's programs are equivalently adequate to meet the needs of those programs in light of the applicable recruiting market and demands of that sport, then such allocation of resources should not run afoul of Title IX's rules regarding recruitment.

101 34 C.F.R. §106.41(c) (2025).

102 *See Deli*, 863 F. Supp. 958; *Stanley*, 13 F.3d 1313; *Jacobs v. Coll. of William & Mary*, 517 F. Supp. 791 (E.D. Va. 1980).

103 908 F. Supp. 1312 (W.D.N.C. 1995).

104 *Id.* at 1323.

105 *Id.* The court made similar conclusions with respect to the head baseball coach as compared to the head softball coach. *Id.*

106 34 C.F.R. § 106.61 (2025).

IV. CONCLUSION

In conclusion, the Title IX regulations governing athletic scholarships and the benefits of participation should not apply to NIL revenue sharing because NIL compensation is neither financial assistance nor a benefit, treatment, or opportunity of athletics, as those terms are used in the Title IX regulations. Rather, NIL agreements are a commercial transaction between the student-athlete and the school to compensate the student-athlete for the schools' licensing and potential use of the student-athlete's NIL rights. Because of the compensatory and commercial nature of NIL agreements, combined with the intent of the *House* Settlement to share athletic revenue with those student-athletes who generate it, NIL agreements should fall outside the scope of these specific Title IX regulations. Since student-athletes will almost certainly be required to prove intentional discrimination to assert a Title IX claim in a post-*Sandoval* world, schools should ensure that their methodology for distribution of their NIL agreement is based on legitimate, nondiscriminatory reasons and factors, such as the proportionate share of revenue generated by particular programs (for example). However, schools should monitor legal developments in this area (such as the appellate challenge to the *House* damages model under Title IX) and continue to develop and modify their approach to NIL agreements to meet the economic realities of the new era of intercollegiate athletics while also providing equivalent athletic opportunities for all student, regardless of sex, in compliance with Title IX.