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

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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.

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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]

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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 Haupert, *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), s*upra* 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 contests[13] 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 adhesion 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

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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

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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

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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 i n 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

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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

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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

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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

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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 Burns, 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

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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

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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]

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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 Haupert, *supra* note 6. Haupert 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 WL 331 (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]

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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* Haupert, *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

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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*, FiveThirtyEight, 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]

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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 Samahaet 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*

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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, 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, s*upra* 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, *supr*a 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

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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

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under the disguise 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 battery, 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://efaidnbmnnnibpcajpcglclefindmkaj/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

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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.

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160 *See* Proceedings of the Second Annual Convention, *supr*a note 58, at 78–79 (PDF # 144).

161 Source:Christies.com,ttps://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.

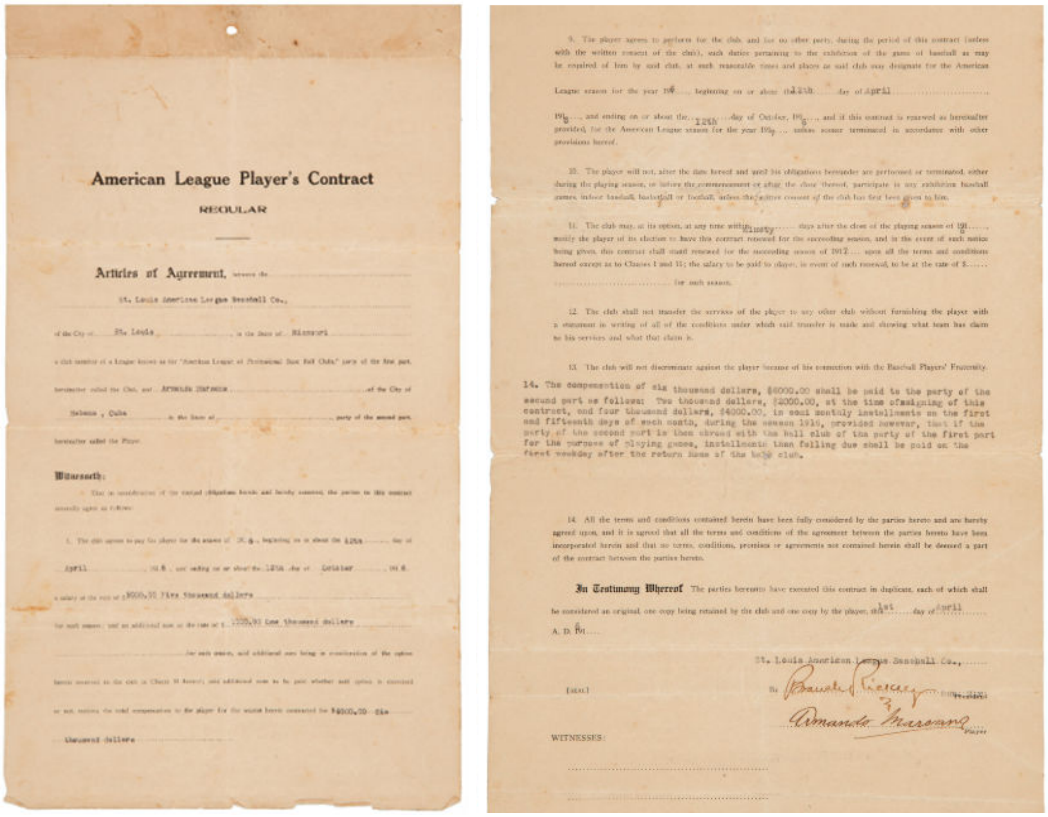
169 *See infra*Table 1, Row 12.

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).



American League Player's Contract

REGULAR

Articles of Agreement,

Witnesseth:

14. The compensation of six thousand dollars, $6000.00 shall be paid to the party of the second part as follows: Two thousand dollars, $2000.00, at the time of signing of this contract, and four thousand dollars, $4000.00, in semi monthly installments on the first and fifteenth days of each month, during the season 1916, provided however, that if the party of the second part is then abroad with the ball club of the party of the first part for the purpose of playing games, installments then falling due shall be paid on the first weekday after the return home of the home club.

In Testimony Whereof The parties hereunto have executed this contract in duplicate, each of which shall be considered an original, one copy being retained by the club and one copy by the player, this 1st day of April A. D. 1916.

St. Louis American League Baseball Co.,

By Barnie Dreyfuss

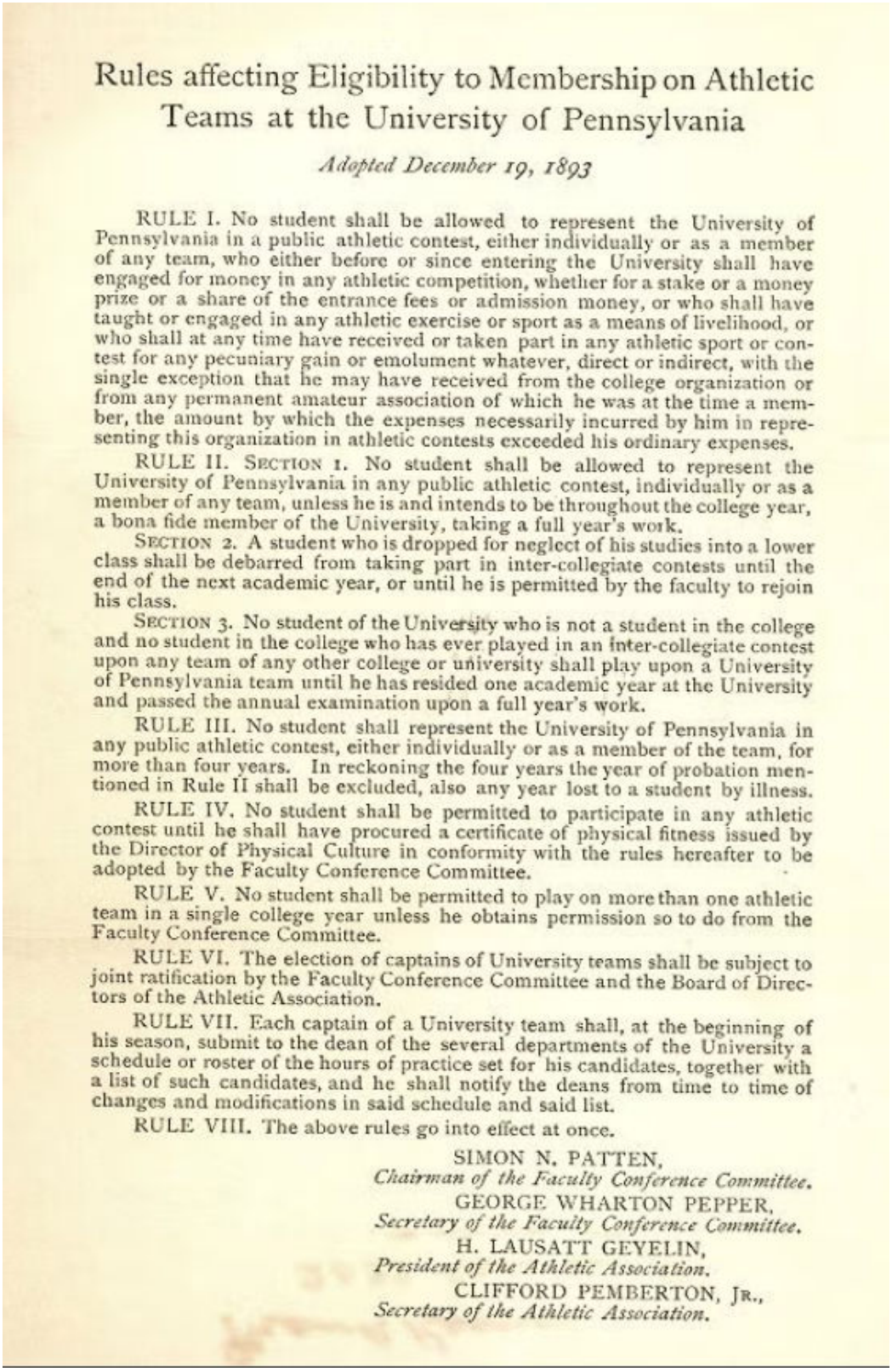
Armando Marsans

WITNESSES:

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 GEYELIN,
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 Period[1], 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)].

(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.

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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.

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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]

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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]

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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 Period[1], 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

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 Standing[2], 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,

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> ….
>
> 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]

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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.

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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]

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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. Reps. 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 o455–56 (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 Period[1], 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

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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

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248 Daniel Libit, *NCAA's Longest-Serving Official, Defender of Amateurism, to Retire*, Sportico, (July 2, 2025),athttps://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….
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> (rr) "Related Injunctive Relief NCAA & Conference Rules" means:
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> 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 discomforting 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

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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

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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)).