

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

JAMES NUSSBAUM*

Abstract

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

* Partner and chair of the higher education practice group at Church Church Hittle + Antrim. He completed his Bachelor of Arts in economics and political science from Northwestern University and his J.D. from the Indiana University Robert H. McKinney School of Law. James can be contacted at jnussbaum@cchalaw.com.

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INTRODUCTION

Many American colleges and universities have rich histories and traditions that date back hundreds of years. One of the longest-standing and most widely known of all collegiate traditions has been the adherence of collegiate athletics to the principle of amateurism, or the idea that college athletes cannot be compensated for their athletic performance. Over the last decade, numerous current and former student-athletes have sought to chip away at the tradition of amateurism, both through the legal system and in the court of public opinion.

On June 6, 2025, Judge Claudia Wilken of the Northern District Court of California granted final approval of a settlement agreement in *In re: College Athlete NIL Litigation* (the House Settlement).¹ The plaintiffs in *House* challenged NCAA (National Collegiate Athletic Association) and athletics conference rules restricting and prohibiting college athlete compensation for the use of their name, image, or likeness (NIL), including in broadcasts.² NIL, however, is not a legally cognizable right, but rather an NCAA-created reworking of athletes' rights of publicity.³

The House Settlement included a framework related to the future use of student-athletes' rights of publicity, including those related to compensation for participation in broadcast athletics events.⁴ The House Settlement created a new label for rights of publicity related to broadcasts: broadcast NIL or BNIL. However, the House Settlement does not disturb the long-standing prohibition on colleges and universities compensating athletes directly for their participation in athletics.⁵ Instead, the settlement's framework provides that compensation from colleges and universities directly to athletes must be in exchange for the use of their rights of publicity. In other words, higher education institutions may directly compensate athletes for their athletics participation indirectly. Further, such compensation is subject to a "cap" calculated as a percentage of average revenue of specific high-level athletics departments (the House Settlement Cap).⁶ Finally, some third parties may only compensate athletes for use of their rights of publicity if the amount paid

1 *In re: College Athlete NIL Litigation*, Opinion and Order Granting Final Approval to Settlement, No. 979, N.D. Cal., June 6, 2025. *In re: College Athlete NIL Litigation* was the consolidation of three different antitrust cases (*House v. NCAA*, *Hubbard v. NCAA*, and *Carter v. NCAA*) brought by student-athletes alleging antitrust violations by the NCAA. To avoid confusion with *In re: Student-Athlete Name & Likeness Licensing Litigation*, this article will refer to *In re: College Athlete NIL Litigation*, as *House* or the House Settlement. Notably, the allegations in *Carter v. NCAA* focused on restrictions on pay-for-play unrelated to NIL, yet the case was still consolidated and settled with the other cases related to NIL specifically.

2 *In re: College Athlete NIL Litig.*, No. 4:20-cv-03919, at 1 (N.D. Cal. June 6, 2025).

3 NCAA, *2024–2025 NCAA Division I Manual* 47 (2025).

4 *In re: College Athlete NIL Litig.*, at 1.

5 *Id.* at 12.

6 *Id.* at 11.

to the athlete is for a valid business purpose and within a reasonable range of compensation as determined by a third party administrator, Deloitte.⁷

The House Settlement allows colleges and universities to pay athletes to ultimately license broadcasts of athletics competitions the athletes participate in but not for participation in those athletics competitions. While this seems nonsensical on its face, an analysis of the jurisprudence surrounding athletes' rights of publicity in athletics broadcasts demonstrates that the athletes may not even have a legal right to the broadcasts in which they participate. Accordingly, this article will analyze the legal basis for compensating college athletes for their rights of publicity in athletics broadcasts and will address whether BNIL can preserve the concept of amateurism.

I. NCAA AMATEURISM AND RIGHTS OF PUBLICITY

The right to publicity has long been a convoluted and evolving legal concept, marked by inconsistent interpretations across jurisdictions, differing state statutes and rationales, and uncertainty about its scope and application. Publicity rights originally stemmed from the broader concept of the right to privacy, famously described by Samuel Warren and Louis Brandeis in their 1890 *Harvard Law Review* article concerning the "right to be let alone."⁸ While Warren and Brandeis laid the groundwork for protections against unauthorized publication of private facts and images, in 1953, the Second Circuit advanced this concept by recognizing that individuals have not only the right to control the commercial use of their identity but also to profit from it. Judge Jerome Frank coined the term "the right to publicity" in the landmark case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, which he articulated as an intellectual property right to one's public persona.⁹

The NCAA has long limited participation in its events to amateur athletes, issuing strict penalties to athletes found to have violated this principle. However, what constitutes "amateur" has evolved over time.¹⁰ Decisions regarding amateurism are not always as simple as the binary determination of whether the athlete is compensated for participation in athletics. *Bloom v. NCAA* demonstrates how the definition of amateurism can be applied expansively, especially as related to rights of publicity.¹¹

Jeremy Bloom was recruited to play football at the University of Colorado beginning in the fall of 2002. At the time of his recruitment, Bloom competed professionally, became a world champion skier, and entered into paid endorsement and entertainment agreements. Bloom was concerned that these agreements might interfere with his ability to play NCAA-sanctioned football. Through the

7 *Id.* at 47.

8 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

9 202 F.2d 866, 868 (2d Cir. 1953).

10 For an in-depth review of this evolution, see Eric Moyen & John R. Thelin, *College Sports: A History* (2024).

11 93 P.3d 621, 625 (Colo. App. 2004).

University of Colorado, he asked the NCAA to waive the applicability of rules restricting athletes from receiving compensation from such agreements. The applicable rule stated,

Subsequent to becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.¹²

The NCAA denied Bloom's requests, and he filed suit seeking declaratory and injunctive relief from the relevant NCAA amateurism rules.¹³

In other words, according to the NCAA, Bloom was no longer an amateur, and therefore was prohibited from participating in NCAA athletics, because he had profited from his NIL. The NCAA made this determination, even though the value of Bloom's NIL was derived from his success as a skier and unrelated to his potential as a collegiate football athlete because it was not "independent of athletics ability."¹⁴ The court denied Bloom's requests for relief and succinctly stated, "The clear import of the bylaws is that, although student-athletes have the right to be professional athletes, they do not have the right to simultaneously engage in endorsement or paid media activity and maintain their eligibility to participate in amateur competition."¹⁵ Ultimately, the Colorado Court of Appeals agreed with the trial court that the legitimate purpose of the NCAA bylaws was to preserve the "clear line of demarcation between intercollegiate athletics and professional sports."¹⁶

The case stands as an example of how the NCAA created a national standard that prohibited college athletes from profiting from common law and state law rights of publicity. While rights of publicity are not always clear and consistent, the NCAA's prohibition on monetizing rights of publicity has been.¹⁷

12 NCAA, *supra* note 3, at 50.

13 Bloom argued that he was a third-party beneficiary of a contract between the NCAA and its members, that the NCAA's restrictions were arbitrary and capricious, and that the restrictions constituted unconscionable restraints on trade. *Bloom*, 93 P.3d at 622.

14 NCAA, *supra* note 3, at 49.

15 *Bloom*, 93 P. 3d at 626.

16 *Id.*

17 While unrelated to rights of publicity, the NCAA has faced other attacks to its amateurism rules that ultimately led to the House Settlement. Most notably, in 2021, the U.S. Supreme Court decided *National Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 106, 141 S. Ct. 2141, 2165, 210 L. Ed. 2d 314 (2021) and concluded that the NCAA's rules prohibiting colleges and universities from providing educational benefits to athletes violated antitrust law.

II. EVOLUTION OF RIGHTS OF PUBLICITY LAW RELATED TO PERFORMANCES AND BROADCASTS

A. *The First Amendment Does Not Protect Third Parties' Broadcasts*

How rights of publicity interact with the constitutional requirements of the First Amendment is not clear and differs depending on statute and jurisdiction. In 1977, the Supreme Court for the first and, to date, only time addressed the interplay of the First Amendment and rights of publicity; specifically, whether the First Amendment immunized a media provider from damages for allegedly infringing on a performer's state law right of publicity.¹⁸ The plaintiff, Zacchini, was a performer of a "human cannonball" act at a county fair in Ohio, producing the show himself for the interested public to observe.¹⁹ After being asked not to film the performance, a freelance reporter for the defendant recorded the entire fifteen-second act, which was then featured later that night in its entirety on a news broadcast.²⁰ Zacchini brought suit, alleging that the broadcaster showed and commercialized the film of his act without his consent.²¹

The Court reasoned that the broadcasting of Zacchini's entire act posed a substantial threat to the economic value of his performance. The Court reasoned that broadcasting the entire performance was different from simply showing Zacchini's picture or telling a story about the performance and that Zacchini's right of exclusive control over the publicity given to the performance was fundamental to Zacchini's ability to earn a living as an entertainer.²² The Court acknowledged another consideration for protecting Zacchini's right of publicity: the economic incentive for him to make the required investment for producing a performance of interest to the public.²³ Therefore, the Court concluded, protecting producer's rights would encourage productions that would ultimately benefit the public only if those production rights could not be usurped by broadcasters via the First Amendment.²⁴ Indeed, Zacchini was not seeking to prevent any broadcast of his performance; he wanted to be compensated for the right to such broadcast.²⁵

In 2011, the Seventh Circuit Court of Appeal applied *Zacchini* to reject the theory that coverage and broadcast are identical.²⁶ In *Wisconsin Interscholastic*, the Wisconsin Interscholastic Athletic Association (WIAA) sought a declaratory judgment stating that it had the right to grant exclusive licenses for broadcasting

18 *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977).

19 *Id.* at 563.

20 *Id.* at 564.

21 *Id.*

22 *Id.*

23 *Id.* This rationale underlies copyright laws that encourage production of works of benefit to the public. *Id.* at 577.

24 *Id.* at 577.

25 *Id.* at 578.

26 *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co., Inc.*, 658 F.3d 614, 616 (7th Cir. 2011).

its athletics tournaments. Gannett, a newspaper company, had streamed entire games without obtaining consent or paying a fee to the WIAA for licensing rights for the broadcasts.²⁷ Gannett argued that WIAA's status as a state actor prohibited it from entering into exclusive contracts with private companies for the purpose of broadcasting entire events online to raise revenue.²⁸ The trial court entered summary judgment for WIAA, and Gannett appealed.

The court rejected Gannett's argument. First, the court established that WIAA was the creator and disseminator of the content at issue.²⁹ Next, the court drew two conclusions from *Zacchini* for this case: It distinguished between the media's First Amendment right to "report on" an event and its lack of a right to broadcast an "entire act" while also making clear that the producer of entertainment is entitled to charge a fee in exchange for consent to broadcast.³⁰ Simply put, "the First Amendment does not give the media the right to appropriate, without consent or remuneration, the products of others."³¹ The court emphasized that WIAA's policy did not prohibit media coverage of its events, impose excessive fees for access, or require prepublication review of content—factors that, if present, might have altered the constitutional analysis.³² The Seventh Circuit Court of Appeals ultimately affirmed the grant of summary judgment in WIAA's favor.³³

Both *Zacchini* and *Wisconsin Interscholastic* stand for the proposition that producers of broadcasts have certain rights related to their broadcasts, including a right to benefit from their broadcasts. However, neither case creates an independent right of publicity for the use of one's participation in a broadcast, that is, a BNIL right.

B. The First Amendment Does Not Preempt College Athletes' Rights of Publicity Claims for Use of Their NIL in Video Games

In the late 2000s, courts around the country began hearing cases related to the use of college athletes' likenesses in popular media platforms such as broadcasts and video games. One of these cases began when Ed O'Bannon, a former basketball student-athlete at UCLA, discovered a virtual version of himself in a college basketball game. O'Bannon neither consented to the use of his likeness in the game, nor did he agree to any terms of compensation; he subsequently brought suit against the game's developer in federal court.³⁴

While the gravamen of O'Bannon's complaint in *O'Bannon v. National Collegiate Athletic Ass'n* rested on the NCAA's amateurism rules, which prevented college

27 *Id.* at 615.

28 *Id.* at 616.

29 *Id.* at 624.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 629.

34 See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (summarizing procedural history of the previous cases).

athletes from being compensated for their NIL, and the fact such rules are an illegal restraint on trade under the Sherman Act,³⁵ the Ninth Circuit Court of Appeals briefly addressed student-athletes' right of publicity. The NCAA argued that any right-of-publicity claim arising from the use of NIL in sports video games would be preempted by the Copyright Act and the First Amendment.³⁶ But the court declined to consider the NCAA's arguments, reasoning that such a conclusion was improper for a case hinging on an antitrust violation inquiry.³⁷ After concluding that the plaintiffs had established injury in fact as a result of the NCAA rules foreclosing the market for their NILs in video games, the Ninth Circuit clarified the holding would not reach "the thornier question[] of whether participants in live TV broadcasts of college sporting events have enforceable rights of publicity"³⁸

O'Bannon avoided the First Amendment implications of student-athletes' right of publicity, specifically choosing not to address whether broadcasts create rights of publicity. But two years prior, the Ninth Circuit Court of Appeals directly addressed the matter in a case balancing a video game developer's First Amendment protection with a former athlete's right to publicity over the use of their NIL.³⁹

In a series of lawsuits relating to the aforementioned suit filed by Ed O'Bannon, former college quarterback Samuel Keller brought suit against Electronic Arts, a video game developer, when he discovered an identical, virtual avatar of himself on an NCAA game.⁴⁰ Similar to how it treated O'Bannon, Electronic Arts did not attempt to license or even ask for Keller's consent to use his NIL in the game.

In response to the lawsuit, Electronic Arts raised four affirmative First Amendment defenses, asking the court to balance its constitutional rights with Keller's right to publicity under California common and statutory law.⁴¹

First, the Ninth Circuit determined that Electronic Arts had no First Amendment protections under California's "transformative use" test because the game depicted Keller in the performance of the same activity for which he was known in real life—playing football—taking place in depictions of actual football stadiums that are

35 *See id.* at 1067 (arguing compensation rules foreclosed market for athletes' NILs in video games and therefore violated Sherman Act because, absent NCAA's compensation rules, video game makers would have negotiated with student-athletes for right to use their NILs).

36 *Id.* at 1068. In a footnote, the Ninth Circuit addressed the First Amendment preemption claim by referring to a previous case that held the "[NCAA] games at issue ... do not sufficiently transform [student-athletes'] identities to escape a right of publicity claim." *Id.* at 1068 n.13 (quoting *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013)).

37 *Id.* at 1069 ("[T]he NCAA's argument about the Copyright Act, even if correct, is irrelevant to whether the plaintiffs lack standing.").

38 *Id.* at 1067.

39 *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

40 *Id.* at 1272.

41 *Id.* at 1273 ("[Defendant] raises four affirmative defenses derived from the First Amendment: the 'transformative use' test, the *Rogers* test, the 'public interest' test, and the 'public affairs' exemption.").

virtually identical to where the public saw Keller during his collegiate career.⁴² Second, the court rejected Electronic Arts' argument that the need to avoid consumer confusion was outweighed by the public interest in free expression.⁴³ Third, the court responded to Electronic Arts' state-law defenses: the common law defense protecting "publication and reporting" of newsworthy items, and the statutory defense to "broadcasts or accounts of public affairs."⁴⁴ The rationale behind both defenses is the substantial public interest in statistics, events, and people involved with sports. The court rejected this argument, concluding that Electronic Arts was not publishing and reporting data.⁴⁵ The fact that the virtual avatars did not include real names further supported the court's conclusion: A video game using collegiate athletes' NIL does not qualify for the same protection as a broadcast. Simply put, "it is a game, not a reference source."⁴⁶

C. *Broadcast NIL Is Not a Right for College Athletes*

The Ninth Circuit Court of Appeals' attempt to clear the air on BNIL was short lived. In the same series of litigation, the Northern District of California further complicated the BNIL question in 2014 when a group of current and former college athletes brought an antitrust class action suit against the NCAA.⁴⁷ The plaintiffs alleged the NCAA restrained competition in the "group licensing" market.⁴⁸ They alleged the current group licensing market allowed anticompetitive practices where broadcasters and videogame developers compete for group licenses to use athlete NIL on particular Division I football and basketball teams in live game broadcasts, archival footage, and videogames.⁴⁹ Plaintiffs specifically argued that the NCAA restrains competition by preventing Division I schools from offering their recruits a portion of the revenue they receive from football- and basketball-related broadcast and videogame licenses. Further, the plaintiffs also pursued compensation for the unauthorized use of student-athletes' NILs in broadcast footage and videogames.⁵⁰ Notably, the plaintiffs blurred the lines between broadcast licenses and licenses for video games, seeming to conflate a producer's ability to prohibit third parties from broadcasting its events with the individual participants' NIL rights for subsequent creations such as video games.

The Northern District of California first addressed plaintiffs' assertion that, absent NCAA restraints, the athletes would be able to assert right-of-publicity claims against broadcasters. Citing *Zacchini*, the court reasoned that the First Amendment does not guarantee media organizations an "unfettered right" to broadcast entire

42 *Id.* at 1276 (citing *No Doubt v. Activision Publ'g, Inc.*, 192 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011)).

43 *Id.* at 1279–80 (explaining the *Rogers* test).

44 *Id.* at 1282.

45 *Id.*

46 *Id.* at 1283.

47 *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126 (N.D. Cal. 2014).

48 *Id.* at 1134.

49 *Id.*

50 *Id.*

sporting events without considering the athletes' rights of publicity.⁵¹ The court further found that absent NCAA restrictions, the student-athletes would have an economic interest in being able to sell licenses for the rights to broadcast their games, thereby countering the broadcaster's ability to "undermine" the athletes' economic interests.⁵² The decision noted that the student-athletes' economic interests are "determined by the value their athletic performances would have in an unrestrained market—not by their value in a market from which they have been allegedly excluded."⁵³

Referring to *Wisconsin Interscholastic*, the court concluded that the First Amendment does not guarantee media organizations an unlimited right to broadcast entire collegiate sporting events.⁵⁴ The court could not reconcile that the First Amendment would allow the NCAA to restrict press access to college football and basketball games through exclusive licensing agreements but, at the same time, prohibit student-athletes from doing the same through right-of-publicity actions.⁵⁵ Based on *Zacchini*, the court stated that publicity rights of "promoters" and "participants" in sporting events are virtually equal under the First Amendment.⁵⁶ The court concluded that *Zacchini* and *Wisconsin Interscholastic* make clear that the First Amendment does not create a right to broadcast entire athletic performances without obtaining a license or consent from all parties who hold valid ownership rights.⁵⁷ The implication is, of course, that being without NCAA restrictions on student-athlete compensation, the athletes would have ownership rights in the broadcasts they participate in, and broadcasters would need to obtain licenses or consent directly from the athlete participants. Therefore, under the rationale of this court, college athletes could sell group licenses to use their NILs in live or recorded full broadcasts of entire games.⁵⁸

However, where the Northern District of California's opinion painted an optimistic picture for future student-athletes, *Marshall v. ESPN Inc.* rejected such a framework.⁵⁹ Further, *Marshall* seems to have more accurately applied the relevant case law in determining that there is not a recognized college athlete BNIL right.

The lawsuit in *Marshall* started as a putative class action brought by current and former student-athletes seeking recovery from several athletic conferences,

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.* at 1142 ("[I]f the First Amendment did guarantee such a right, then it would cast doubt on the NCAA's ability to issue exclusive licenses to specific broadcasters.").

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* at 1145. The opinion did not conclude the same for broadcasts with highlights or partial clips from games. *Id.* ("[T]he Court can neither summarily adjudicate that the First Amendment precludes a market for clips and highlight footage nor can it conclude that, absent the challenged restraint, such a market would actually exist.")

59 111 F. Supp. 3d 815 (M.D. Tenn. 2015).

broadcasters, and licensing agencies who allegedly profited from the broadcast and use of the athletes' NIL without permission.⁶⁰ The court found no applicable authority for participants in sporting events having a common law right to publicity in broadcasts.⁶¹ The sole exception, the court pointed out, was the Northern District of California's ruling from 2014. Choosing to limit the scope of that ruling, the court concluded that "[t]he only value that case has ... is that there *might* be a right of publicity under Minnesota law for sports broadcast, itself a dubious proposition given a more recent interpretation of that state's caselaw."⁶² The court further stated that the Northern District of California's opinion as it related to whether the First Amendment protected broadcasts from rights-of-publicity claims was "clearly *dicta*."⁶³

Marshall then took another jab at the applicability of the Northern District of California's opinion, reasoning that, based on *Zacchini* and *Wisconsin Interscholastic*, just because the First Amendment does not guarantee unlimited broadcast rights does not mean that it also establishes a right to publicity by athletic participants when entire games are broadcast.⁶⁴ In other words, where the First Amendment may act as a shield for producers against third-party attempts to broadcast their events, it does not act as a sword for participants in the events who wish to create a BNIL right. The primary difference between *Zacchini* and *Marshall*, according to the court, is that the plaintiff in *Zacchini* was the performer *and* producer—a "one-man show"—which provided him the right to prohibit third-party broadcasts under the law so he could produce a performance of interest to the public.⁶⁵ Inferring that *Wisconsin Interscholastic* was not applicable here because it involved a violation of an exclusive licensing agreement, the court borrowed some of its language: "*Zacchini* makes clear that the producer of entertainment is entitled to charge a fee in exchange for consent to broadcast; the First Amendment does not give the media the right to appropriate, without consent or remuneration, the products of others."⁶⁶

These cases emphasize that courts are primarily interested in compensating producers for their product, that is, the broadcast. The cases are not concerned with compensating the performers in broadcasted events, but rather the events' producers because the producers are orchestrating the performance for the interested public.⁶⁷ The courts distinguish broadcasting from reporting to ensure the

60 *Id.* at 820.

61 *Id.* at 825–26 (citing cases from decisions in Minnesota, Florida, and California).

62 *Id.* at 826.

63 *Id.*

64 *Id.* at 828 ("[J]ust as with all cases, *Zacchini* and *Wisconsin Interscholastic* must be read in context and, when so read, are inapposite.").

65 *Id.* at 828–29 ("It is a mistake ... to read *Zacchini* as supporting a right of publicity by anyone who performs in an event produced by someone else.").

66 *Id.* (quoting *Wis. Interscholastic Athletic Ass'n v. Gannett Co., Inc.*, 658 F. 3d 614, 624 (7th Cir. 2011)).

67 The court agreed with the Northern District of California on commercial speech; broadcasting sporting events does not merely propose a commercial transaction; rather it depicts and distributes a real event in which the public takes interest. The court then countered plaintiffs' claims about the likelihood of confusion for false endorsement claims, finding it "implausible" to infer an athlete

producer of the broadcast benefits from its own production while protecting First Amendment rights to reports on newsworthy events. The *Marshall* opinion firmly stated there is no common law right of publicity for college athletes appearing on broadcasts in virtually all jurisdictions in the United States.

III. BNIL AND THE HOUSE SETTLEMENT

As demonstrated by *Marshall* and the vast majority of applicable case law, college athletes do not have a right to BNIL. Nevertheless, the parties in the House Settlement allocated \$1,815,000,000 to compensate former students for the past use of their BNIL.⁶⁸

The injunctive portion of the House Settlement provides that institutions that opt in may provide two new categories of benefits to student-athletes: (1) payments in exchange for the use of their NIL and (2) “compensation” in the form of “direct benefits worth up to 22% of the Power Five schools’ average athletic revenues each year.”⁶⁹ Because the direct benefit amount is calculated as a proportion of athletics revenues, it is being colloquially referred to as “revenue share.” The House Settlement is silent on what consideration the athletes offer in exchange for the revenue share payments.

This may prompt the question, what consideration do the athletes provide for these revenue share payments? Per NCAA rules, the consideration cannot be athletes’ participation in athletics contests.⁷⁰ The parties to the House Settlement might argue that the consideration is the athletes’ BNIL. This would seem to make sense because the vast majority of college athletics revenue is derived from broadcast agreements. But as the legal analysis above demonstrates, these rights are not cognizable. Indeed, the NCAA and defendant conferences have repeatedly argued that rights of publicity related to broadcasts are not cognizable. Furthermore, schools may (and likely will) choose not to compensate all of their athletes with revenue share payments, meaning that some would be compensated for their BNIL and others would not.

The House Settlement’s silence on revenue share consideration seems intended to thread the needle of compensating athletes while preserving the NCAA’s amateurism model. However, to the extent the silence is filled with BNIL, the legal basis for such an argument is thin at best. Accordingly, the model will likely not withstand judicial scrutiny and is unsustainable without additional legislative action.

IV. CONCLUSION

Forty years ago, the Supreme Court stated, “The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports.”⁷¹ Now,

is endorsing a product when, for example, an advertisement is shown while they are at the free throw line.

68 *In re: College Athlete NIL Litig.*, No. 4:20-cv-03919, at 11 (N.D. Cal. June 6, 2025).

69 *Id.* at 8.

70 NCAA, *supra* note 3, art. 12.

71 NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

the NCAA and defendant conferences in the House Settlement have agreed to pay nearly \$2 billion for former-athletes' BNIL, a right that is not clearly recognized by the law. Further, colleges and universities can share a percentage of revenues, including broadcast revenue, directly with student-athletes. Yet again, the "NCAA [has] couch[ed] its arguments for not paying student athletes in innocuous labels."⁷² Whether it is with NIL, BNIL, revenue share, or any other label, the fundamental quid pro quo between higher education institutions and students participating in athletics is most closely analogous to a producer compensating a performer. Accordingly, the NCAA and its member institution should prepare for a landscape where that reality is recognized and regulated in compliance with all applicable law.

72 NCAA v. Alston et al., Nos. 20–512, 20–520 at *3 (U.S. June 21, 2021).