

**Title:** The Evolution and Challenges of Name, Image, and Likeness (NIL) Rights for College Athletes: Current Issues and Emerging Revenue Sources

## **Introduction**

Intercollegiate sports began in the United States in 1852. The Intercollegiate Athletic Association of the United States (IAAUS) was established in 1906 primarily in response to repeated injuries and deaths in college football due to inconsistent rules. The organization quickly evolved into what is now known as the NCAA. What started as an exercise to make amateur, collegiate contests safer resulted in the creation of a number of concepts which stood the test of time for more than a century, including the concept of “amateurism”, prohibition of inducements offered to athletes to attend particular schools, and requirements that students remain in good standing at their academic institutions in order to participate in sport.<sup>1</sup> Over the years, the NCAA evolved into a multi-division membership organization to prioritize playing rules, eligibility, enforcement, television, and championships.

Alongside the growth of the governing structure of collegiate sports came the growth of big business. In the first part of the 20<sup>th</sup> century, universities built, and expanded, arenas capable of seating tens of thousands of fans willing to pay to watch the action. By 1921, Ohio State completed construction on a 64,000 seat football stadium, and many soon followed. The growth in popularity and profit in college sport exploded with the advent of broadcast TV. Starting with the first TV deal in 1952 for college football, the business of college sports has evolved into a \$19 billion industry, and includes the broadcast of dozens of different sports contexts involving hundreds of member institutions and, of course, thousands of athletes representing those institutions.

As the money grew, so did the temptation to procure the best available talent, in many cases by any means possible. Any college football fanatic is well aware of stories of “bag men”, “golden handshakes” and, of course, the “Pony Excess.” The stories of creative financing of the best rosters money could buy are legion, but, at least from 1906 through 2021, none of the financing was allowed under the NCAA’s strict amateurism model, which broadly prohibited payment or other impermissible inducements of players to a booster’s favorite school. This changed in 2021, when, for the first time, the NCAA allowed athletes to be compensated without jeopardizing their eligibility to participate in college sports.

The business of college sports has evolved rapidly in the last 3 years. The NCAA and its member institutions have been forced to grapple, often unsuccessfully, with the reality that the courts of the United States would no longer countenance the traditional amateurism model, which allowed member schools and their administrators and coaches to make millions of dollars while the athletes participating in the contests remain uncompensated. The focus of this paper and

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<sup>1</sup> This paper would not be possible without the research and analysis set forth in a forthcoming Boston College Law Review Paper discussing the many aspects of the financial landscape in collegiate athletics. Holden, John and Edelman, Marc and McCann, Michael A., (Still) Anticompetitive College Sports (August 19, 2024). Boston College Law Review, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=4929874> or <http://dx.doi.org/10.2139/ssrn.4929874>

presentation is on the current state of play in athlete compensation within the framework of college sports.

## I. Historical Background of NIL Rights

The rights of college athletes to profit off of their name, image or likeness prior to 2021 can be easily described as nonexistent. No case better illustrates the point than the case of Jeremy Bloom, a world class skier who obtained monetary compensation for his publicity in conjunction with his skiing prowess. See *Bloom v. NCAA*, No. 02CA2302 (Colo. Ct. App., Div V, 5/6/2004), 93 P. 3d 621. Mr. Bloom was also an accomplished football player who wished to participate in college football for the University of Colorado. Recognizing that the payments that he received unrelated to his football career jeopardized his eligibility, Mr. Bloom sought a waiver from the NCAA, which rejected his request and declared him ineligible. Mr. Bloom then sought, unsuccessfully, to enjoin the NCAA's decision in the state courts of Colorado. There, the court applied the NCAA bylaws as written, observing:

In our view, when read together, the NCAA bylaws express a clear and unambiguous intent to prohibit student-athletes from engaging in endorsements and paid media appearances, without regard to: (1) when the opportunity for such activities originated; (2) whether the opportunity arose or exists for reasons unrelated to participation in an amateur sport; and (3) whether income derived from the opportunity is customary for any particular professional sport.

In reaching its decision, the court relied on *dicta* from *NCAA v. Bd. of Regents*, 468 U.S. 85, 101, that recognized the NCAA as “the guardian of an important American tradition”, *i.e.*, amateurism in intercollegiate athletics. For many years, the NCAA zealously attempted to preserve its role of guardian and broadly prohibited in type of financial compensation outside of the traditional scholarship opportunity available for athletes.

This all changed on July 1, 2021, when the NCAA adopted the Interim Name, Image and Likeness (NIL) Policy allowing NCAA student-athletes the opportunity to benefit from their NIL without jeopardizing their NCAA eligibility. The interim policy began within weeks of the Supreme Court's decision in *NCAA v. Alston*, 594 U.S. 69 (2021), which underscored a long-developing observation that the NCAA and its member institutions are bound by antitrust laws. At issue in *Alston* were restrictions placed on academically-related aid by the NCAA. In a concurrence, however, Justice Kavanaugh went a step further, questioning whether the NCAA could restrict any compensation payable to college athletes.

The new NIL Policy was widely seen as a mitigating measure that would allow athletes to receive some compensation while participating in college sports, while at least facially preserving an evolved definition of amateurism that still prohibited direct payment of athletes for their services. The Interim NIL Policy permitted college athletes to earn compensation from third parties as a result of the use of their NIL. Examples of permissible NIL activities included appearances in television, print, or social media advertisements for commercial products or services; sale of autographs; conducting camps; and personal appearances by athletes. Under the policy, however, NIL compensation could *not* include any of the following:

- Compensation in exchange for a student-athlete’s athletic participation or performance at a particular school (*i.e.*, “pay-for-play”);
- Compensation in exchange for a student-athlete’s decision to attend a particular school (*i.e.*, improper recruiting inducements); and
- Compensation for work not performed (*i.e.*, sham agreements with third parties in which a student-athlete does not provide a legitimate NIL-related service).

The NCAA’s NIL policy evolved over time, and, while the evolving NIL Policy answered some questions, it raised many others, and the NCAA and its members still have not been able to effectively resolve the many concerns with amateurism and athlete compensation that have arisen in the intervening time.

## **II. Current Issues with NIL Rights**

The NIL world consists primarily of two separate worlds: the so-called “true” NIL, in which college athletes promote various products and brands in exchange for compensation that is mostly based upon traditional market appeal, and NIL “in name only”, in which dollars are allocated based on how well an athlete plays a particular sport. Livvy Dunne, a gymnast for LSU with a massive social media presence has made millions of dollars in endorsement deals during her collegiate career. She is a good, not great, athlete, and her earnings are the classic example of success in the “true” NIL arena. On the other side of the coin are the performance-based payments that fuel the world of the big revenue sports of college football and basketball. One recent newsworthy example includes the recruitment of a high school quarterback to the University of Michigan purportedly involving guaranteed payments of more than \$10,000,000 for his services by mega billionaire Larry Ellison. Performance-based payments are the type of payments that NCAA NIL Policy has sought to restrain, but have nonetheless become pervasive in the world of college athletics.

The NCAA’s policies on NIL have evolved over the years in reaction to issues which have arisen, but there is a lack of comprehensive regulation. This is in no small part due to the fact that legal challenges to restrictions upon athlete payments have largely been successful. As a result, the NCAA has been rendered mostly powerless to address issues that have broad impacts upon the competitive landscape. While football is king in college sports and undoubtedly drives any discussion of athlete compensation issues, there are implications across the entire landscape, impacting intradepartmental dynamics and even intrateam dynamics.

In the absence of comprehensive regulation, the NCAA and its members are forced to deal with a patchwork arrangement of state NIL laws of varying degrees of restriction. Inasmuch as the biggest players in the world of college sports are, by and large, massive land grant and flagship institutions of their respective states, state NIL laws which are more restrictive than other states create competitive disadvantages in the world of college athletics. This has led to a race to the bottom in some respects within state legislatures, as legislators seek to create the least restrictive regime possible in order to enhance the competitiveness of the home state universities.

There is very little guidance available on what constitutes a legitimate NIL deal versus an illegitimate one. Generally, it is permissible to pay an athlete fair market value in exchange for an appearance or advertisement, but there is no defined marketplace from which fair market value

can be easily determined. The NCAA has been mostly powerless in its ability to police the deals that are being struck by boosters of universities and the athletes that they seek to woo.

In 2020, for most institutions (other than those “motivated” enough to use illicit financial incentives) attracting the best talent to play for your school was largely the same as it was in 1950. A school’s ability to attract a player came down to factors like prestige, conference affiliation, coaching staff, schematic fit, academic interests and facilities. Since 2021, the recruitment of a high profile athlete undoubtedly involves the relative strength of the NIL prospects available to a prospective athlete. The impact of NIL is not limited to the initial recruitment of a player. With the advent of unlimited player movement via the NCAA transfer portal, it is now commonplace for schools to negotiate agreements with current players to retain their services for the following year. In the event the athlete is not satisfied with their NIL package, they are free to explore opportunities elsewhere on the open market. Disparities in payment packages, and the free discussion of payment packages, fuel a challenging environment for college coaches and administrators as they attempt to promote unity across their departments and teams.

These are but a few of the issues that have arisen. Now that paying players is “legal”, the amount of money in player enticement is staggering. Naturally, when new markets emerge, so do opportunists attempting to participate in the action. It is now commonplace for unlicensed, unregulated player agents to seek out the best possible terms for players that they represent and sometimes do not represent. These unlicensed agents charge upwards of 20% of the total guaranteed payments in some cases. (In contrast, agent fees in the NFL are capped at 3% of the total guaranteed payments.) While many institutions attempt to educate players on issues like taxation, teenagers and young adults are often ill-prepared to deal with the consequences of suddenly making large sums of money. Moreover, young people can be gullible and can be lured to leave their colleges for the allure of large sums of money, only to find that actual amounts offered are much smaller than the promised amounts that allured them to transfer.

### **III. The Role of NIL Collectives**

Soon after the floodgates were opened in 2021, university boosters began to support their universities by forming collectives. Collectives effectively act as the financial arm of the recruiting operations of major sports programs. Collectives have typically operated outside of the university structure but in close support with the particular sports programs that they support. Collectives supporting major programs have funded football “payrolls” reportedly as high as twenty million dollars in a few cases. Typical collective budgets for football programs in conferences such as the Big 10 or SEC are believed to be in the eight figures, while typical budgets in the ACC and Big 12 are in the high seven figures, while the so-called Group of Five conferences have budgets that often do not exceed a million dollars per year. Very little hard data is available on collective operations due to their operating structures outside of the university.

The operations of a collective are relatively straightforward. It raises money through fundraising and corporate sponsorship, and sets a budget based upon available funds. It then allocates money to players on the university rosters, typically in the form of a contract which guarantees payment on a monthly basis in exchange for the performance of NIL activity, promoting a local business via television or social media, making personal appearances, etc.

Collectives are not the only organizations involved in the NIL space. It is now commonplace for multimedia partners of universities such as Learfield to solicit traditional brand/marketing deals with corporate sponsors. It is now typical for a contract between a multimedia rights partner and a corporate sponsor of a university program to include an allocation of money to be used in brand deals for athletes. As the world of athlete compensation shifts to more direct participation by universities, the role of the multimedia partners is expected to grow while the role of traditional collectives are likely to diminish.

#### **IV. Other Revenue Sources for College Athletes**

New revenue and financial opportunities through NIL and anticipated university licensing/revenue share payments because of the *House Case Settlement* will afford athletes and families with new opportunities to generate wealth in ways previously unimaginable. Financial literacy will be key to supporting athletes to take advantage of new ways to generate wealth through investments, real estate, entrepreneurship and other means. The emergence of student-athlete entrepreneurs has created a demand for attorneys, agents, financial and other advisors to provide guidance in the review, execution of endorsement deals and a host of other financial and business considerations that were previously not available. In today's NIL era the foundation of what it means to be a student-athlete has changed. As student-athletes will be able to benefit from direct university payments with the opportunity to create strong followings through personal branding, social media, and other entrepreneurial ventures. Student-athletes today have the opportunity to become their own individual businesses with sound management and strategy.<sup>2</sup>

Collectives and NIL opportunities give athletes more control and the opportunity to diversify their interests outside of their primary sport, build strategic relationships and cultivate brands to support personal and charitable interests or to support family and sibling college funds. The opportunities are endless with the proliferation of student-athletes as brand ambassadors and influencers through leveraging personal brands through content creation via Meta, Youtube, Tik Tok, Instagram and other platforms. A 2023 Pew Research Center survey showed that 1 in 5 teens are almost constantly on Youtube or TikTok, with Instagram and Snapchat not far behind. NIL represents a transformative change in the relationship of marketing and student-athletes. As digital platforms continue to evolve student-athletes will undoubtedly realize tremendous growth opportunities to help marketers and brands reach coveted consumers.<sup>3</sup>

Student-athletes are earning significant major brand deals. JuJu Watkins, of USC recently agreed to a multiyear contract extension with Nike that will give her one of the most lucrative shoe endorsement deals in women's basketball while still participating as a collegiate athlete. Nike also has major brand deals with Colorado quarterback, Shedeur Sanders. Other elite college athletes have secured deals with private jet companies, health and fitness brands, luxury automobiles (Lamborghini, Rolls Royce), music accessories, retail and food products represent a few deals where college athletes are profiting off their name, image and likeness since July 2021. While not all athletes have the local or national appeal to secure major brand deals, for those who do, the opportunities seem limitless. On the other hand, for those who do not yet have tangible appeal,

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<sup>2</sup> Messineo, Nick. "Emergency of Student-Athlete Entrepreneurs Creates New Market for Attorneys", [Sportsillustrated.com](https://www.sportsillustrated.com), 11/23/23.

<sup>3</sup> Dudash, Steven, "College Athletes & The NIL: A New Marketing Frontier", [Forbes.com](https://www.forbes.com).

they are merely one season, one play, one catch or major moment away from transforming their personal brands and potentially earning a major payday.

## V. Traditional Athletic Department Funding and the Advent of *House*

While the focus is clearly on newfound opportunities for student-athletes to monetize their brands through name, image and likeness and future direct revenue share with institutions, equal attention is critical to understand how college athletic departments are traditionally funded and what new emerging revenue trends may impact the future of college sports. Traditionally, athletic departments are funded through:

1. Conference media deals, such deals are primarily weighted towards football media rights and other sports are bundled into the packages.
2. College Football Playoff and bowl revenue.
3. Donor giving.
4. NCAA distributions, primarily from men's basketball tournament media rights.
5. Ticket sales and sponsorship deals.

While total revenues through these sources can be significant, with some athletic department budgets in the nine figures, profits are typically fairly modest due to the already large expenses associated with running an athletics program. In most college programs, the university is already required to subsidize the operations of their athletics departments. Accordingly, a seismic change is afoot with the expected approval of a class action settlement in the landmark *House v. NCAA*<sup>4</sup> (and related cases subject to the settlement agreement discussed below) expected to be approved in March.

The so-called *House* settlement is a watershed moment in the world of college athletics. At its core, *House* and its related cases are antitrust cases challenging all manner of restraint upon trade imposed by NCAA bylaws. The settlement agreement calls for \$280,000,000 to be paid annually by the NCAA and member institutions over a 10 year period beginning in the 2025-26 academic year as damages sustained by NCAA rules impermissibly limiting their ability to be compensated for their performance. Funding the settlement will squeeze already tight margins. Perhaps more significantly, however, the proposed settlement sets forth a framework for direct revenue sharing among colleges and its athletes in exchange for their services.

Pending approval of the proposed *House* settlement, colleges and universities may opt into a new revenue share model with athletes up to approximately \$20.5 million. A critical question for those planning to spend to a revenue sharing cap agreed upon in the settlement, is the source of new revenue for sharing. Athletic departments will not be able to cost contain their way to solvency, rather cuts to existing personnel or potentially devastating reductions to how all sports are funded may be inevitable. Recently, college athletics power, Ohio State University, announced it will be eliminating its men's gymnastics scholarship program. While the team will still exist student-athletes in this sport will no longer receive scholarships to compete. OSU is not alone in

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<sup>4</sup> 4:20-cv-03919 (N.D.Cal.).

this approach. It is predictable that more institutions will have to consider adjustments of this kind and possibly outright elimination of some non-revenue generating sports.

While colleges and universities are being pushed to the brink in order to remain competitive in a post-*House* world, *House* does not provide a comprehensive solution to the myriad issues facing the deterioration of the strict amateurism model. Additional antitrust questions remain, including whether the agreed upon cap is even enforceable. In general, while the \$20.5 million cap seeks to represent the total compensation that athletes at a university can receive from sources other than “true” NIL, and a clearinghouse is being established to police NIL deals to seek to enforce compliance, it appears unlikely that such a cap would survive judicial scrutiny. For example, prior to the *House* settlement, the court in *Tennessee v. NCAA*<sup>5</sup> imposed a temporary restraining order prohibiting the enforcement of any NCAA rules that would prohibit the use of NIL funds in the process of inducing players to participate for a particular university. Sources within the collective world have indicated that the proposed clearinghouse that would seek to limit inducement-type deals beyond the agreed revenue sharing limit will be challenged the moment it goes into effect. Moreover, the *House* settlement does nothing to solve the looming employment question, *i.e.*, whether athletes should be classified as employees for labor law purposes, which could further cripple or even collapse already tenuous athletic department budgets. Finally, while the *House* settlement, if approved, would provide tacit endorsement by at least one federal judge of a sharing framework that meets Title IX scrutiny, it is not altogether clear that the NCAA and its member institutions are completely out of the woods with respect to Title IX, particularly as male sports get disproportionately richer through the new sharing models.

Conferences and institutions are constantly on the hunt for new revenue deals through conference affiliation. There has been significant conference realignment over the past 10 years predicated by college football and the lure of increased conference payouts to member institutions. From an emerging revenue perspective there is ongoing discussion about further conference consolidation into a selection of 60-75 programs to form a super league. A new trend of recently announced talent fees by the University of Tennessee on all season and single game ticket sales to support the schools efforts to attract, retain and pay student-athletes. Private equity is making headlines for potential involvement in college sports to provide cash infusions to conferences and athletic departments in dire need of capital to meet the new opportunities presented by the *House* settlement and NIL. This offseason we saw the restructuring of several coaching deals that reduced the amount of money payable to the coach in exchange for a promise from the university that the savings would be used to fund revenue sharing with athletes in their sports. Conversations around student-athlete compensation and new revenue models to support this growth will be a topic worth watching as they may have major unintended consequences for traditional sport offerings.

## **VI. An Uncertain Future in College Athletics**

There is a sense of urgency to “fix” college sports, but precious few obvious ways to do it. Most people believe the current college sports model is broken. With a central leadership structure that does not have independent authority to make decisions, there is an expressed need for federal legislation to standardize NIL rules and create consistent guidelines for the NCAA or alternate

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<sup>5</sup> No. 324CV00033DCLCDP, 2024 WL 464164 (E.D. Tenn. Feb. 6, 2024).

organization to govern competitions, establish and enforce rules around athlete eligibility, name, image and likeness, health & safety and a host of other items governing rules of conduct and operation. College and professional sports are similar and uniquely different in distinct ways. Similar in the entertainment it provides, faithful fan bases, and quality of competition. Uniquely different in the way teams are governed, owned, funded and assembled. As an example, primarily, professional sports leagues acquire talent through drafts and have clearly defined salary caps and rules and an effective enforcement mechanism to govern their operations. They are able to do so because of the antitrust exemption afforded them by Congress as part of a larger framework for the operation of those leagues. College sport programs aggressively recruit teenagers through creative recruiting campaigns and now lucrative NIL/collective/revenue share deals to build rosters. There is no true salary cap for college sports and impending new rules currently lack the ability to establish clear rules. Attempts to impose caps without an antitrust exemption will likely be futile. Furthermore, differing state laws and risk aversion of the national governing body to make rules based upon the current legal landscape due to the potential for new legal challenges by plaintiff attorneys makes progress towards real governance elusive.

At the recent Learfield Intercollegiate Athletics Forum and College Football Hall of Fame in Las Vegas, there were a variety of viewpoints shared regarding the future of college sports. The current system is unequivocally broken. The future of Olympic sports is in question. Change is here and college sports leaders, politicians and others must embrace this change and figure out ways to chart a sustainable path forward. How that path forward will maintain the integrity and educational value of college athletics will be imperative. Professional sports provide examples of athletes suffering financially from unethical advisors, poor financial management and failed business deals. These stories emphasize the importance of maintaining the integrity and opportunity for college athletes to earn meaningful degrees that will support the 99% of athletes who will not play professionally. NIL and revenue share are not going away. The challenge now is how do we help athletes maximize financial opportunities, build a sustainable governance structure, and generate the necessary revenue, while maintaining academic integrity and equal opportunity for all athletes who engage the collegiate sports experience in order to create professional opportunities beyond the playing field.