Off the Guardrails: Opportunities and Caveats for Name Image Likeness and the [Student] Athlete Influencer

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OFF THE GUARDRAILS: OPPORTUNITIES AND CAVEATS FOR NAME IMAGE LIKENESS AND THE [STUDENT] ATHLETE INFLUENCER

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ABSTRACT

The landscape of college athletics is undergoing a seismic shift with the advent of Name, Image, and Likeness (“NIL”) opportunities for student-athletes. In Off the Guardrails: Opportunities and Caveats for Name Image Likeness and the [Student] Athlete Influencer, Professor Maureen A. Weston examines the evolving terrain, tracing the journey from the National Collegiate Athletic Association's (“NCAA’s”) rigid amateurism policies to the current era of NIL legislation and its implications. This Article navigates the complex intersection of athlete empowerment, entrepreneurial ventures, and regulatory challenges, shedding light on the multifaceted opportunities and risks for athletes in the burgeoning NIL market.

Delving into the heart of the matter, Weston dissects the dynamics of NIL dealmaking, unveiling the potential windfalls and pitfalls awaiting collegiate student-athletes. From the allure of financial independence to the specter of predatory practices and regulatory ambiguities, the author uncovers the intricate tapestry of concerns surrounding the NIL framework. Drawing on insights from legal, regulatory, and ethical perspectives, Off the Guardrails offers a roadmap for those navigating this uncharted territory, exploring avenues for policy reform, regulatory harmonization, and athlete welfare safeguards in the quest for a balanced and equitable future for student-athlete influencers.

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I. Introduction

The National Collegiate Athletic Association (“NCAA”) is a membership association serving as the governing body for intercollegiate athletics. The NCAA was founded in 1906 “to protect young people from the dangerous and exploitive athletics practices of the time.” Among its many rules, the NCAA’s bedrock amateurism requirement used to be fairly straightforward, albeit controversial. Athletes who competed
for their respective colleges and universities were students, not professionals. Thus, student-athletes could not be paid, accept money or “extra benefits” associated in any way with their athleticism or their schools, or have agents. The rule was to protect student-athletes against commercial exploitation, at least when it came to the athletes profiting, and to promote integration of the student-athletes within the general student body.

While the NCAA continues to adhere to this traditional amateurism structure for intercollegiate athletics, the foundation has become precarious, and the distinctions have blurred with the advent of name, image, and likeness (“NIL”) state legislation. Although litigation challenging the NCAA’s various amateurism rules had been brewing in the courts for over a decade, state legislatures, starting with California in 2019, forged ahead with enacting legislation prohibiting schools from penalizing student-athletes for monetizing their NIL/publicity rights. While other states followed in adopting NIL legislation, these laws had varying scopes and effective dates, starting in 2023, to provide time for programs to adjust to the new laws. Yet any delays on NIL laws imploded shortly after the United States Supreme Court released its June 30, 2021, decision in National Collegiate Athletic Ass’n v. Alston. Although Alston determined that the NCAA’s limits on education-related benefits to college athletes violated federal antitrust laws, and coincidentally had nothing to do with NIL rights, the Court’s excoriating treatment of NCAA policies and practices evident in the opinion and in oral argument was seen as the green light to unleash NIL rights.

Florida became the first state to expedite its NIL law’s effective date to July 1, 2021. On this same date, the NCAA Board of Directors also

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4. See, e.g., O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1055 (9th Cir. 2015).
5. CAL. EDUC. CODE § 67456 (2021) (codifying the right of participants in intercollegiate athletics to earn compensation).
7. See generally Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69 (2021) (affirming that the NCAA’s education related restrictions violated the Sherman Act).
relented, agreeing to suspend its rules prohibiting NIL and adopting an “Interim NIL Policy,” providing that student-athletes will be allowed to profit off NIL starting in 2021 if “consistent with the law of the state where the school is located.”10 Facing protracted and ongoing litigation, the NCAA Board realized it too had to “transform” in order to survive in this new era of college sports.11

In a relatively short time span, the collegiate sports commercial landscape has indeed changed. While endorsement opportunities for athletes have opened, college sports program management, recruitment, and the role of outside third parties, including boosters, marketing agents, sponsors, and “collectives,” have likewise transformed.12 In most states, college athletes (with the exception of international athletes)13 can now profit from their NIL and enter endorsement deals, both individually and collectively.14 Activities and contracts that were long prohibited and grounds for sanction are now solicited and celebrated. While Colorado football player Jeremy Bloom had to choose between playing football or accepting endorsements needed to sustain his world championship ski competition in 2009,15 a decade and change later, Colorado star quarterback Shedeur Sanders drives a $200,000 Mercedes Maybach onto campus, with an estimated NIL valuation of $5 million. Sanders is expected

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11. The NCAA declined to oppose state legislation on “dormant commerce clause” grounds that it successfully lodged in Nat’l Collegiate Athletic Ass’n v. Miller, 10 F.3d 633, 640 (9th Cir. 1993). After the thrashing by the Supreme Court in Alston and the convergence of state NIL laws, the NCAA convened a constitutional convention. In January 2022, all three divisions approved an amended NCAA Constitution (last revised in 1997). Corbin McGuire, NCAA Members Approve New Constitution, NCAA (Jan. 20, 2022, 6:12 PM), https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx [https://perma.cc/C9UD-7VGB]. While it still bans pay-for-play, the NCAA relaxed restrictions on educational benefits and NIL. Id.


to earn $10 million over his college career. An entirely new industry has emerged to service and likewise profit from the student-athlete NIL market, including deal agents, collectives, social media and influencer advisors, marketing agents, established sport/entertainment agencies, and, yes, lawyers. While the NCAA rules still prohibit pay-for-play and require that NIL deals involve fair market value and some quid pro quo arrangement, boosters, marketing agents, and collectives are heavily ensconced in facilitating NIL deals with the athletes. While the schools themselves technically cannot be involved in the NIL deals, every school must now address NIL as part of their sports administration program. As Kentucky Coach John Calipari acknowledged, “[p]eople are looking to us” on how to handle NIL deals. Schools are imploring boosters to provide NIL deals, forming collectives, using NIL institutional support as a de facto recruiting magnet, and establishing their own institutional

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NIL centers. While recognizing student-athletes’ rights to benefit from NIL, however, many stakeholders emphasized the need for “guardrails” to ensure fairness, to prevent exploitation of student-athletes, and for the sustainability and integrity of college sports. The lack of a national standard and the current patchwork of varied state laws are resulting in chaos in recruiting in many athletic programs.

The NIL era is largely regarded as a positive breakthrough in college sports. This brave new college athlete NIL industry offers exciting opportunities and benefits for the athlete/influencer/entrepreneur/student. And while this new era in college sports is getting very lucrative for some athletes, it also attracts a whole new cast of largely unregulated boosters, agents, and collectives and significantly alters major college athletic programs and administration. The impacts of the NIL industry on revenue and non-revenue sports, the athletes, recruiting, and even Title IX and student wellness are yet to be fully determined. This Article examines the developments and implications resulting from the changing collegiate sports landscape, what may be the hidden costs of NIL, and how to fix a system that might already be broken.

II. HOW WE GOT HERE: NCAA AMATEURISM FROM THEN TO NOW

A. Before Alston: NCAA Amateurism Policy & Reasoning

As the governing body for intercollegiate sports, the NCAA regulates athletic competition among its members and virtually every aspect of the intercollegiate athlete’s experience. It sets forth rules for athlete eligibility, recruiting, championships, academics, and enforcement. The NCAA’s stated “fundamental policy” is to maintain intercollegiate athletics as an integral part of the education program and the athlete as an amateur.

25. NCAA, supra note 2, at 3.
26. See id. §§ 12.01–.02, 13.01–.02, 14.01, 18.01–.02, 18.1, 19.01–.02, 19.1.
integral part of the student body. By doing so, the NCAA considers its mandate to maintain “a clear line of demarcation between college athletics and professional sports.” Thus, amateurism and education are foundational tenets of the Association.

1. NCAA v. Board of Regents

During the 1950s–1980s, the NCAA attempted to regulate the media contracts, the number of televised game appearances for its member schools, and the sale and pricing of NCAA football games to TV networks. The NCAA's rationale for the plan was that televised games could have an adverse effect on attendance, and it wanted to provide competitive balance televised opportunities for all members. In Board of Regents of the University of Oklahoma, the Supreme Court rejected the NCAA's proffered antitrust justification for non-profit status or non-commercial goals, holding these restraints involved commercial activities subject to and, here, in violation of the Sherman Antitrust Act. Yet, in his opinion, Justice Stevens emphasized the distinction between college football and professional sports such that “[i]n order to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like.”

Board of Regents opened the free marketplace for major college sports media contracts that we see today. Since then, the power and media money has shifted from the NCAA to the major conferences, which negotiate and benefit from multi-billion dollar media rights deals, bowl games, and their own national championship in the College Football Playoff (“CFP”). The NCAA’s primary source of income derives from the NCAA Men’s Division I Basketball “March Madness” Championships. Coaches, too, were successful in antitrust challenges

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27. Id. at xii.
28. Id. § 12.01.2.
29. Id. art. 1.
33. Id. at 102.
35. Id.
to the NCAA restricted-earnings rule in Law v. NCAA.\textsuperscript{37} Coaches are frequently the highest-paid employees at their respective institutions, if not the entire state.\textsuperscript{38}

2. Amateurism and “Students Must Not Be Paid”

The view that “athletes must not be paid” aligned with the NCAA’s traditional stance that student-athletes are amateur athletes distinct from professionals. Amateurism rules also prohibited athletes from endorsements or advertising revenue.\textsuperscript{39} Two athletes who “paid” the price of NCAA amateurism rules include Jeremy Bloom and Donald De La Haye.

\textit{a. No Endorsements or Advertising Revenue}

NCAA rules required Jeremy Bloom, a multi-sport athlete who competed in the 2002 Olympic Winter Games as a mogul skier, to choose between financing his skiing career through endorsements and modeling, or playing wide receiver for the University of Colorado football team.\textsuperscript{40} NCAA bylaws permitted an athlete to maintain amateur status in one sport while competing professionally in another.\textsuperscript{41} However, the athlete still had to abide by the prohibition on sponsorships.\textsuperscript{42} Unlike sports such as baseball, where the NCAA allows a player to accept salary money in a second sport, professional skiers are instead funded through endorsements.\textsuperscript{43} Bloom needed his endorsements to pay for travel and ski competition expenses, including a bid to compete in the 2006 Winter Olympics, while also playing football for Colorado.\textsuperscript{44} Bloom sued to enjoin the NCAA and maintain eligibility while engaging in his ski-related endorsement and media deals.\textsuperscript{45} As a third-party beneficiary of the University of Colorado’s contractual relationship with

\textsuperscript{37} Law v. Nat’l Collegiate Athletic Ass’n, 134 F.3d 1010, 1024 (10th Cir. 1998) (holding NCAA salary restrictions on entry-level coaches did not enhance competition or reduce coaching inequities).


\textsuperscript{39} Alan Blinder, College Athletes May Earn Money from Their Fame, N.C.A.A. Rules, N.Y. Times (Sept. 29, 2021), https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html [https://perma.cc/Y74C-DXY3].

\textsuperscript{40} Bloom v. Nat’l Collegiate Athletic Ass’n, 93 P3d 621, 622 (Colo. App. 2004); see also Freedman, supra note 15, at 681 (noting that Bloom’s modeling opportunities included contracts with Tommy Hilfiger, appearances on EXTRA, Access Hollywood, MTV, and an offer to host a show on Nickelodeon).

\textsuperscript{41} Freedman, supra note 15, at 679.

\textsuperscript{42} Id. At the time, “NCAA Bylaw 12.5.2 prohibit[ed] athletes from granting the use of their name and likeness for a commercial product, even if the athlete [was] uncompensated.” Id. at 681.

\textsuperscript{43} See id. at 680.

\textsuperscript{44} Id.

\textsuperscript{45} See id. at 681.
the NCAA, Bloom alleged that the NCAA rules were arbitrary and capricious. The court upheld the NCAA’s rule as rationally related to its role in protecting amateurism and recognized the NCAA’s stated concerns that “endorsements invoke concerns about ‘the commercial exploitation of student-athletes and the promotion of commercial products.’”

Former University of Central Florida (“UCF”) kicker Donald De La Haye, better known by his social media handle “Deestroying,” also had to choose between playing at UCF or accepting advertising revenue from his popular YouTube videos in which he relayed his life as a student-athlete, among other musings. The account had over 90,000 subscribers and nearly 5 million total views (numbers that have since continued to increase). Because De La Haye refused to move his sports and UCF-related videos to a non-monetized account, UCF suspended him from play. In both cases, were the students not also “student-athletes,” their entrepreneurial activities would not have been restricted. Yet, these cases demonstrate how NCAA bylaws may “act to the detriment of student-athletes, rather than to their benefit” and were the precursor to heated litigation against NCAA amateurism rules.

b. Restrictions on Athletic Scholarship Compensation

For decades, NCAA amateurism rules restricted athletic financial “compensation” to the form of a “grant-in-aid” scholarship covering an athlete’s cost of tuition, fees, housing, books, and supplies, even though this aid could fall short of an athlete’s full cost of attendance (“COA”). These rules came under direct siege in *O’Bannon v. National Collegiate Athletic Ass’n*, a class action on behalf of men’s basketball and football players whose images were used without authorization or

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47. Id. at 626–27.
51. See, e.g., NCAA, supra note 2, §§ 12.1.2, 12.4–5 (detailing the rules that prohibit college athletes from engaging in entrepreneurial activities).
52. See Freedman, supra note 15, at 677.
payment in NCAA video games. By the time of trial, the case’s focus pivoted from misappropriation of athlete publicity rights to antitrust attacks on athletic scholarship restrictions. The NCAA argued the rules served the pro-competitive justification of promoting amateurism, the American tradition of college sports, competitive balance, and the integration of athletics and education. Presiding District Court Judge Claudia Wilken held that NCAA rules restricting scholarship amounts to “grant-in-aid” rather than full “cost of attendance” violated federal antitrust laws and ordered the NCAA to permit schools to pay athletes up to $5,000 in deferred compensation for their NIL rights. The Ninth Circuit affirmed, with the exception of vacating the order regarding NIL payments “untethered” to education expenses. As a result of O’Bannon, the NCAA granted the Power 5 conferences “autonomy” to set their own rules regarding athletic scholarship compensation up to the full COA. The Supreme Court declined to accept certiorari in O’Bannon, however, Alston was already in the litigation pipeline.

B. Now: NIL Litigation, Alston, & Into the NIL Wild West

1. Alston and Unlimited “Education-Related” Benefits

In July 2021, the U.S. Supreme Court unanimously changed the landscape and lives of college athletes, even though the Court ruled on a very narrow issue in National Collegiate Athletic Ass’n v. Alston. Alston involved an antitrust class action suit against the NCAA, led by former college football and basketball players who alleged “that the NCAA implemented anticompetitive bylaws unreasonably limiting the compensation and benefits that student-athletes might receive in exchange for their athletic participation.” Even with the change to full COA scholarships, NCAA rules “restrict[ed] not only benefits unrelated to education, but also benefits tied to education, such as postgraduate scholarships, vocational school scholarships, expenses related to study abroad, and posteligibility internships.” Thus, while students

55. See Tumminello, supra note 53.
57. See id. at 1007–08.
58. O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1079 (9th Cir. 2015).
59. See, e.g., Tumminello, supra note 53.
60. O’Bannon, 802 F.3d at 1049, cert. denied, 137 S. Ct. 277 (2016).
62. Id. at 107 (reviewing whether the district court’s injunction on the NCAA was “within the law’s bounds”).
were restricted to athletic scholarships, the NCAA and member schools engaged in vast commercial opportunities and media contracts for major college sports, lavish athletic facilities, and extravagant coach contract deals. These strict rules imposed financial hardships on athletes, some of whom had to choose between opportunities for compensation and eligibility. For years leading up to Alston, the NCAA had attempted to uphold its mantra that amateurism in collegiate athletics was inexorably intertwined with higher education. This assumed protective rule was imposed upon every NCAA institution and individual athlete. And then came Alston.

The plaintiff’s antitrust claim established that the NCAA’s lack-of-compensation framework had significant anticompetitive effects in the market of Division I basketball and FBS football. It restricted competition between and among the member institutions by limiting and controlling the compensation that could be used to recruit prospective athletes. As a result, athletic participation was depressed to the point where the price and quantity of student-athlete labor were suppressed below competitive levels.

In a unanimous decision, Alston held that the NCAA’s compensation rules for student-athletes violated the Sherman Antitrust Act “when they restricted non-cash education-related benefits such as post-eligibility undergraduate or graduate scholarships or tutoring, study-abroad expenses, and paid post-eligibility internships.” This decision upheld the district court’s finding, which was based on the rule-of-reason analysis. That analysis found that the NCAA and its member schools collectively enjoyed monopsony power (i.e., when there is only one buyer for a particular good or service) in the relevant market of student-athlete services in Division I basketball and FBS football. Additionally, the NCAA exercised this power in a way that restrained compensation without risking its market dominance. As a result, “there were no viable substitutes for the Division I market that student-athletes could switch to in response to decreases in compensation.”

65. Id.
69. Id. at 82.
70. Id. at 86–87.
71. Yoo, supra note 63.
72. Id.
73. Id.
74. Id.
75. Id.
special consideration should be afforded to the association as a joint venture that inevitably necessitates collaboration among members to ‘offer consumers the benefit of intercollegiate athletic competition.’”  

While some degree of coordination between competitors in sports leagues can be pro-competitive, the Court found that joint venture restrictions, especially by those with monopoly power like the NCAA, were subject to antitrust scrutiny under the rule of reason test.  

The significance of Alston is not limited to antitrust jurisprudence. “Alston unprecedently lifted the limits on education-related compensation/in-kind benefits for student-athletes and further attenuated the NCAA’s control over student-athlete compensation.” This landmark case revealed the evolving landscape of college athletics through the lens of fair compensation and treatment, and it “recognized that the NCAA relied heavily on amateurism to unduly exploit student-athlete labor for free or for a lower price in college sports.” From an antitrust perspective, the NCAA’s steadfast enforcement of amateurism did not align with the reality of the enormous economic market for college sports and athletes as essential labor in this marketplace. Its rules, eliminating market dynamics and reducing competition in the collegiate athletic marketplace, came under tremendous pressure to re-establish the intricate relationship between schools and student-athletes. Karma to the 1984 Regents mantra, Justice Kavanaugh’s concurrence is now oft-cited by sports reporters, that “[t]he NCAA is not above the law” and “[a]ntitrust laws . . . ‘should not be a cover for exploitation of the student athletes.’”  

2. Alston’s Opening for State NIL Laws  

While Alston and related litigation challenging NCAA amateurism rules were navigating through the federal courts, states were also working to enact their own NIL legislation in defiance of NCAA rules. California was the first state to “create a legal right for college athletes to be compensated for the commercial use of their identities” via the Fair Pay to Play Act. The Act “makes it illegal for California colleges...

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76. Id.  
77. Id.  
78. Id.  
79. Id.  
80. Id.  
81. Id.  
82. Id.  
to deny their student athletes opportunities to gain compensation for the use of their names, images and likenesses,” thus ensuring that college athletes will be free to profit from their identities. Additionally, the Act authorizes college athletes to hire agents and other representatives to help them negotiate and secure commercial opportunities. Other states followed, yet the effective dates of these laws were for 2023 until the Alston decision came down on June 21, 2021. Florida sped up its NIL law effective date for July 1, 2021.

3. NCAA NIL Guidelines and Enforcement

Days after the Alston decision, on July 1, 2021, the NCAA announced an “Interim NIL Policy,” suspending NIL prohibitions and allowing student-athletes to profit off of NIL effective immediately, if consistent with the collegiate model and otherwise in accordance with applicable state law. The NCAA subsequently clarified that NIL deals are not to be used as recruiting inducement and should reflect fair market value, not pay-for-play. The deals should not be “without a quid pro quo,” and student-athletes are to be compensated only for work actually performed and not contingent upon enrollment at a particular school. The policy allows student-athletes to consult with a Professional Services Provider on issues related to NIL activities, such as an agent, tax advisor, marketing consultant, attorney, brand management company, or anyone who is employed or associated with such persons. The policy applies to all NCAA divisions and student-athletes in all states. As a result, any regulations regarding NIL athlete deals were/are left to the respective states and institutions, at least for the time being.
Periodically, the NCAA has issued further “clarification” guidance on this policy, which is addressed in detail in Part IV. 95

C. The Perfect Storm: NIL + Transfer Portal + Collectives

Along with NIL, developments in NCAA transfer rules and the NIL industry converged. Enter the Wild, Wild West of NIL.

1. The Transfer Portal

Just months before the NCAA adopted the Interim NIL Policy, it had also ratified changes to its Transfer Rule. 96 The NCAA transfer portal has existed since 2018, and the NCAA instituted the automatic “one-time transfer” rule in 2021, allowing college athletes who enter the transfer portal during the requisite notice and window period immediate eligibility rather than requiring a one-year sit-out period. 97 In 2022, the “open market” this rule created was rolled back slightly, as the NCAA instituted transfer window periods during which each in-season NCAA sport (fall, winter, and spring) could take advantage of the opportunity to transfer. 98 Nonetheless, transfers between institutions became more prevalent. From August 2022 to May 2023, 8,669 NCAA football players entered their names into the transfer portal, which is more than twice as many as the 4,076 who entered in 2018–19. 99 For example, UCLA defensive end and top NFL 2023 draft pick Mitchell Agude entered the transfer portal and left UCLA for one of several NIL deals offered to him. 100 With the lure of more lucrative NIL deals at other schools combined with the ease of entering the transfer portal, many athletes sought out opportunities while also impacting roster management for sports programs. 101

95. See infra Section IV.A.
97. Id.
2. The Rise of Donor and Marketplace Collectives

Concurrently, “collectives,” or entities comprised of donors and fans, arguably boosters, and corporate operations, exploded upon the NIL scene to provide NIL opportunities to student-athletes for their respective institutions. While NIL was portrayed as an independent venture by an athlete to have local merchant deals or social media presence, the emergence of the collectives radically changed the NIL marketplace and college sports administration. Collectives are structured in various forms, such as a Donor Collective, which pools donor money, or a Marketplace Collective, which operates to direct NIL deals to athletes, or other corporate forms that enable athletes to enter revenue deals, such as through software programs that universities contract to provide connections to student-athletes. A New York Times report identified “more than 120 collectives, including at least one for every school in each of the five major college football conferences. The average starter at a big-time football program now takes in about $103,000 a year.”

NCAA rules prohibit NIL from being used as a recruiting inducement, but in fact the power is in the deals that school collectives can offer. Multiple school collectives offer NIL deals upwards of $60,000 per recruit, such as the Texas and Nebraska collectives. Miami billionaire John Ruiz spent $7 million on NIL deals, mostly on University of Miami football players and in de facto recruiting the Cavinder Twins. As an incoming Texas quarterback prospect, Quinn Ewers signed a deal

102. See Dennis Dodd, Inside the World of ‘Collectives’ Using Name, Image and Likeness to Pay College Athletes, Influence Programs, CBS (Jan. 26, 2022, 1:03 PM), https://www.cbssports.com/college-football/news/inside-the-world-of-collectives-using-name-image-and-likeness-to-pay-college-athletes-influence-programs/ [https://perma.cc/4C85-PMQM] (“Collectives have emerged as NIL brokers of varying levels of sophistication. They can be part of a larger company as a for-profit or non-profit entity. In the vast majority of cases, there can be no relationship with a school. Collectives must remain a third party in the process . . . NIL has allowed these collectives to manifest their CEO’s desires to win in the marketplace, even if their school isn’t winning on the field. The guardrails are few from a diminished NCAA that has lost power and influence in the space, mostly by ignoring the opportunity to allow NIL for decades. The only NCAA rules: There can be no ‘play-for-play’ defined as direct compensation for athletic accomplishment regarding NIL benefits. Also, the athletes have to do something for the money they’re getting.”).


105. A collective is “an organized corporation that is structurally unaffiliated with the school, yet operates to provide money and NIL opportunities to the school’s athletes.” Bilas, supra note 24 (“Currently, NCAA guidelines of NIL prohibit boosters or collectives from offering NIL opportunities or other compensation for athletes to enroll or remain at a particular school. But some say that is exactly what is happening.”).
worth $1.4 million over three years to provide autographs for GT Sports Marketing. A Texas-supporting non-profit collective called Horns with Heart offered every scholarship offensive lineman $50,000 annually. Another Texas-backing organization, Clark Field Collective, announced $10 million in donor commitments. A Knoxville-based organization called Spyre Sports established a collective to funnel NIL benefits in the form of cars, apartments, and “six-figure packages” for Tennessee football players. Collectives have caught on, and schools are now embracing them. Yet, as many donor collectives are set up as non-profits or charities, this invites the Internal Revenue Service’s scrutiny.

3. The Power Conference Realignment Factor

An added factor contributing to this uncertainty is the current state of disruption in conference realignment. The Pac-12, currently home to a few of the biggest NIL stars (Bronny James and Caleb Williams), may cease to exist and will certainly no longer be a part of the Power 5. While the University of Southern California (“USC”) is safe in the Big Ten, local NIL deals with California brands may decrease in value as the heart of the conference no longer revolves around the West Coast. Further, student-athletes at schools like Oregon State and Washington State who have been “left behind” can watch their potential earning value on the NIL market plummet through no fault of their own.

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106. Pierson, supra note 100.
107. Id.
108. Id.
110. Fahrenthold & Witz, supra note 104.
112. Additionally, there is a cost to student well-being from conference realignment. See Ann Killion, USC, UCLA Moving to Big Ten Creates a Big Problem No One Is Talking About, S.F. CHRON. (Sept. 7, 2022, 12:33 PM), https://www.sfchronicle.com/sports/annkillion/article/USC-UCLA-moving-to-Big-Ten-creates-a-big-problem17423221.php [https://perma.cc/4VU5-4GQC] (noting the troubling aspects of USC and UCLA’s move to become part of the Big Ten and the effects on not just tradition, but “sacrificing all sports on the altar of football profits. The devaluing of the storied Olympic sports at each university. The toll the extra travel will take on athletes whose sports have multiple games per week. The diminishing of Pac-12 powerhouses for women’s sports like basketball, softball and soccer . . . [and] the environmental consequences of such a move. More travel means a larger carbon footprint and the devouring of more resources.”). USC and UCLA both will be traveling across three time zones for three of their league road games in 2024. See also Washington State, Oregon State Prepare for Uncertain Future as NCAA Offers Help, SPORTS BUS. J. (Nov. 27, 2023), https://www.sportsbusinessjournal.com/Articles/2023/11/27/washingtonstateoregon-state-pac-12-future-uncertainty-football-realignment [https://perma.cc/6PL7-V9V4].
Student-athletes can take advantage of this rule to move to a more prominent conference in the event of conference realignment, but this can have a further impact on NIL deals as well. For one thing, an athlete’s NIL deals, especially if made with a collective created to support a specific university, may be contingent on continuing to play for that university. If athletes fail to take caution and understand the limitations imposed by their deals, they could find themselves in breach and owing money back that they no longer have. Furthermore, the existence of the transfer portal incentivizes collectives to market their NIL deals as an advantage of transferring into their university’s program; however, recruiting inducements are a form of pay-for-play, which violates the NCAA’s Interim NIL Policy.\(^{113}\) Overall, the incentives created by the transfer portal and continuing conference realignment serve to further complicate the already convoluted regulations of NIL deals and leave athletes potentially even further at risk of exploitation without proper guidance. Athletes affected by conference realignment may have a path of recourse via the NCAA transfer portal.

III. NIL Dealmaking: Opportunities, Risks, and Caveats for the Athlete Influencer

A. NIL Opportunities for Money, Agency, Entrepreneurship

“Amateur” athletes now have the same right as professional athletes to monetize their publicity rights, earn endorsements, develop a personal brand or business, and engage in social media and the influencer industry, as well as philanthropy.\(^{114}\)

1. “Superstar” NIL and Media Attention

As states have quickly taken legislative advantage of the Alston decision, so too have athletes. The term “athletes” is increasingly preferred instead of “college athletes” or “student-athletes”\(^{115}\) because NIL has


\(^{114}\) Bilas, supra note 24 (acknowledging NIL benefits include that athletes in all sports have the opportunity to monetize NIL, including women college athletes, such as Paige Bueckers, the UConn star basketball player, who has NIL deals with companies as varied as Gatorade and StockX, and Olivia Dunne, an LSU gymnast with over 6 million social media followers, who was reported to have earned over $1 million representing a clothing company; and with NIL, more athletes opt to stay in school and help balance talent among schools).

\(^{115}\) The term student-athlete is deemed by some to be an oppressive and perhaps illegal term misclassified under federal laws. Memorandum from Jennifer A. Abruzzo, Gen. Couns., Nat’l Lab. Rels. Bd., to all Regional Directors, Officers-in-Charge,
reached beyond the collegiate landscape. To date, 30 states have revised their rules to allow high school athletes to monetize their NIL rights, with certain conditions.\footnote{116} According to On3’s NIL valuation rankings, two of the top three highest valued athletes have not had the opportunity to see the court or field in college yet.\footnote{117} Going into their respective freshmen year in Fall 2023, and before either of their teams’ seasons had begun, Bronny James had the highest NIL valuation at $6.1 million and Arch Manning the third highest at $2.9 million.\footnote{118} James thankfully survived an on-court cardiac arrest episode while practicing at USC over the summer and, following recuperation, has returned with little effect on his NIL valuation.\footnote{119} Even before either of these athletes have played an official college game, NIL provided them with the opportunity to earn millions of dollars as a result of their identities (and pedigree). Certainly, these valuations are not the norm for freshmen who have yet to compete at the collegiate level, but the collegiate programs also benefit from the high-profile influencer athletes.

For example, Colorado University (“CU”) football players Shedeur Sanders and Travis Hunter were ranked second and fifth in NIL valuation, respectively, going into their first season in Fall 2023 for the Buffaloes.\footnote{120} Combined, their NIL potential was estimated at almost $3 million, but that seems insignificant when looking at the massive media attention and appeal the CU football team has garnered the school since the appointment of Head Coach Deion “Prime” Sanders. Just four months after the team had finished the 2022 season with a 1-11 record, the Buffs’ spring football game was sold out and nationally

\begin{addendum}
\item \footnote{116}{For example, the Georgia bylaw restricts athletes using school intellectual property or NIL for recruitment, pay, and collectives. \textit{Georgia Becomes 30th State to Allow NIL in High School Athletics}, \textit{Sports Bus. J.} (Oct. 3, 2023), https://www.sportsbusinessjournal.com/Articles/2023/10/03/georgia-high-school-nil-laws-ghsa-meeting.aspx [https://perma.cc/6JVB-9ZSQ].}
\item \footnote{118}{Dougherty, supra note 117.}
\item \footnote{120}{\textit{NIL Valuations & Rankings}, supra note 117.}
\end{addendum}
broadcast for the first time in school history. Season tickets for the 2023 season sold out, and CU merchandise sales increased by 505%. CU has benefited from star power, media attention, followers, and commercial revenue in one mere season, despite what most may consider a mediocre win record. CU’s social media presence has boomed as well. In the span of three months, CU’s followers across Facebook, Twitter, Instagram, and TikTok rose from 226,800 to well over 1 million combined, and this number continues to grow. Coach Prime was even featured on 60 Minutes, sweetly mimicked on Saturday Night Live, and is himself a social media sensation. USC quarterback Caleb Williams is one of the most high-profile superstars in college sports, with an annual NIL valuation as of July 2023 starting at $2.6 million and likely to rise as the 2022 Heisman Trophy winner signed additional NIL deals with major brands such as United Airlines, PlayStation, Dr. Pepper, and Beats by Dre.

2. Average NIL Deals Much More Modest

Granted, the foregoing superstar athlete NIL deals represent an extremely small percentage of the NIL reality. According to data from INFLCR compiled over a 12-month span, the average value of all NIL transactions was $1,815, and the median was even less at $53. The difference between Power 5 and non-Power 5 deals is also dramatic, with the average Power 5 deal being almost four times greater than the average non-Power 5 deal. As most of the talk about NIL has focused on the high-profile exorbitant deals, much less attention has been paid to the more common signings among the average student-athletes. Yet


124. Rittenburg & Bonagura, supra note 122.


128. Id.
lower-profile student-athletes also have struck NIL partnerships: “Of the 26 sports at [Arizona State University], 19 have seen at least one athlete NIL deal.”

3. Financial Security

NIL offers athletes opportunities for financial support while in college, as well as life skills beyond college. Before NIL, a 2019 study by the National College Players Association reported that “86% of student-athletes who live off campus are living below the federal poverty line.” Athletes would struggle to afford basic necessities like groceries, utilities, and transportation, and the demands of student-athletes preclude outside work.

As the influencer industry and social media following has become the advertising mecca, athletes can utilize NIL to grow their personal brands in college and generate a wider fan base that expands beyond just the sport they play or the school they attend. Traditionally, most college athletes were followed by fans of the school they represented. For a large majority of the student-athletes who did not reach the professional level, this fandom and following would end when they graduated. NIL can benefit these athletes as well as those few who enter professional sports. Some athletes are choosing to stay in school instead of signing a contract with a pro team, where collegiate NIL deals are as or more lucrative. The endorsements that these athletes secure by growing their personal brands while in college will allow them to “establish themselves as valued members of their university community, develop important business skills, and create valuable connections that can benefit them in their future careers.”

4. Philanthropy

Some athletes also use NIL platforms to engage with community and social justice initiatives to promote charitable causes. For example,
Florida State University offensive lineman Dillan Gibbons started a GoFundMe to raise funds to bring his friend Timothy Donovan, a wheelchair user with serious health issues, to attend a game in Tallahassee. The GoFundMe raised more than $30,000 in a single day. As the campaign grew, Gibbons connected with GoFundMe executives and was made its first sponsored athlete. Gibbons also created a non-profit called Big Man Big Heart in an effort to provide educational resources and assist other athletes in using their NILs for social good. Through his efforts, Gibbons has raised “more than $150,000 for people in need and has set up five GoFundMe campaigns,” while the company provides executive assistance in these endeavors.

Other athletes using NIL to partner with community organizations include University of Nebraska volleyball player Lexi Sun, whose deal with a volleyball apparel company included contributions to a non-profit sports psychology organization. University of Michigan running back Blake Corum likewise donated over 100 turkeys to those in need during Thanksgiving, prompting other organizations in the community to match his donation and provide other goods. Heisman finalist and current Pittsburgh Steelers quarterback Kenny Pickett garnered multiple NIL partnerships during his time at the University of Pittsburgh, and “[t]wo of them, a trucking company and an apparel company, collaborated to produce ‘Pickett’s Partners’ T-shirts, with all the proceeds going to another of his partners: the Boys & Girls Clubs of Western Pennsylvania.” Growing up, Pickett spent a lot of time at his local Boys & Girls Club, and he wanted to give back.

This generation of athletes is aware of athlete activism in social justice causes, and NIL offers athletes an opportunity to connect with philanthropy and social causes. These actions are entirely laudable and fulfill the quid pro quo requirement for NIL deals. Yet, the IRS, which granted tax-exempt status to numerous collectives on this basis, is now questioning some of these deals where collectives seek tax-exempt non-profit status for ostensibly connecting athletes with charitable activity if the real purpose is to entice the player to a particular institution and team.

135. Burtka, supra note 129.
136. Id.
137. Id.
138. Id.
139. Id.
140. Id.
141. Id.
142. Id.
143. Id.
144. See Jim Vertuno, IRS Throws a Chill Into Collectives Paying College Athletes While Claiming Nonprofit Status, APNews (June 30, 2023, 8:09 AM), https://apnews.com/article/nial-athlete-endorsements-ncaa-irs-9d006bdb429f76adaa3d108196fd2c8c [https://perma.cc/C84A-F8ZQ] (explaining the IRS’s memo warned collectives that they “may not qualify as tax-exempt if their main purpose is paying players instead of supporting charitable works”).
B. Concerns with the Current NIL Framework

The initial concerns that NIL would lead to the death of “amateurism” in college sports have proven unfounded. The disruption and chasm in college sports in the new NIL era is evident and has given way to other concerns. In addition to the concern regarding the power of collectives to impact recruiting and use NIL as disguised pay-for-play, questions regarding athlete protection also arise. These include concerns about bad and predatory deals, the unregulated third parties in the NIL/social media industry, NIL’s role in the evolving landscape of Division I due to conference realignment and in-flux transfer portal regulations, Title IX implications, and player well-being.

The NIL marketplace clearly provides unprecedented opportunities for student-athletes to receive cash and in-kind compensation, as well as an educational experience to learn marketing, social media management, contracts, and dealing with sponsors, agents, regulations, finance, and taxes. For some, education can come in the form of the school of hard knocks.

1. Predatory Deals?

NCAA athletes entering NIL deals are often between the ages of 17 and 22, and “one-and-done” sports trend even younger. Most of these young athletes have no formal education in financial management, marketing, sponsorship contracts, tax literacy, or working with agents. Athletes may not have the sophistication to understand complex contracts, deal terms, or long-term implications. Further, as student-athletes are still developing, NIL deals have the potential to be speculative in nature; a brand that takes a chance on a lesser-known athlete could get a huge return on investment if the athlete develops into a superstar.

As a case example, while at the University of Florida in 2022, football star Gervon Dexter received a message stating: “What’s up Gervon! I’m a partner at a data & analytics firm here in Washington, DC. We have a 6 figure financial/NIL opportunity for you. Would love to discuss more

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if you’re interested. Let me know what you think.”148 Within one day, Dexter entered into a contract that provided that Big League Advance (“BLA”) would “make Dexter a one-time payment of $436,485 and a $5,000 contribution to the charity of his choice” in exchange for 15% of any pre-tax future earnings for 25 years he receives as an NFL pro athlete.149 The contract further provided that Dexter grants BLA a “perpetual, irrevocable, royalty-free, and worldwide license for the duration of the Initial Term to use the Player’s [NIL,] comments, biographical information and/or athletic reputation for the advertisement or publication of BLA, including in social media posts, interviews, online content, press releases, and any other media.”150 In exchange, Gervon was required to make “at least one social media post promoting BLA and its products, autograph as many as 100 items for BLA, make at least two personal appearances and provide BLA with at least one VIP invitation to the NFL draft and draft-related events that he hosted.”151 A year later, as a second-round draft pick, Dexter signed a four-year, $6.72 million contract with the Chicago Bears.152 BLA then sought to collect $1 million.153 Was this an NIL deal or a predatory loan? That is the issue in the case, which has now been voluntarily dismissed.154

Major League Baseball’s (“MLB’s”) Fernando Tatis also entered into a shocking deal with BLA, which called for a percentage return on his future earnings in exchange for an up-front advance.155 While the exact numbers of Tatis’s deal are not publicly available, the average advance payment by BLA was $350,000.156 One BLA deal that has been brought to light offered a $360,000 advance for 10% of the athlete’s future earnings.157

149. Schlabach, supra note 148.
150. Complaint for Declaratory Judgment, supra note 148, at Exhibit 3. “‘Professional Football Earnings’ means all of Player’s pre-tax earnings or remuneration paid to Player by a Professional Football League or Team during the Extended Term of this Agreement.” Id. at 10.
151. Schlabach, supra note 148.
152. Id.
153. Id.
156. Id.
157. Id.
If Tatis agreed to comparable numbers, this means he would pay BLA $34 million on his fourteen-year deal, signed with the Padres in 2022. When asked if he regrets making this deal, Tatis noted the personal nature and circumstances that surrounded his choice. Similarly, student-athletes, especially those coming from backgrounds of economic hardship, may be coming into college in financially difficult circumstances, making them vulnerable to predatory offers that give them immediate financial relief in return for claims on their future earnings at usurious rates.

2. Financial Literacy and NIL Tax Implications

Even at the professional level, athletes’ struggles with wealth management and taxes have been well-documented. Younger athletes are also at risk of squandering earnings rather than using the proceeds as an opportunity to invest, save, and build wealth, even where the deals are fair. The opportunity to build wealth during college has previously never been available to these student-athletes, and thus, universities and private agencies heretofore were not well-equipped to provide the necessary financial guidance and training. This opportunity is especially critical for female athletes, whose professional earning potential in their sport is far lower than their male counterparts today. Yet, the gender gap in financial literacy persists.

Depending on term structure, NIL deals can impose complex income tax burdens on student-athletes. All income earned on NIL deals, including “non-cash” income, is required to be reported on an individual’s IRS Form 1040. The resulting impact on the student’s taxable income must also be reported to FAFSA and may impact the student-athletes’ eligibility for federal aid, including Pell Grants. Student-athletes typically enter NIL deals as independent contractors and thus need to complete tax forms, such as Form 1099, file Schedule C and Schedule E along with their 1040, and pay self-employment tax, among other requirements. State income tax raises further issues, as athletes may need to file in multiple states if they are residents of one state but attend a university.

158. See id.
159. Id.
162. Raquel Fonseca et al., What Explains the Gender Gap in Financial Literacy? The Role of Household Decision Making, 46 J. CONSUMER AFFS. 90, 90 (2012), https://doi.org/10.1111/j.1745-6606.2011.01221.x (“The financial literacy index for women is about 0.7 standard deviations lower than that for men (p < .001).”).
164. Id.
165. Id.
in another state, depending on where the work for each particular deal was performed. Most student-athletes will have little or no familiarity with these requirements and may use the full proceeds of their NIL deal(s) without accounting for their tax liability, ending up in debt or legal liability.

3. Federal Regulatory Issues: FTC Guidance

The [Federal Trade Commission (“FTC”)] recently updated its guidance for social media influencers relevant to student-athletes engaging in promotional activities. All student-athletes should know the disclosure requirements for endorsements, sponsorships, and partnerships with other brands and companies. Student-athletes need to understand what constitutes a “substantial material partnership”—and that it may include work done for family members or work done in exchange for free products.

The FTC requires influencer disclosures to foster transparency and avoid misleading the public about any potential bias or motivation. Under the FTC Guidance, an influencer-athlete could be responsible for significant monetary fines if they promote products and services for which they signed NIL deals without disclosing them as paid ads. These fines can far exceed the value the student-athlete received on the NIL deal in the first place. For example, retired NBA star Paul Pierce faced charges for failing to disclose that he was paid to promote crypto assets known as EMAX tokens. While he was paid $244,000 to promote the assets, he settled the lawsuit for over $1.4 million. In addition to financial literacy, student-athletes need training and guidance on compliance with legal and regulatory schemes in which they can unknowingly become entangled.


While collegiate athletics at the NCAA level consist of a selective group of elite athletes who must also meet a range of eligibility and academic requirements, the NIL service providers, collectives, and agents

166. Id.
168. Id.
171. Id.
promulgating NIL deals are not subject to equivalent scrutiny. For better or worse, NIL has opened up an entirely new industry where seemingly anyone, yes, anyone, can get in on the action. While many NIL agents are also lawyers, most are not. And the lawyers acting as NIL agents are representing players nationwide, with heretofore no unauthorized practice of law repercussions.172 Even if the NCAA were to issue a more stringent NIL policy, it has no jurisdiction to regulate these third parties and marketing agents.173

In major professional sports leagues, player agents are accredited by the respective player association. At the high school and college levels, agents or NIL providers have no similar certification process.174 Federal legislation, such as the Sports Agent Responsibility and Trust Act (“SPARTA”) and equivalent state athlete agent laws, set forth regulations for agents who impact player collegiate eligibility regarding professional contracts.175 Service providers operating as agents in the NIL space must comply with the applicable requirements.176 However, these laws were adopted well before the advent of NIL and do not address the range of commercial actors in the NIL marketplace and have rarely been enforced even against those who are registered.

Another workaround for this requirement is for a service provider to hold themselves out as a “manager” for the student-athlete and their NIL portfolio rather than as an agent. For the average NCAA athlete, when given the opportunity to sign a three- or four-figure deal, the costs of hiring a certified professional agent are too high to be worthwhile. Instead, they may rely on a college friend or teammate who claims to have the necessary skills to negotiate a deal. Even if these “managers” are well-intentioned, and presumably not all are, they lack the requisite training and skills to adequately represent the student.

172. See generally Athlete Agent Laws and Registration Requirements by State, Bus. Coll. Sports (Jan. 11, 2023), https://businessofcollegesports.com/athlete-agent-laws-and-registration-requirements-by-state/ [https://perma.cc/D4 AX-KUVF]. Whether a lawyer who is also a sports or marketing agent is “practicing law” and thus should be licensed in every jurisdiction in which the lawyer represents a client is rarely questioned by state bar authorities. Agents need not be lawyers, but many sport-agents emphasize their status as lawyers in advertising and promoting their legal/agency services.

173. See Ralph D. Russo, Lack of Detailed NIL Rules Challenges NCAA Enforcement, AP News (Jan. 29, 2022, 12:46 PM), https://apnews.com/article/college-football-sports-business-15e776b5d115dac0a37a1563d5bfce00 [https://perma.cc/Y9D3-VSMV] (“The deals are being done with third parties. And the NCAA obviously has no jurisdiction over those third parties,’ said Mit Winter, a former college basketball player and now a sports law attorney for Kennyhertz Perry.”).


176. Id.
5. Gender Pay Gap and Inclusivity Issues

NIL deals are not just for men’s football and basketball, but most of the
top deals seem to fall into these categories. Inclusivity issues persist. That
same study shows that football is by far the most compensated sport,
as it makes up 50.6% of all NIL endorsements. Some female athletes
with massive social media followings, such as Olivia Dunne and the
Cavinder Twins, have procured lucrative NIL contracts. But overall,
women’s sports receive fewer sponsorship deals and compensation.
NIL collectives factor in this gender pay gap: “Often founded by
prominent alumni and influential supporters, school-specific collectives
pool funds from a wide swath of donors to help create NIL opportunities
for student-athletes through an array of activities.” Opendorse found
that when excluding money from collectives, male and female college
basketball players make roughly the same amount of money from NIL
deals. When taking collectives into account, male college basketball
players make twice as much money as females. These collectives have
a direct correlation to the concern regarding unequal recruitment as
well. Although the NCAA has warned collectives against recruiting
athletes by directly engaging with them, “athletes know which schools
have established collectives that are willing to pay up, so the funds
likely factor into many players’ college decisions.”

177. Only Olivia Dunne and Sunisa Lee, both female gymnasts, cracked the top 10 list
in 2023. Andrew Miller, NIL’s Top 10 Most Valuable Athletes for 2023, FirstPoint USA
(Feb. 6, 2023), https://www.firstpointusa.com/blog/2023/02/nils-top-10-most-valuable-
athletes-for-2023/ [https://perma.cc/U5A4-H2M8].

178. Vox Creative, The College Athlete Pay Gap, and Why It Matters, SBNATION
(Apr. 5, 2022, 11:02 AM), https://www.sbnation.com/ad/23009992/college-athlete-pay-
gap-nil [https://perma.cc/L6UC-JZ7X].

179. Id.

180. Biles, supra note 24 (“Women’s college athletes are benefiting, not being left
behind. It was said early on that NIL would be unfair to female athletes and actually
hurt women’s sports. Early returns indicate such concerns were without merit. Paige
Bueckers, the UConn star basketball player, has NIL deals with companies as varied as
Gatorade and StockX. Olivia Dunne, an LSU gymnast with over 6 million social media
followers, was reported to have earned over $1 million representing a clothing company.
Women have thrived in the NIL space, not only earning money, but gaining a platform
to advance gender equity in college sports and beyond.”).

181. Vox Creative, supra note 178.

182. Pete Nakos, What Are NIL Collectives and How Do They Operate?, ON3NIL
(July 6, 2022), https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-
operate/ [https://perma.cc/9R6E-M2NT].

183. Carly Wanna, Men Make Twice as Much Money as Women Under the NCAA’s
New Rules That Allow College Basketball Players to Cash In, FORTUNE (Mar. 16, 2023,
2:54 PM), https://fortune.com/2023/03/16/how-much-do-college-basketball-players-
make-ncaa-men-twice-as-much-women-nil/ [https://perma.cc/GC8C-R6XM].

184. Id.

185. Id.
countless positive opportunities to college athletes, but it will bring several concerns to light that must be addressed as well.

6. Title IX Implications with University NIL Involvement

As NIL progresses and institutions further embed with collectives and NIL “education” in the form of facilitating NIL deals, Title IX claims are inevitable. Under the current NIL structure, third parties, rather than institutions, compensate athletes directly for the use of their NIL. Title IX’s non-discrimination mandate only applies to institutions, as recipients of federal funds. Thus, independent third-party NIL agreements directly with NCAA athletes are not subject to Title IX scrutiny. However, many NIL deals are brokered by or signed with alumni “boosters,” and NIL collectives are formed to benefit a specific institution. In that instance, if boosters and collectives are taking direction, guidance, or instruction from the institution, then Title IX’s gender equity requirement applies. Schools may claim this interaction does not occur, but, in practice, most alumni donors are well-ingrained in their institutional communities and likely have the attention of the athletic department.

Institutions must also be wary of enacting NIL compliance policies that could have a “disparate treatment or impact . . . on the opportunities and benefits for women athletes.” This means any education, training, or guidance provided to male athletes in revenue-producing sports must be matched in equitable quantity and quality for female athletes. For example, providing more advice or assistance in procuring NIL deals to the men’s football and basketball teams would violate the equal treatment requirement of Title IX, which considers benefits such as recruitment, academic support, and publicity. Especially if schools choose to grant athletes access to university trademarks, logos, or other intellectual property rights for NIL deals, those policies, limitations, and approval requirements would have to comply with gender equity requirements too.

7. Athlete Welfare Concerns

NIL deals don’t solve every problem for student-athletes. In fact, the increase in popularity and social media presence that follows a lucrative

186. See, e.g., Daniels v. Sch. Bd., 985 F. Supp. 1458, 1462 (M.D. Fla. 1997) (showing booster clubs garner Title IX scrutiny when schools “acquiesce” to their funding systems).
188. Id.
NIL deal can have a significant impact on a student-athlete’s mental health. According to Pat Coyle (founder of Day Off Social, a campaign to protect college athletes and promote mental health), while social media might be good for business, it can also exacerbate mental health issues.190 “If we’re honest, we might have to admit the influencer marketing business model—and the new ‘opportunities’ to capitalize on athletes’ name, image and likeness—comes with potentially serious psychological consequences.”191 Some may think NIL deals, combined with more social media followers, automatically become a good thing. However, the influencer marketing model can drive some young athletes to hyper-focus on social media performance, followings, and likes.192

An academic study on athlete well-being examined college athletes as “brands” in the context of a social identity theory of “role engulfment.”193 As the authors explain, “Social identity theory argues that people come to see their whole selves in reference to various social roles, patterns, and interactions they hold across their relationships and social endeavors.”194 The authors further state that “[w]ithin and outside of sport, research continues to support the contention that holding multiple roles is beneficial to an individual’s mental and physical health.”195 The researchers noted that where athletes see themselves in a singular role as an athlete, role engulfment envelopes such that athletes feel “enormous pressures to see themselves as athletes first, or even athletes only.”196 For college athletes who identify “using their name, face or other brand elements in the market” those brand elements consist of an athlete’s athletic performance, their attractive appearance, and marketable lifestyle.197

This is a demographic that has unique social pressures in a digital era.198 Athlete stars are not immune. The already intense pressures to train, study, and now procure endorsement deals and become “brands” with followers and social media engagement can overwhelm and risk athlete well-being.199

191. Id.
192. Id.
194. Id.
195. Id.
196. Id.
197. Id. at 31.
199. Harris et al., supra note 193, at 30.
IV. Paths Forward: Legal Remedies or Self-Regulation?

The awakening and disruption of college sports is here, if not long overdue. Perhaps the system can proceed as is, yet most would like to see some structure and guidance in this mayhem. NIL’s role is evolving in the landscape of major collegiate sports programs due to conference realignment, flux transfer portal regulations, Title IX implications, and player well-being.

A. NCAA NIL Policy Updates

The NCAA has had to provide additional guidance to its Interim NIL Policy. On May 10, 2022, in response to widely reported alumni and booster involvement in NIL deals for new recruits and transfers, the NCAA Division I Board of Directors issued guidelines that clarified that the university is responsible if its boosters “recruit[] and/or provid[e] benefits to prospective student-athletes” (including NIL deals), which are prohibited by Division I Bylaws. The NCAA defines a “booster” to include “[a]ny third-party entity that promotes an athletics program, assists with recruiting or assists with providing benefits to recruits, enrolled student-athletes or their family members,” including “collectives.”

On October 26, 2022, the Division I Board of Directors provided guidance regarding “Institutional Involvement in a Student-Athlete’s Name, Image and Likeness Activities,” further emphasizing that “athletics department staff members are prohibited from representing a prospective student-athlete or enrolled student-athlete in marketing their athletics ability or reputation.” Existing bylaws remain in effect, including the restriction that institutions are not to compensate a student-athlete in exchange for the use of their NIL and that student-athletes may not use athletics skills (directly or indirectly) for pay in any form. And although institutional staff members or boosters are precluded from providing a student-athlete with a special arrangement or benefit, institutions may finance and assist student-athletes with personal development services.

201. Id.
203. Id.
Under this guidance, member schools may facilitate and support their student-athletes’ NIL activities, including by providing educational sessions on “[f]inancial literacy, taxes, entrepreneurship, social media, etc.”; by introducing student-athletes to representatives of an NIL entity (e.g., collectives); by providing them with information about potential NIL opportunities; and by requesting that donors provide funds to an NIL entity. Schools are prohibited from directing that an NIL entity use its funds for a specific sport or student-athlete. Likewise, schools are prohibited from communicating with it about a specific student-athlete’s request for a particular amount of NIL income (or encouraging its satisfaction).  

The NCAA also announced rule enforcement would be forthcoming and adopted a rule presuming violations in cases involving NIL offers, agreements, and/or activities that will trigger the infractions process “if circumstantial information suggests that one or more parties engaged in impermissible conduct.” Thus, enforcement staff can make a formal allegation based on the presumption, and the hearing panel “shall conclude a violation occurred unless the institution or involved individual clearly demonstrates with credible and sufficient information that all communications and conduct surrounding the name, image and likeness activity complied with NCAA legislation.”

The first alleged NIL infractions proceeding involved two University of Miami women’s basketball players and social media sensations, Haley and Hanna Cavinder. The Cavinder twins were in the transfer portal when a high-profile University of Miami supporter, John Ruiz, tweeted a photo showing the athletes and their parents dining at his home in Miami. While Ruiz denied being a “booster” for Miami and thus bound by NCAA rules, Miami and the NCAA agreed to a negotiated resolution, resulting in a three-game suspension for head coach Katie Meier and minor sanctions on the university’s basketball team.

State Attorneys General of both Tennessee and Virginia sued the NCAA on antitrust grounds, seeking a preliminary injunction prohibiting the NCAA from enforcing its NIL policy or restrictions on third parties
using NIL for recruiting purposes. On February 23, 2024, a federal district court judge in Tennessee issued the injunction pending trial.

B. Lack of Uniform State Laws and Regulations

The NCAA, some member schools, and state and federal legislators cite the variance among state NIL legislation and lack of uniform regulation as a growing concern. The NCAA has provided scant guidance and placed most of the responsibility for overseeing the process of student-athlete compensation in the hands of athletic departments. Despite this patchwork of state laws and numerous federal hearings on NIL and the state of college sports, Congress has yet to act. In 2022, the NCAA hired former Massachusetts Governor Charlie Baker as its president in an effort to “flex some political muscle on behalf of the NCAA” and help get NIL legislation passed at the federal level.

Although NIL allows student-athletes to receive NIL compensation, differing state laws can create an uneven playing field between schools. Some states have created more restrictive environments, putting their athletic programs at a recruitment disadvantage compared to others operating with fewer NIL rules. For example, California’s NIL law simply allows athletes to earn compensation based on their name, image, likeness, or athletic reputation as long as the deals do not conflict with any provision of the athlete’s team contract. Oklahoma’s NIL law allows postsecondary institutions, such as colleges and universities, to adopt additional restrictions for student-athletes and to earn compensation “for the use of their marks or facilities in conjunction with a student athlete’s NIL activities.” Thus, California places a large amount of freedom in the hands of the student-athletes who are signing

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216. Moody, supra note 12 (“While various state laws exist, there has been little movement on an NIL bill at the national level. And after years of resisting NIL, even the NCAA hopes to see federal guidance on the matter.”).

217. Id.

218. Id.

219. Id.


221. Id.
their own NIL deals while states like Oklahoma are more restrictive and even retain the ability to take part of the compensation that could be going to their own student-athletes.

The difference in state NIL laws is not the only concern regarding unequal athlete compensation. The size of the school, and thus the financial resources available, is another factor that plays an extremely critical role in the inequality of NIL deals. Large, Division I state schools like Tennessee and Nebraska have spent the past two years “building sprawling NIL programs, hiring consultants for NIL education, content creation, compliance, and more.” However, most Division II and Division III schools simply can’t afford to do this, which creates a domino effect of problems for these smaller schools.

One is a direct consequence of the NCAA not supplying schools with outside experts who can help navigate the murky waters of NIL laws. This makes it more difficult for them to “teach athletes not just how to monetize their NIL, but also to make sure they’re not violating state or NCAA regulations.” At the Division III level, the information that the general public has about NIL is the same level of information the schools have. Another issue the lack of NIL-directed funding presents to these smaller institutions is its impact on recruiting. “There is a narrative that’s developed in recent months that NIL is the ‘most important thing’ in college recruiting.”

According to a survey of student-athletes, nearly 70% of the respondents “want more education and support from their institutions on things like personal branding, managing their social media presence, finding NIL opportunities, contract review, and much more.” Alabama, one of the largest Power 5 schools that has the funding to support its student-athletes’ NIL endeavors, partnered with sports-marketing giant Learfield to create what it calls “The Advantage Center.” Learfield and Alabama plan to collaborate on the development of the center to provide both a physical home and a staff to educate athletes on NIL opportunities and showcase successful local and national NIL-related relationships.

Next door to this NIL hub, Alabama also has what it calls “The Authentic,” which is a

223. Id.
224. Id.
225. Id.
226. Id.
228. Id.
230. Id.
Fanatics retail team store that focuses on “selling officially licensed team apparel and student-athlete NIL merchandise.”\textsuperscript{231} While resources like these are a positive result of NIL, they will also widen the gap between those schools with the necessary resources and those without them.

C. Federal Pondering: Will Congress Intervene or Watch Hunger Games?

Members of Congress are monitoring the NIL landscape. They have held several hearings and proposed several bills, but no federal law has been passed to date.\textsuperscript{232} The NCAA seeks congressional help not only for a uniform NIL law, but, more importantly, for immunity from the litigation onslaught it suffers and from the legal impacts of regarding athletes as employees:

We’re already seeing that with name, image and likeness compensation, which has inspired 30-plus individual state laws. In short time, this patchwork of state laws will cripple the notion of integrity of athletics competitions, diminishing the number of teams in a position to fairly compete for national championships. . . . Finding fair, sustainable and equitable resolutions to each issue will be essential to Division I’s future. We simply need a clear, stable framework under which to address them. Congress is the only entity that can grant that stability.\textsuperscript{233}

The various federal NIL bill proposals seek to establish a uniform, national NIL framework.\textsuperscript{234} Some go further by providing lifetime scholarships and long-term medical coverage for sports injuries, as well as establishing the College Athletics Corporation (“CAC”) to regulate NIL.\textsuperscript{235} The proposed Protecting Athletes, Schools, and Sports (“PASS”)...
Act of 2023, sponsored by Senators Manchin and Tuberville, would prohibit athletes from entering the transfer portal during their first three years of eligibility, mandate financial literacy training, and prohibit athletes from deals with certain industries such as drug paraphernalia, gambling, and dangerous weapons. PASS also calls for medical coverage for sports-related injuries for eight years after a player graduates and sets out rules for collectives, stating they can assist in recruiting if they are associated with the university through an official contract. If violations occur, the NCAA would be given the power to revoke universities’ licenses to participate in NIL or send the violations to the FTC to be investigated.

Until Congress acts—whether it should, or whether such acts are necessary, are separate debates—the NIL industry rages on largely unregulated. But more proposals are coming forth.

D. Potential Solutions: Leadership Needed

The NCAA’s delay in addressing NIL policy before state laws or litigation could emerge has caused significant disruption, and that’s not always bad. Seemingly, because of the new and previously unimaginable advent of NIL, the NCAA opted to wait and see how effective state law regulation of NIL would be. This strategy may not have been as
successful as hoped, as the NCAA now finds itself ultimately responsible for the variety of concerns brought up in this Article. Now, over two years later, the Association is providing increased guidance to address this new reality and its concerns. In an October 2023 announcement, the NCAA introduced proposals to address student-athlete protection concerns. Among these proposals are: (1) developing a “voluntary registry for NIL service providers”; (2) requiring “disclosure and aggregate reporting of certain elements of NIL agreements”; (3) developing “best practices for NIL contracts”; and (4) “the creation of an education program for prospects and current student-athletes, as well as service providers and licensees.”

The proposal to establish a voluntary NIL Provider Registry would help create some level of transparency in the NIL space, but its voluntary nature could still leave athletes vulnerable to predatory deals by some entities who request confidentiality. In addition, many collectives and NIL service providers are local businesses offering deals to only their local universities. The requirement for Disclosure and Aggregate Reporting of Deal Terms could serve to give athletes an idea of what a fair or average deal value looks like. However, due to the variable nature of NIL deals, especially in the case of social media promotion and athlete influencers, businesses can easily distinguish an athlete’s variation in followers or ability as a way to bypass the “standard” value. And it is not necessarily the role of educational institutions or the NCAA to advise on the propriety or fairness of NIL deal terms.

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240. Id.
241. Id. “Registration of NIL service providers[:] Agents, financial advisors and others who support college athletes in NIL arrangements would be able to voluntarily register with the NCAA. Information supplied — including business and education background of providers, service descriptions and fee structure — would then be published in a centralized registry for student-athletes to access as they consider service provider selections. Within that same centralized registry, student-athletes could have the ability to review and/or rate their own experiences with those service providers (similar to a ‘rate my professor’ platform for college students). The registration process could also include a dispute resolution system (‘grievance hotline’) for student-athletes experiencing issues with service providers. The council noted these provisions will help student-athletes, their families and others weed out potential bad actors.” Id.
242. Id. “Disclosure and transparency[:] For any NIL agreements exceeding a certain value (e.g., $600) student-athletes would be required to report specified information — possibly including a description of the arrangement, compensation received, services rendered, term length, etc. — to their school within 30 days of entering into or signing an agreement. If a service provider (i.e., agent) is involved in arranging an NIL deal, the name of the provider and nature of their agreement would also be disclosed. For prospects, all current or previous NIL arrangements would be disclosed to a school prior to the school issuing a National Letter of Intent or written offer of athletics aid. Information reported to schools would then be deidentified and aggregated by campuses and reported to the national office (or a third-party designee) at least twice per year.” Id.
An NIL Contract Best Practices guide would be helpful information for athletes and small businesses. The NCAA could go further with this proposal and turn those best practices into a “template” style uniform NIL contract, such as the form of contract that professional player associations use with agents. Creation of a standardized form for common types of deals with standardized terms and conditions could help protect athletes and their value. An Education Program for Prospects, Athletes, and Providers geared toward financial literacy and transparency will be effective if utilized broadly. To encourage or require utilization, the NCAA could impose mandatory training for athletes as an eligibility requirement and certify only service providers who completed the training as authorized agents to negotiate NIL deals on behalf of NCAA student-athletes.

While these proposals indicate a step in the right direction, the following question remains: What enforcement power does the NCAA have to regulate an industry already allowed to run wild? The NCAA’s main form of power in this scenario is its control over athlete eligibility and institutional involvement. However, restricting eligibility to certain types or structures of NIL deals now creates an enforcement problem. Athletes already contractually obliged to deals that were valid in a pre-NCAA regulation framework would have to be grandfathered in. Similar issues come up in the current framework when an athlete transfers out of state whose NIL deals were signed in State A but are then subject to regulations applicable in State B. The NCAA seems to be finally addressing measures toward protecting its athletes and the new version of “amateurism” that now exists. If these proposals are adopted, the NCAA’s legitimacy and enforcement power will be tested.

If the NCAA fails to protect student-athletes, another possibility is that leadership will emerge from within. At the professional level, athletes establish their own regulation and protection through unionization. Player associations exist for most unionized professional team sports in the United States. Despite NCAA opposition, litigation regarding

243. Id. The NCAA would recommend the use of specific contractual terms and information in all NIL agreements, with the purpose of helping student-athletes and their families understand what is included and expected in specific transactions.

244. Id. “Student-athlete education[,]” Among the concepts for education are: The regulatory environment in federal, state and local laws and how those laws intersect with NCAA rules; An overview of types of NIL opportunities that exist for college athletes, including work product, group licenses and individual licenses; Education on elements of NIL agreements, including how to read contracts, awareness of arbitration provisions, taxable income, selection of service providers (agents, financial advisors, etc.), and other topics.” Id.

245. See Labor Organizations in the Sports Industry, RUTGERS UNIV. LIBRS. (Oct. 18, 2022, 10:45 AM), https://libguides.rutgers.edu/c.php?g=336678&p=2267003 [https://perma.cc/2W48-7SM7] (listing major player associations, such as the NFLPA, NBPA, WNBPA, MLSPA, NWSLPA, and NHLPA).

employee status is pending in the federal courts and NLRB. A grant of employee status will inject numerous issues, including a potential campaign to unionize. Organizations such as the College Athlete Players Association (“CAPA”) are ready to unionize and form a players association to look out for their own collective best interests.

V. Conclusion

The current vast, Wild West NIL industry was not anticipated by the mere contention that student-athletes should be allowed to profit from their publicity rights as anyone else. What was not intended was the emergence of collectives and now the obligation of institutions to consider NIL as essential to their respective athletic program curriculum, recruitment, alumni and fan relations, and overall success and survival. NIL has not ruined college sports, but certainly, things have changed, and the implications and operations of the NIL industry deserve scrutiny. It remains to be seen who will sort out the mess caused by the unregulated onset of NIL, but one thing is clear: The protection of student-athletes must be the top priority. The NCAA is waking up to address concerns for athlete protection in the NIL era, but the prayer that Congress can fix things, provide an antitrust exemption, and ward off employee-status litigation will likely be unanswered. NCAA and conference leadership is thus, even if woefully overdue, a must.

(“To enable enhanced benefits while protecting programs from one-size-fits-all actions in the courts, we support codifying current regulatory guidance into law by granting student-athletes special status that would affirm they are not employees.”).


248. See, e.g., Dawson v. Nat’l Collegiate Athletic Ass’n, 932 F.3d 905, 912 (9th Cir. 2019); see also Dan Murphy, National Labor Relations Board Files Complaint for Unfair Labor Practices vs. NCAA, Pac-12, USC, ESPN (May 18, 2023, 8:46 PM), https://www.espn.com/college-sports/story/_/id/37680838/national-labor-relations-complaint-ncaa-pac-12-usc-unfair-labor-practices [https://perma.cc/E6ZF-4SRE].


250. Bilas, supra note 24 (“The threat of congressional intervention and NCAA litigation is bad for college sports[.] Essentially, the NCAA is begging Congress to bail it out and provide it with an antitrust exemption to limit athletes without running afoul of federal antitrust law . . . NIL and recruiting: the ongoing confusion over ‘collectives[.]’ . . . While the NBA and the NFL have salary caps, they also have salary minimums that are collectively bargained with the players. And, a fact most often ignored, the players in those salary cap sports are able to split around 50% of league revenues. When you think about that, college sports is getting off cheap.”).