The NIL Paradox: How Unfettered NIL Rights Will Shrink Student-Athlete Opportunities

Gary Way
THE NIL PARADOX: HOW UNFETTERED NIL RIGHTS WILL SHRINK STUDENT-ATHLETE OPPORTUNITIES

by: Gary D. Way*

Abstract

In 2019, California passed the Fair Pay to Play Act which granted student-athletes (“SAs”) attending institutions within the state the right to monetize the use of their name, image, and likeness (“NIL”). That enactment ushered in the most transformative change in college sports since the National Collegiate Athletic Association’s (“NCAA”) decision over 50 years ago to allow freshman eligibility to play varsity football. The California law, coupled with the subsequent Supreme Court decision in NCAA v. Alston, which held that the NCAA’s limitations on education-related SA benefits constituted an unlawful restraint of trade under the Sherman Act, unleashed a tidal wave of states legislation conferring SAs within their borders the right to receive compensation for the use of their NIL. In the immediate aftermath of Alston, more than 30 states enacted a version of the Fair Pay to Play Act, creating a dizzying patchwork of NIL laws. In scarcely the two years since Alston, the NIL landscape has devolved into what many describe as the “Wild West” resulting in virtually every stakeholder in this new economy—the NCAA, college leaders and coaches, SAs, and collectives—to plea for federal regulation to bring uniformity and order to the extant chaos. The author concurs with the call for reform and Congressional action. However, this Article argues that key areas of NIL reform—expanded access to institution intellectual property and assets (“IP”) and the elimination of restricted deal categories—are ill-considered and, indeed, will have a material, adverse impact on athletic department wellness.

DOI: https://doi.org/10.37419/LR.V11.I4.5

* The author is a veteran of over 35 years in sports marketing. He began his sports industry career as a league lawyer at the National Basketball Association, where his practice focused on corporate sponsorship and licensing. At the NBA, he was deal counsel on an array of sponsorship agreements, including with Coca-Cola, McDonald’s, General Mills, Gatorade, MasterCard, and the Miller Brewing Company. He then went on to a decades-long career at NIKE, Inc. from which he retired. He headed the sports marketing law practice group at NIKE for 20 years and was Vice President and Global Counsel of the company’s worldwide sports marketing organization before becoming General Counsel of NIKE’s Jordan brand division. He was lead counsel on many of NIKE’s iconic athlete endorsement deals, and strategic team outfitting agreements including with the NBA, NFL, Brazil National Soccer Teams, US Soccer, and China Basketball Federation. He similarly was lead counsel on NIKE outfitting deals, current and past, with college athletic programs across the Power Five and Big East conferences such as Alabama, Arizona, Arizona State, Arkansas, Cal Berkeley, Colorado, Connecticut, Duke, Florida, Florida State, Georgetown, Illinois, Iowa, Kansas, Kansas State, Kentucky, LSU, Miami, Michigan, Michigan State, Missouri, North Carolina, Ohio State, Oklahoma, Penn State, Rutgers, St. John’s, Texas A&M, Texas, USC, and Washington. The author is deeply grateful to Madeline Farrell (Marquette University Law School, 2024) for her indispensable research assistance in preparing this Article.
This Article first reviews the framework of state NIL statutes and the myriad inconsistencies in laws from state to state. It then examines how team corporate sponsorship agreements are structured, with a focus on athletic product supply deals, and the intersection of team sponsorship and NIL licensing. The Article then surveys and analyzes the team sponsor protection provided by current state laws (and proposed federal measures), identifies their significant flaws, and urges that the standard approaches be abandoned before they become the law of the land. Thus far, the broad failure of sponsor protection has neither been directly noticed in print nor questioned by commentators. The Article then delineates how team corporate sponsorship value is diminished by lax protection and will be further devalued as NIL laws are presently evolving particularly through expanded access to athletic department IP and, in one law refresh thus far, by elimination of blocked promotion activities. The penultimate Part of this Article argues for enhanced team sponsor protection, explains how corporate sponsorship relates to athletic department wellness and greater opportunities for SAs, and recommends reforms that strike a balance among the competing interests of SAs, institutions, and team corporate sponsors. The conclusion reached in the Article is that the present movement towards unfettered NIL rights for SAs erodes the value of team corporate sponsorship, which will have significant negative consequences that, if not stemmed, paradoxically, will diminish opportunities for SAs, students at large, and in some cases, entire university communities.

Table of Contents

I. INTRODUCTION .......................................................... 951
II. STATUTORY BACKGROUND AND FRAMEWORK:
    STATE NIL LAWS .................................................. 954
III. ATHLETIC DEPARTMENT CORPORATE SPONSORSHIP:
    DEAL STRUCTURE ................................................ 957
IV. TEAM SPONSOR PROTECTION AMID NIL: A FALING ........ 959
    A. State Laws Swing and Miss ......................... 959
    B. Pending Federal NIL Measures: Super Spreaders ... 964
V. DIMINUTION OF SPONSORSHIP VALUE .................... 967
    A. Dilution by Subtraction ............................... 967
        1. Feet First ....................................... 967
        2. Other Sponsored Products ..................... 971
    B. Encroachment .......................................... 973
    C. Dilution by Addition ................................. 974
        1. The Privilege of Team Sponsorship ............ 975
        2. Side Door Entry ................................. 977
VI. EVOLVING STATE NIL LAWS ............................ 979
    A. Flipping on Facilitation and Putting Up Shields ... 979
    B. Relaxing Access to Institution IP ................. 980
VII. THE CASE FOR ENHANCED SPONSOR PROTECTION .... 983
    A. Chronic Foot Problems ............................. 983
    B. Athletic Program Wellness and Student-Athlete
       Opportunities ............................................. 987
    C. Recommendations .................................... 993
VIII. CONCLUSION ...................................................... 996
I. Introduction

In 2019, when California passed The Fair Pay to Play Act, which granted intercollegiate student-athletes ("SAs") and interscholastic athletes attending school in California the right to monetize the use of their name, image, and likeness ("NIL"), it paved the way for college athletes throughout the United States to receive that long overdue, deserved benefit. Uncommon for a law with such a broad sweep, it was devised with little if any input from interested parties to be directly impacted—understandably so—given the staunch opposition to the outcome from the National Collegiate Athletic Association ("NCAA") and its member institutions and the lack of any organization of SAs. Another voice absent in California’s legislative process, equally understandably so at that time, was the very source of commercial opportunities for SAs, namely “funding parties.”

Fearing that the Golden State, as the nation’s most populous state and home to four “Power Five” schools, seven NCAA Division I Football Bowl Subdivision ("FBS") schools, and a total of 24 Division I institutions, would have a significant recruiting advantage over the cherished public institutions of other states, legislatures across the land raced at breakneck speed to enact their own NIL laws. The result of that

---

1. **Cal. Educ. Code § 67456 (West 2021).**
2. Funding parties refer to “collectives” and the corporate sponsor/business community that provide the commercial opportunities for SA and are the payors in the NIL ecosystem.
3. The University of California, Berkeley; The University of California, Los Angeles; Stanford University; and The University of Southern California.
4. The FBS is the highest level of college football in the United States. The California-based schools within this subset are California State University, Fresno; The University of California, Berkeley; The University of California, Los Angeles; San Diego State University; San Jose State University; Stanford University; and The University of Southern California.
rush of “me-too” lawmaking has been a dizzying patchwork of diverse state statutes forming a landscape often described as the “Wild West.”

Scarcely a year into the NIL era, the system was in such disarray and so fractured that the key stakeholders—the NCAA and its member institutions, SAs, and, more recently, collectives—had hoisted the white flag on the state approach to NIL and states’ ability to administer it and concluded that the federal government was the only agency capable of reforming the system and began calling upon Congress to intervene.

Congress has taken up the call. In the prior two Congresses, over a dozen proposed bills have been discussed, and at least eight bills introduced, though none have advanced so far as to floor debate. However, presently, a combination of persistent pleas for federal action, together with macro-political dynamics, has created momentum to pass a federal

---


---


law in the relatively near term, as signaled by the flurry of activity prior to Congress’s 2023 summer recess.\(^\text{12}\) Significantly, several of these bills are bipartisan,\(^\text{13}\) indicating that NIL reform has now gained serious focus, will likely advance,\(^\text{14}\) and will likely result in the passage of a bill. While many of the measures now being considered, if passed, will remedy the chaotic state of NIL and impose uniform standards, whichever bill succeeds, without refinement, will perpetuate a latent failing in state NIL laws that will ultimately lead to diminished opportunities for all SAs.

Meanwhile, not holding their collective breath awaiting Congressional action, reform is underway at the state level, driven by the desire to keep pace with other states in the rapidly changing NIL landscape.\(^\text{15}\) The focus has been primarily on loosening restrictions on institution facilitation and direct involvement in NIL deal-making, eliminating restricted deal categories, increasing athletic department engagement with collectives, and, more recently, expanding SA rights via permitting SAs greater use of institution intellectual property (“IP”)\(^\text{16}\) and eliminating restricted deal categories.\(^\text{17}\) This Article questions the wisdom of

\(^\text{12}\) In a span of three months from May to August, five comprehensive NIL bills and two discussion drafts were announced or introduced in Congress. See, e.g., Kristi Dosh, 4 New Federal NIL Bills Have Been Introduced in Congress, \textit{Forbes} (July 29, 2023, 9:31 AM), www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/?sh=3a55725e4d46 [https://perma.cc/PM5P-MLFJ]. When Congress resumed in September, attention continued on NIL, with the conduct of the tenth hearing on the subject, despite urgent matters such as funding of Ukraine in its ongoing war with Russia, looming federal government shutdowns, a speaker-less House of Representatives, and Hamas’ attack upon Israel and ensuing war.

\(^\text{13}\) See infra text accompanying notes 84, 87, 89.


\(^\text{16}\) For purposes of this Article, IP means an institution’s name; trademarks; and any words, symbols, designs, trade dress, mascots, colors, landmarks, campus locations, songs, sounds, and other assets used by the institution to identify and distinguish the institution.

\(^\text{17}\) See, e.g., Eric Olson, \textit{College Athlete Shoe Deals in NIL Era Get Stepped on by Lucrative School Contracts with Big Brands}, \textit{Associated Press} (Oct. 17, 2023, 4:17 PM), https://apnews.com/article/college-shoe-deals-36328d08ee035ab046db745a57df2482 [https://perma.cc/CA9K-UNHE] (quoting Ramogi Huma, Executive Director of the College Athletes Players Association, that limiting athletes to wearing the school’s sponsor brand footwear “prevents athletes from achieving their full NIL earning potential because they can’t wear the shoes in competition . . . .”); Tyler Kraft, Note, \textit{Pay-for-Play(ers): Missouri’s Recent NIL Amendment Is a Solid Blueprint for Federal NIL Regulation}, 88 Mo. L. Rev. 595, 597 (2023) (suggesting that SA should enjoy freedom on par with professional athletes to engage in on-field action to earn NIL compensation
permitting athletes increased access to school trademarks and assets and opening product/service categories, and argues for balancing the interests of commercial supporters of university athletics against those of SAs, rejecting such rights expansion, and shoring up sponsor protection.

After tracing the rapid evolution of NIL and its arrival at a state where it is in need of federal intervention, this Article deconstructs corporate sponsorship agreements. It then examines the protection afforded to corporate sponsors under state laws and finds those protections wanting. From there, the Article assesses the likely protection that would be provided to corporate sponsors under the bills now wending through Congress and concludes that, at best, protection would be no better than now received and, at worst, quite possibly dramatically less. The Article then, in a case study manner, illustrates the harm caused to marketing partners by the inadequate protection accorded to corporate sponsors. Finally, the Article recommends maintaining limited restricted deal categories and moving Top Tier team sponsors into it and concludes that, unless NIL reform includes rigid competitor protection, support from key corporate sponsor segments will significantly decline, concomitantly negatively impacting athletic departments and ultimately resulting in diminished benefits and opportunities for the entire SA population.

II. STATUTORY BACKGROUND AND FRAMEWORK: STATE NIL LAWS

Spurred by the passage of California’s NIL law and the NCAA’s adoption of its Interim NIL Policy allowing SAs to benefit from their NIL, more than 30 states have enacted NIL laws. These statutes largely mirror California’s Fair Pay to Play Act and share its framework and several general characteristics. They (1) permit SAs to receive NIL compensation from third parties without adversely affecting their athletic eligibility; (2) prohibit athletic associations, conferences, and universities from directly or indirectly providing NIL compensation to SAs; (3) permit SAs to engage agents and other professionals to assist them with NIL activities; (4) require agents be registered with the state authority; and (5) require SAs to disclose to their institution any contracts they have concluded. From these mainstay elements, the laws diverge.

and approvingly citing Missouri’s revised NIL law, which does not explicitly prohibit SA from engaging in NIL opportunities that may conflict with a school’s perceived values); Johnathon Blaine, The Marathon Continues: Texas NIL Has Room to Grow, 9 Tex. A&M J. Prop. L. 27, 52 (2023), https://doi.org/10.37419/JPL.V9.I1.2 (advocating for a tweak in Texas NIL law to permit SA to wear footwear of their choice).


20. Id.
State laws vary widely on a host of material points. For instance, they differ on the extent to which athletic departments are permitted to participate in NIL activity. Many early adopting states emulated California’s law, which was silent on the matter of institutional support of NIL, while the laws of some late-moving states permitted some limited participation by institutions in NIL activity. In recent months, several states have amended their laws to be more institution-friendly and collective-friendly. Some laws address the impact of NIL compensation on financial aid, but others do not. Even where state laws are in alignment in expressly dealing with a particular topic—for instance, the intersection of NIL earnings and financial aid or the use of IP—the resulting outcomes have been different. For instance, the laws of many states prohibit their institutions from reducing grant-in-aid on account of NIL compensation, while others instruct to the contrary. Some states outright bar SA use of institution IP, while some permit use at the institution's discretion, while still others permit use subject to the user’s compensating the institution at “market rate.” Some state laws mandate that their state institutions provide a financial literacy course required to be taken by its SAs; others merely urge financial literacy education be offered or are entirely silent on the matter. Some state laws impose virtually no restrictions on what an SA may endorse, while other laws include stated restrictions.

22. Id.
23. Id.
25. NIL State Laws: Current Name, Image, and Likeness Legislation at the State Level, supra note 21.
27. By contrast, the law applicable to Big Ten member Nebraska provides that NIL compensation “may be used for the calculation of income for determining eligibility for need-based financial aid.” Neb. Rev. Stat. § 48-3603(4) (2022).
30. See NIL State Laws: Current Name, Image, and Likeness Legislation at the State Level, supra note 21.
31. Many state laws allow universities to prevent SAs from entering into NIL deals in vice categories such as alcohol, tobacco, adult entertainment, and sports wagering.
As universally cited by those urging NIL reform, the inconsistencies among state laws have created an uneven playing field, with most identifying states with more permissive NIL laws as having a recruiting advantage. Most often mentioned is NIL affairs in the Lone Star State. The Texas law permits its institutions themselves to create opportunities. The law also allows Texas schools to recognize a donor as a third-party entity, namely an NIL collective, with priority status or other items of de minimis value as it would to those who donate directly to the institution. This provides Texas-based collectives with a significant fundraising advantage over those of other states and, in turn, allows Texas-based collectives to provide more lucrative opportunities to SAs of their state. The NIL laws of Arkansas and Missouri allow high school recruits to enter into endorsement contracts and start receiving compensation as soon as they sign a letter of intent with in-state institutions, thus giving their schools an edge in that a not-yet-enrolled student can begin receiving compensation while still in high school.

The case for reform focuses on giving different leeway to collectives and deal-making from state to state and on the shields against NCAA enforcement. The NCAA and coaches assert that NIL deals sometimes disguise “pay-for-play” deals choreographed by collectives ahead of

See NIL State Laws: Current Name, Image, and Likeness Legislation at the State Level, supra note 21.


33. Letter from Cody Shimp, Chair, Nat’l Collegiate Athletic Ass’n Div. 1 Student-Athlete Advisory Comm., to Cong. Leaders (June 12, 2023), https://ncaaorg.s3.amazonaws.com/committees/d1/saac/2023D1SAAC_LetterCongress.pdf [https://perma.cc/N7G8-3A4U].


35. Id. § 51.9246(g-1)(2).

36. The state of Texas boasts two of the top-5 NIL collectives—those aligned with Texas A&M and the University of Texas—while the Matador Club, the Texas Tech aligned collective, has garnered headlines for providing $25,000 NIL deals to every member of the Texas Tech football team. John Riker, Texas Tech Football’s Matador Club Partnership Continues Trend of Team-Wide NIL Deals, BUS. COLL. SPORTS (July 22, 2022), https://businessofcollegesports.com/name-image-likeness/texas-tech-football-matador-club-partnership-continues-trend-of-team-wide-nil-deals/ [https://perma.cc/D3L2-X38N].

National Signing Day”\(^{38}\) or, in the case of enrolled SAs, before they enter the transfer portal.\(^ {39}\) Per NCAA rules, boosters are not permitted to pay SAs directly or be part of the recruiting process;\(^ {40}\) however, NIL laws of many states render the NCAA powerless to enforce this.

### III. Athletic Department Corporate Sponsorship: Deal Structure

At every level of intercollegiate sports, corporate sponsorship of an institution’s athletic department or teams is present. Deal structures vary widely but have in common several elements. The institution provides the sponsor with a bundle of benefits: typically, a trademark license, a designation (e.g., “Corporate Partner,” “Official [fill-in-the-blank],” “Proud Partner,” “Exclusive Supplier”), media (e.g., broadcast inventory, website banner, venue signage, and print advertisement space), product/service usage, tickets and parking, hospitality, and promotion opportunities in exchange for compensation in either cash or value-in-kind.\(^ {41}\) Cash typically takes the form of a rights fee or base compensation paid to the school (or its athletic association) at scheduled intervals over the term of the contract and royalty payments if the sponsor sells products or merchandise that bear or incorporate the school’s trademarks (e.g., apparel or equipment).\(^ {42}\) In addition, in the case of sponsors that provide product that is used in competition, bonuses are often paid for performance achievements such as conference championships or post-season appearances in consideration of the value-added by the additional product/brand exposure received by the sponsor through the heightened attention and additional exposure received beyond the regular playing season.\(^ {43}\)

---

38. A day in November is designated as the first day a high school SA can officially sign a National Letter of Intent to commit to attend a NCAA Division I or Division II member institution.


In addition to cash payments, many sponsorship deals include in-kind consideration of products or services that can be used by SAs, coaches, and staff. These hybrid deals generally provide the athletic department with a negotiated base level of product or services furnished at no cost to the school and a school right to purchase additional product at a steep discount. This is the predominant deal structure with respect to products used in training and competition—uniforms, footwear, and equipment (so-called “Outfitting Deals” or “Product Supply Deals”). Product Supply Deals, in which both base compensation and product consideration are received, however, constitute a minuscule percentage of the overall number of Product Supply Deals. Generally, only Power Five schools and Division I institutions that regularly field Top-25 or nationally recognized football or basketball programs (e.g., Villanova, Gonzaga, Boise State, Marquette, UConn, Georgetown, San Diego State) command base compensation paying deals. Most “Group of Five” and “Mid-Major” Division I programs receive only product. Programs below the Division I level (i.e., Division II, Division III, and NAIA schools) receive product-only deals, if they secure Product Supply Deals at all, through authorized local dealer programs maintained by the major athletic footwear/apparel companies (i.e., NIKE, adidas, and Under Armour), which enable these schools to purchase products at a considerable discount.

Beyond the benefits-compensation exchange, corporate sponsorship agreements share one other component: a grant of exclusivity.

---

44. See, e.g., id. at 5.
45. Goldberg & Kettell, supra note 41, at 3.
46. Cf Id. (noting that schools with premier sports programs and nationally recognized brands receive cash-paying deals while many schools receive only product); Jeff D’Alessio, Open-Records Report: 20 Things to Know About College Athletic Apparel Contracts, News-Gazette (Oct. 2, 2023), news-gazette.com/business/open-records-report-20-things-to-know-about-college-athletic-apparel-contracts/article_47f6cfe1-8c2b-5450-bdd9-877395bde72f.html (noting that every major college athletic department—inferring “major college athletic department” to mean Power Five schools—has a multi-million dollar cash-paying apparel contract). Of the 1,100 NCAA member schools, less than 10% enjoy cash-paying product supply deals, i.e., the 68 Power Five schools plus the top “Group of Five” and “Mid-Majors” schools. The “Group of Five” is a term used in college football parlance to refer to the five FBS athletic conferences that are not members of the Power Five (i.e., the American Athletic Conference, Conference USA, the Mountain West Conference, the Sun Belt Conference); Mid-Majors is a term used in college basketball parlance to refer to programs that are not members of either the Power Five conferences or the Big East Conference.
47. Goldberg & Kettell, supra note 41, at 3.
Universally, athletic department top-tier sponsors are granted category exclusivity. Corporate partners are provided with the exclusive right to supply defined product to the school and the exclusive right to use the school’s trademarks and other intellectual property in advertising, marketing, and promotion within a defined product or service category, such as athletic apparel and footwear, soft drinks, sports drinks, automotive, fast foods, technology, electronics, and financial services to name but a few. These exclusive grants of rights are often buttressed by warranties and covenants from the institution that it shall not grant rights to any competitor of the sponsor. These are the most material terms of sponsorship contracts, and their breach grants the sponsor with a termination right.

IV. TEAM SPONSOR PROTECTION AMID NIL: A FAILING

A. State Laws Swing and Miss

In creating the right for SAs to commercially exploit the use of their name, image and likeness, California’s legislators viewed holistically the collegiate sports economy, recognized the importance of corporate sponsorship to the health of that ecosystem, and endeavored to protect the sponsor relationships of institutions. That is manifested in the seminal NIL law, the Fair Pay To Play Act. It provides protection for sponsorship relations by means of a carve-out from the interdiction that institutions “shall not uphold any rule, requirement, standard, or other limitation that prevents a student . . . from earning compensation as a result of the use of the student’s name, image, [or] likeness.” The carve-out provides that an SA “shall not enter into a contract providing compensation to the athlete for use of the athlete’s name, image, or

49. See, e.g., Kansas Contract, supra note 43, at 7; Coca-Cola Sponsorship, supra note 42, at 1.
50. See, e.g., Kansas Contract, supra note 43, at 7–11.
52. Coca-Cola Sponsorship, supra note 42, at 11.
53. No doubt lawmakers were mindful of the more than $375 million in sponsorships committed to the two nationally renowned public universities within California’s borders: the University of California - Los Angeles (“UCLA”) and the University of California, Berkeley. UCLA at the time was the beneficiary of the then-largest outfitting deal ever valued at $280 million, while Cal-Berkeley was the beneficiary of an Under Armour deal valued at $86 million. David Wharton, UCLA’s Under Armour Deal for $280 Million is the Biggest in NCAA History, LA Times (May 24, 2016, 6:29 PM), https://www.latimes.com/sports/ucla/la-sp-0525-ucla-under-armour-20160525-snap-story.html [https://perma.cc/H4GL-4YNZ]; Ahiza Garcia, Under Armour Signs $86 Million Deal with UC Berkeley, CNN Bus. (Apr. 22, 2016, 1:49 PM), https://money.cnn.com/2016/04/22/news/companies/under-armour-cal-berkeley-deal/ [https://perma.cc/59JS-7ALA].
likeness, or athletic reputation if a provision of the contract is in conflict with a provision of the athlete's team contract.\textsuperscript{55} Early-moving states, in enacting their own NIL statutes, replicated that formulation, often verbatim.\textsuperscript{56} The NIL laws of many later-moving states, indeed most state NIL laws, also provide a sponsor shield using similarly-worded protection from competitors.\textsuperscript{57} 

Many institutions subject to laws containing the California form of sponsor protection—the so-called “no conflict” provision—have interpreted such provisions as permitting a ban on deals with competitors of team sponsors \textit{per se} and express that in NIL policies established by their athletic departments.\textsuperscript{58} Illustrative is the policy of the University of Arkansas, which provides that its SAs are permitted “to contract with any company except those . . . who conflict (direct competitors) with exclusive partners/sponsors of the [University of Arkansas].”\textsuperscript{59} Such statutes do not, in fact, prohibit SAs from entering into contracts with a team sponsor’s competitor—these clauses merely proscribe entering into a contract that contains a clause that conflicts with a provision in a team sponsor agreement.\textsuperscript{60} Though there has not been a reported SA challenge to a disapproval of a proposed deal based solely on the basis of the offeror’s status as a competitor to a team sponsor’s, it is the author’s view that such a challenge would be sustainable if the contract did not require the SA to provide any services during official team activities. Social media posting, photo sessions, wearing or using competitor-furnished product (when situationally appropriate and permitted), and making personal appearances are typical endorsement deal requirements that would not conflict with any provision of a team sponsor contract. That a deal with a team sponsor’s competitor can be crafted that does not conflict with any provision of a sponsor’s contract has been amply demonstrated. For instance, in California itself, Rose Zhang, then a golf SA at NIKE-sponsored Stanford University, signed an endorsement deal with adidas.\textsuperscript{61} More recently, Louisiana State

\textsuperscript{55} Id. § 67456(e)(1).
\textsuperscript{56} See, e.g., FLA. STAT. ANN. § 1006.74 (West 2023); COLO. REV. STAT. § 23-16-301 (West 2020); GA. CODE ANN. § 20-3-681 (West 2021).
\textsuperscript{57} See, e.g., ARK. CODE ANN. § 4-75-1304 (West 2023); TEX. EDUC. CODE § 51.9246 (West 2023).
\textsuperscript{58} Steven A. Bank, The Olympic-Sized Loophole in California’s Fair Pay to Play Act, 120 COLUM. L. REV. F. 109, 112 (2020).
\textsuperscript{60} See, e.g., ARK. CODE ANN. § 4-75-1304 (West 2023).
\textsuperscript{61} Beth Ann Nichols, Rose Zhang Becomes First Student-Athlete to Sign NIL Deal with Adidas, Joins Stanford Teammate Rachel Heck in Showing What’s Possible for Elite Amateurs, USA TODAY (May 31, 2022, 7:00 AM), https://golfweek.usatoday.
University ("LSU") star basketballer Flau’Jae Johnson signed a six-figure deal with Puma, which is a direct competitor with LSU exclusive footwear and apparel sponsor NIKE.  

There are two variations to the no-conflict approach to competitor protection: (1) time and place restrictions; and (2) brand exposure restrictions. In the case of the first variation, rather than placing a ban on any deal type (e.g., with a team sponsor competitor), the law instead imposes a restriction on when SAs can conduct promotional activities. Such laws prohibit the SA from engaging in any promotional activities during team so-called “official activities” (e.g., games, competition, practice, training, and media events). This approach provides a team sponsor with protection by precluding a competitor from receiving exposure (e.g., wear or use of product, posting, streaming) when the SA is in a team-controlled setting or environment, thus preserving the sponsor’s exclusive rights. This approach gives institutions the advantage of having neither to disclose to the SA any term of its sponsor agreement nor the necessity of analyzing an SA’s deal. In essence, the institution can simply instruct that an SA cannot engage in any promotional activity during easily defined circumstances, i.e., while on the clock. This approach is airtight—during official activities, one cannot wear or use a product that is furnished by any party other than a team sponsor.

The second variation of competitor protection, brand exposure restrictions, imposes a prohibition on the SA wearing or using during official team activities any product that bears the branding of a team sponsor’s competitor. Illustrative of this approach is the Mississippi NIL statute that provides that an institution may “prohibit a student-athlete from wearing any item of clothing, shoes, or other gear or wearables with the name, logo or insignia of any entity during an intercollegiate athletics competition or institution-sponsored event.” The intention of such highly specific provisions is clearly to preclude a team sponsor’s competitor from receiving any promotion in competition or during other official activities. This approach falls far short of that goal. Such provisions are severely flawed and reflect a lack of understanding of sports marketing and practices, which is a byproduct of the absence of stakeholder input in the lawmaking process of first-generation NIL laws.

Brand exposure restriction formulations, particularly those written as the insignia prohibition contained in the Mississippi law, have a
profound loophole. The obvious gap is that, in the case of the Mississippi statute, it does not encompass non-apparel and equipment items, such as beverages, fast foods, and cars, to name a few.\footnote{Miss. Code Ann. § 37-97-107(3).} Could a football player post from the film room watching tape while guzzling Powerade brought in and endorsed by him instead of drinking the Gatorade supplied by the team sponsor? Can a softball player post from the team bus doing homework on her iPad Pro rather than using the Surface Pro furnished by the team tech sponsor, Microsoft? Could a member of the Beats Elite class\footnote{See Cameron Salerno, Caleb Williams, Quinn Ewers, J.J. McCarthy Among 15 College Football Players Joining Beats by Dre for NIL Deal, CBS SPORTS (Aug. 24, 2023, 4:38 PM), https://www.cbssports.com/college-football/news/caleb-williams-quinn-ewers-j-j-mccarthy-among-15-college-football-players-joining-beats-by-dre-for-nil-deal/ [https://perma.cc/UZ65-EAUP].} post from the team’s charter flight showing themselves wearing their noise-canceling headphones? Yes, yes, and yes, if not subject to a time and place restriction.

With respect to apparel and gear, unlike time and place restrictions, an exposure restriction does not bar the wear or use of competitor product in official activities; it merely bars the use of branded product. The savvy competitors can simply furnish their endorsees with unbranded product for use in competition and during other official team activities. There are decades’ worth of precedent of manufacturers doing that. Some of the NFL’s biggest stars, including Tom Brady, Randy Moss, and Tony Romo, have worn blank (i.e., brand-free) game cleats season-long because the brand they endorsed was not a league sponsor,\footnote{Nick DePaula, Why Tom Brady’s Cleats Are Blank, BOARDROOM (Nov. 4, 2021), https://boardroom.tv/tom-brady-under-armour-cleats [https://perma.cc/4CJ9-562T].} and the practice of covering sponsor logos on footwear is commonplace in track and field.\footnote{Jeré Longman & Joe Ward, Olympic Cover-up: Why You Won’t See Some Shoe Logos, N.Y. TIMES (Aug. 2, 2016), https://www.nytimes.com/2016/08/03/sports/olympics/olympic-cover-up-why-you-wont-see-some-shoe-logos [https://perma.cc/QS3R-MJJW].} Indeed, footwear and apparel team sponsor agreements universally include a clause dealing with taping or covering logos on products, and they often have a provision that permits SAs to wear a competitor’s footwear in limited circumstances and specifies that the competitor’s shoe be blank.\footnote{Paragraph 7(f) of the UCLA-NIKE outfitting agreement provides that if a player is unable to wear NIKE footwear because of a medical condition or fit issue, “NIKE shall directly furnish player with footwear of his or her choice (produced by any manufacturer whatsoever, and at NIKE’s expense) but with all visible manufacturer’s identification removed or otherwise covered so as to completely obscure such manufacturer’s identification. If notwithstanding Remedial Efforts, a player is still unable to wear NIKE footwear, then such player shall be permitted to wear non-NIKE footwear provided all visible manufacturer’s identification is removed or otherwise covered so as to completely obscure such manufacturer’s identification.” Agreement Between the Regents of the Univ. of Cal., by and on Behalf of the L.A. Campus (“UCLA”) and NIKE USA, Inc. 8, Jan. 28, 2021, https://ca-times.brightspotcdn.com/c0/83/9209eacc470ab92b042e606467e/nike-jordan-brand-agreement-with-ucla.pdf [https://perma.cc/8B5X-L5YF] [hereinafter UCLA Contract].} With blank shoes the SA will be compliant with state
law and institution policy, and the game shoe that will be worn can be promoted on social media, thereby bringing public notice to the shoe.

In addition, many equipment suppliers create product that is “distinctive by design” and recognizable as their brand without any logo or identification.73 Examples include the distinctive silhouettes of Beats by Dre headphones, Cloudboom and HOKA sneakers, Crocs, NIKE Air Max footwear, and Oakley sunglasses, to name a few. Even if such product is de-branded and thus cannot be prohibited from use in official activities, knowledgeable consumers will know at-a-glance the product maker. Another artifice used by gear providers is color stories, which are the use of a specially developed colorway (e.g., Lightning Yellow, Bred [Black + Red], Cement) or color combination across a product line as a brand signature, such as a particular hue of pink or neon color, that gains secondary meaning (e.g., Tiger Woods’ signature Sunday Red).74 Footwear companies, in particular, are adept at communicating their brand without displaying a logo or insignia.75 NIL statutes and policies that simply prevent the use in official activities of a product that bears the logo or insignia of a competitor of a team sponsor do not effectively prevent promotion of the competitor’s product.

There is also a variant of the foregoing approach that is less comprehensive. An example is the Michigan NIL law, which provides that a “student shall not enter into an apparel contract providing compensation to the student for use of his or her name, image, or likeness rights that requires the student to display a sponsor’s apparel, or otherwise advertise for a sponsor, during official team activities . . . .”76 No doubt the Michigan lawmakers’ intention was to protect team sponsors and to make it crystal clear that the aim was to particularly protect game uniform providers, which are the pinnacle athletic department sponsors. Ironically, the unintended consequence of that particularization is that, rather than being comprehensive, such constructs are less comprehensive than the non-specific competitor protection. This formulation has a massive gap. The prohibition is against apparel contracts, not footwear contracts. By specifying apparel contracts and omitting references to other categories of contracts, the footwear product category is uncovered. Thus, any basketball player at the University of


75. Longman & Ward, supra note 71.

Michigan or Michigan State, both of which are outfitted by NIKE, could not be prohibited from signing a footwear-only endorsement contract with NIKE’s chief rivals, Under Armour and adidas, and wearing their logo-identified sneakers in official team activities.

These differing approaches to sponsor protection, or lack thereof, create an unlevel field. Those states that prohibit SAs from entering into conflicting deals *per se* effectively block access to dozens of product categories—including key endorsement sectors such as athletic footwear and apparel, soft drinks, sports drinks, fast food, banking, and financial services categories—and scores of potential NIL endorsements. States that merely restrict an SA from wearing or using competing sponsors’ products in competition are free to seek opportunities in those categories. Of greater consequence, though, is the fact that the inadequate protection of university team sponsors is an existential threat to the general economic welfare of intercollegiate athletic departments and their sports teams at large; the author urges unqualified conflict deal protection for team sponsors.

B. Pending Federal NIL Measures: Super Spreaders

Team corporate sponsorship is presently inadequately protected; however, the degree of insufficiency is on a sliding scale, registering differently from state to state. A survey and analysis of the seven NIL bills that have thus far been announced (discussion drafts) or introduced in the current 118th Congress reveal the potential for an exponential

77. See, e.g., *LSU Athletics Corporate Partners*, LSU, https://lsusports.net/corporate-partners-of-lsu-athletics/ [https://perma.cc/FDX3-DKY6]. A blocked category eliminates from the pool of potential NIL partners a half-dozen or more companies per prohibited category (e.g., if the footwear/apparel category is blocked because Under Armour is the team sponsor, then adidas, New Balance, NIKE, Pony, Puma, Sketchers, Vans, etc. are blocked). The existence of 20 blocked categories could well represent over 200 prospective deal doors closed. SAs are, of course, free to sign NIL contracts with team sponsors as such contracts do not conflict with team sponsor contracts. The reality, however, is that team sponsors have lesser need for endorsers since they already have promotional rights with the team, can use the team’s IP in advertising, have some ability to use the NIL of team members, and often have publicity rights of the biggest personalities on campus, i.e., the head coaches of the football and basketball teams and some personal services, such as personal appearances. See *UCLA Contract*, supra note 72, at 3, 8.

78. See *infra* text accompanying notes Part VII.

spread of the shoddy protection afforded to team sponsors as the flawed constructions discussed above are embedded in each of these bills and, should any one of these measures pass, will be the standard of the land. Indeed, several of these bills even diminish the level of protection currently afforded to team sponsors. Following, these proposals are assessed seriatim with respect to the level of protection they would afford to sponsors if enacted.

The earliest of the bills released in the current Congress, The Fairness, Accountability, and Integrity in Representation of College Sports Act (“FAIR Act”), sponsored by Representative Gus Bilirakis (R-FL), follows the California formulation providing that a party “may not enter into, or offer to enter into, a NIL agreement with a student athlete that provides covered compensation if a provision of the NIL agreement conflicts with a provision of a contract” of the institution. As discussed in Part IV above, such a measure does little to protect team sponsors from competing marketing within the orbit of an institution’s athletics program for which sponsors pay a premium for participation.

Next introduced was the bipartisan bill, The Student Athlete Level Playing Field Act, sponsored by Representatives Mike Carey (R-OH) and Greg Landsman (D-OH). That bill follows the brand-exposure-restriction approach, permitting an institution to prohibit an SA “from wearing an item of clothing or gear with the insignia of an entity during an athletic competition or athletic-related event that is sponsored by the institution.” That approach, as discussed, contains a loophole that permits competitors to promote alongside team sponsors within official team activities and does nothing to prevent an SA from promoting endorsed products that are neither apparel nor gear during official team activities.

The Protecting Athletes, Schools, and Sports Act, sponsored by Senators Joe Manchin (D-WV) and Tommy Tuberville (R-AL), also adheres to the brand-exposure-restriction formulations and its gaping loophole, providing that an institution:

[M]ay prohibit a student athlete from—wearing any item of clothing, shoes, or other gear with the insignia of any entity while wearing any athletic gear or uniform provided by an institution of higher
education or otherwise competing in a varsity intercollegiate sports
competition or athletic event sponsored by the institution . . . .

The unnamed bill released by Senator Ted Cruz (R-TX) adopts the
no-conflict approach, providing that an institution “may restrict . . . a
student athlete who enters into a name, image, and likeness agreement
that . . . conflicts with the terms of an existing contract or agreement, of
the institution at which the student athlete is enrolled.”

At the other extreme of the spectrum from the foregoing bills is the
bipartisan discussion bill circulated by Senators Jerry Moran (R-KS),
Richard Blumenthal (D-CT), and Cory Booker (D-NJ): The College
Athletes Protection and Compensation Act. This bill provides virtu-
ally no protection for team sponsors. It is devoid of any of the spon-
sor protective provisions found in every enacted NIL law and in every
proposed federal measure, save for The College Athlete Economic
Freedom Act discussed below. The bill provides no competitor pro-
tection beyond permitting an institution to prohibit an SA “from
engaging in in-person activities in connection with an endorsement
contract that are concurrent with a mandatory college athletic event
or college athletic competition.” In effect, the only thing a team
sponsor is protected against is an SA promoting a competitive product
by way of a personal appearance, posting, or streaming during official
team activities. Among the many progressive advances of this act, it
_sub silentio_ clears a path for SAs to pursue endorsement deals with
sponsor competitor athletic footwear companies that include wearing
competitor footwear in competition. This has long been a goal of
those advocating for unrestricted NIL rights.

90. See generally id. § 4.
91. That is, either a prohibition against endorsement-containing terms that conflict
with a term of a team sponsor contract, product wear/use limitations, or brand exposure
restrictions. See id.
92. See infra text accompanying notes 97–101.
94. See id.
95. The history of this bill reveals that that is precisely the intention of its sponsors.
The initial version of this bill, introduced in 2020, contained a provision that would
have prohibited institutions from discouraging or prohibiting an SA from wearing the
footwear of his or her choice during team activities. College Athletes Bill of Rights,
96. See, e.g., Dan Murphy, Federal Bill Pushes for Unrestricted NIL Endorsements for
NCAA Athletes, ESPN (Feb. 4, 2021, 01:02 PM), https://www.espn.com/college-sports/
story/_/id/30833820/federal-bill-pushes-unrestricted-nil-endorsements-ncaa-athletes
[https://perma.cc/PHSM-GZ5Q] (explaining in 2021 that if “coaches and NCAA
Finally, The College Athlete Economic Freedom Act, introduced in the Senate by Senator Chris Murphy (D-CT) and introduced in the House of Representatives by Representative Lori Trahan (D-MA), is touted by its sponsors as legislation that “would enshrine unrestricted NIL rights into federal law.” The bill provides that an institution, conference, or association “may not enact or enforce any rule, requirement, standard, or other limitation that prevents college athletes or prospective college athletes, individually or as a group, from marketing the use of their names, images, or likenesses.” That proscription stands alone, not subject to any qualifiers or carve-outs. Beyond the unprecedented degree of contracting freedom, it would codify and require schools and athletic associations to obtain a group license to use any group of SAs “for any type of promotion, including a media rights agreement . . . .”

While it is doubtful that in this turbulent year of a presidential election, 52 lawmakers not seeking reelection, and conflicts in Ukraine and Gaza, any of the bills introduced or announced in the 118th Congress will pass into law before the end of 2024, inevitably, NIL will be federalized whether in the 119th Congress or the next. Once that occurs, the inadequacy of sponsor protection will be locked, and the decline in team sponsorship will be well afoot with, as discussed in Part V below, a corresponding loss of benefits to SAs at large.

V. Diminution of Sponsorship Value

A. Dilution by Subtraction

1. Feet First

Few are the state NIL laws that prohibit SAs from entering into deals with a competitor of a team sponsor. Rather, most laws merely bar SAs from signing any agreement that contains a provision that conflicts with a provision of a team contract. Invariably, the tension in conflicting brand contracts is in any provision in an NIL endorsement that calls for the SA to wear or use an endorsed product or to render any performance during an athletic competition or any other official

executives can have unfettered endorsement deals, why shouldn’t . . . athletes be afforded the same opportunity?”).

100. Id.
101. Id. at §3(a)(4)(A).
102. See supra Section IV.A.
103. See supra Section IV.A.
team activity. \footnote{104} The conventional thinking is that so long as any such requirement is eliminated from a competitor contract, the team sponsor will be protected from harm. That is not the case. To illustrate the deleterious effect of such inadequate sponsor protection, one need not look to a hypothetical, but only to the real-time predicament of NIKE, “the exclusive supplier of athletic footwear, apparel and accessories of LSU Athletics . . . “\footnote{105}

It is not surprising that a footwear sponsor should be the first and most glaring example of how unrestrained NIL rights can devalue corporate sponsorship. Indeed, from the outset of the NIL era, the footwear sponsor category has been viewed as one that should be open. New Mexico’s initial NIL statute provided that its institution could not “prohibit or discourage a student athlete from wearing footwear of the student athlete’s choice during official, mandatory team activities . . . “\footnote{106} One of the earliest federal proposals, The College Athletes Bill of Rights, included the same provision.\footnote{107} Though that is not the case in Louisiana, nonetheless, NIKE has found its exclusive outfitting agreement materially devalued.

Pursuant to NIKE’s agreement with LSU, NIKE is an official sponsor of the women’s basketball team,\footnote{108} a designated “Flagship Program” of the University\footnote{109} and the 2023 NCAA National Champion. It is a unique, one-of-a-kind marketing asset. The sponsorship agreement grants NIKE, among other rights, the right to use in advertising, marketing, and promotion “game photographs, videotape and/or film footage of [the women’s basketball team].”\footnote{110}

\begin{footnotes}
104. \textit{See supra} Section IV.A.
105. All-Sport Agreement Between the Bd. of Supervisors of La. St. Univ. & Agric. \\
    & Mech. Coll., on behalf of the Athletics Dep’t of La. St. Univ. & Agric. & Mech. \\
    & Coll., and NIKE USA, Inc. 3–4, May 16, 2022, https://ath-ems.lsu.edu/prr/contracts/
    & Equipment%20Contracts/2022-07-01%20-%20Ath.%20Dept.%20-%20Nike.pdf \\
    & [https://perma.cc/K5FB-4JEZ] [hereinafter \textit{LSU Contract}].
    (West 2021). This provision was subsequently dropped when the law was amended in \\
    provision was unaware of its deletion from the revised statute. One surmises that it was \\
    dropped because it imperiled the University of New Mexico’s then-$9 million outfitting \\
    agreement with NIKE (or the renewal thereof) which provides NIKE with “the \\
    right to terminate this Agreement immediately upon written notice . . . if . . . [a] Team \\
    member fails to wear or use NIKE Products during Covered Program Activities . . . “ \\
    athleticscontracts.unm.edu/equipment-contracts/nike,-all-sports-agreement-2020-2023. \\
    pdf [https://perma.cc/Z7X8-R84V].
    Championship, Nat’l Collegiate Athletic Ass’n} (Apr. 2, 2023, 8:38 PM), https:// \\
    www.ncaa.com/live-updates/basketball-women/d1/live-updates-no-2-iowa-vs-no-3-lsu-
    national-championship-game [https://perma.cc/347M-6CQS].
\end{footnotes}
Louisiana’s NIL law provides that an “institution may prohibit an intercollegiate athlete from using the athlete’s name, image, or likeness for compensation if the proposed use of the athlete’s name, image, or likeness conflicts with . . . [e]xisting institutional sponsorship agreements or contracts.”111 Critically, the statute gives institutions the discretion to prohibit an SA from entering into an endorsement that conflicts with a team sponsorship. Exercising that discretion, the University opted not to block deals with competitors to its apparel and footwear sponsor and instead permitted its top basketball player, All-American and 2023 Final Four’s Most Outstanding Player, Angel Reese, to sign an endorsement agreement with Reebok.112 Previously, LSU permitted Reese’s star teammate, Flau’Jae Johnson, to sign an endorsement deal with Puma.113 Following its championship, LSU landed the top player in the transfer portal, Hailey Van Lith, from the adidas-sponsored University of Louisville, where she had entered into an NIL deal with adidas.114 Van Lith was permitted by LSU to maintain her adidas NIL contract by limiting her promotion of the adidas brand to off-court activities.115 Through the 2023-24 season, LSU’s women’s basketball team’s three biggest stars—Reese, Johnson, and Van Lith—constituting 60% of the team’s starting line-up, were endorsers of competitors of the team sponsor, NIKE.116 As such, NIKE did not leverage these athletes in any of its advertising, marketing, or promotion because of their NIL deals117 and

113. Bachman, supra note 62.
115. Id.
117. Though outfitters invariably have the right to use the NIL of team members in advertising, marketing, and promotion of the supplied product, see LSU Contract, supra note 105, ¶ 4, the industry custom is for the outfitter to not use in marketing the NIL of any athlete who has an endorsement contract with a competitor. The outfitter forebears because its use of such an athlete’s NIL will often draw an objection from the athlete or the company the athlete endorses—sometimes even drawing a lawsuit or other derogatory action. See e.g., Cyle Kiger, Two Apparel Giants in Suit Over New Jet, Tim Tebow, Heitner Legal (Apr. 2, 2012), https://heitnerlegal.com/2012/04/02/two-apparel-giants-in-suit-over-new-jet-tim-tebow [https://perma.cc/
the history of star athletes endorsed by a competitor bringing negative attention to the outfitter through performative protests. The value of NIKE’s sponsorship was substantially limited, having gone from 100% player support of the brand to the team’s three biggest stars not supporting the brand and, indeed, actively promoting competitive brands. Though these defections were a severe blow, it is not the fatal wound that would be the case if players were permitted to wear their brand-endorsed footwear in competition, which would be allowed under two federal measures being considered.


119. NIKE is not entitled to any financial relief for such dilution. Given this unprecedented occurrence, one speculates that going forward in new deals that NIKE, and other sponsors that can be diluted, will insist on financial relief when diluted by NIL deals and, perhaps, even a termination right.

120. Fairness, Accountability, and Integrity in Representation of College Sports Act, H.R. __ 118th Cong. § 101(c) (2023) (Discussion Draft), https://bilirakis.house.gov/
value of the sponsorship would be destroyed by virtue of the team’s best players not wearing (and thus not promoting) the company’s most important and hallmark product—performance athletic footwear.

2. Other Sponsored Products

Like official footwear providers, sponsors whose products are part of the game day landscape—apparel, equipment, beverages, personal electronics, and technology—are most susceptible to dilution through NIL deals. That is so because of two reasons. First, many such products are used by SAs, and athletes have preferences as to such products (e.g., personal sports equipment such as gloves, bats, sticks, and balls) and are able to express their preferences by not using the sponsored product brand. For example, most Division I baseball and softball teams have bat sponsorship agreements. Typically, players are not required to use the sponsor’s product, but most do. To the extent a player does not use the sponsored brand bat and instead opts to use a competitive product pursuant to an NIL endorsement, the sponsorship deal is diluted, at the least, pro rata based upon the number of players that do not use the sponsor’s bat.

Second, because these products are used in-game (or game adjacent) and thus receive optimum exposure, when an SA chooses either to refrain from the use of a sponsored product or to use an alternative brand of product, it is observable and notable. The decision not to use a sponsored product is often perceived as a rejection or snub of the product. This has been most famously illustrated in the sports realm by pro soccer player Cristiano Ronaldo, who, at a press conference during


121. Because bat supply agreements do not typically require that players use the supplier’s bats, in NIL bat endorsement deals there is no conflict if the SA is required to use the endorsed product in competition. NCAA Baseball Bats: Analyzing NCAA Baseball and Fastpitch Bat Usage Trends, Bat Dig. (Jan. 11, 2024), https://www.batdigest.com/blog/ncaa-baseball-bats [https://perma.cc/6G89-URS9]. Bat endorsements are a rare species of deal where the SA is permitted by the institution to use the endorsed product in competition. Id.

122. Id.

123. The sponsor’s deal may be even more diluted if the opted-out player happens to be the team’s best hitter, or biggest homerun hitter. See How Could My Personal Deal Go Against Team, School, or Governing Body Sponsorships?, Glob. Sports Advocates, https://www.globalsportsadvocates.com/faqs/sponsorships-nil-lawyer-usa.cfm [https://perma.cc/2A9T-MMDL].

124. For example, the public has no visibility to, or idea of, whether an SA eats Jersey Mike’s subs or uses the official bank, healthcare provider, tires, etc., of the athletics department, but the public is keenly aware when an SA uses a different bat brand than the rest of the team or eschews Powerade for water. See, e.g., Alec Hulmes, Do Professional Athletes Really Use What They Endorse #LeBron #McDonalds, SAMFORD (June 14, 2015), https://www.samford.edu/sports-analytics/fans/2015/do-professional-athletes-really-use-what-they-endorse-lebron-mcdonalds [https://perma.cc/86KL-3E6Z].
the Euro 2020 Tournament, moved Coca-Cola bottles aside as he sat down to speak to the media and requested water instead; a move subsequently repeated during the tournament by Manuel Locatelli who also moved Coca-Cola bottles aside and placed a bottle of water in front of him before speaking to the press after his Man of the Match performance.\footnote{Simon Evans, \textit{UEFA Reminds Teams of Sponsorship Obligations After Ronaldo Coca-Cola Case}, \textit{Reuters} (June 17, 2021, 9:25 AM), https://www.reuters.com/lifestyle/sports/uefa-reminds-teams-sponsorship-obligations-after-ronaldo-case-2021-06-17 [https://perma.cc/A3C4-LYJK].}

Those Coca-Cola rejection-type occurrences are easily replicable in the college sports landscape. Many athletic departments have a soft drink sponsor, a sports drink sponsor, and an energy drink sponsor.\footnote{See \textit{SportsAtlas Top 25 College Sponsor Rankings}, \textit{SBJ Atlas} (Nov. 10, 2020), https://www.sbjatlantis.com/sportsatlas-top-25-college-sponsor-rankings/ [https://perma.cc/N7WW-QLHT].} Many SAs have beverage endorsement deals, often with brands competing with the team sponsor. For instance, Texas Longhorn quarterback Quinn Ewers endorses C4 Energy brand drinks,\footnote{Pete Nakos, \textit{Texas Quarterback Quinn Ewers Signs NIL Deal with C4 Energy Following Alabama Win}, \textit{On3} (Sept. 10, 2023), https://www.on3.com/nil/news/texas-longhorns-quarterback-quinn-ewers-nil-deal-c4-energy-alabama-crimson-tide-win/ [https://perma.cc/GJ88-36RZ].} a competitor of team sponsor Monster Energy drinks.\footnote{Official Corporate Sponsors of Texas Athletics, \textit{Univ. Tex. Athletics} (July 19, 2023), https://texassports.com/sports/2013/7/29/sponsor_0729134007.aspx [https://perma.cc/HSW3-4FEV].} Similarly, former University of Southern California (“USC”) quarterback and Heisman Award winner Caleb Williams famously endorsed Dr. Pepper,\footnote{Edward Sutelan, \textit{Caleb Williams Dr. Pepper Commercial: Inside the USC QB’s “Fansville” Skit After Heisman-Winning Season}, \textit{Sporting News} (Sept. 2, 2023), https://www.sportingnews.com/us/ncaa-football/news/caleb-williams-dr-pepper-commercial-fansville-usc-qb-heisman/692e7ace2bfbb6e8e8c363d#:~:text=The%20USC%20quarterback%20and%20reigning.of%20college%20football%20in%202023 [https://perma.cc/L5KH-UB5T].} while the Trojans’ beverage sponsors included Coca-Cola and the company’s Powerade brand.\footnote{Proud Partners of USC Athletics, \textit{USC Athletics}, https://uscathletics.com/sports/2020/5/13/usc-trojans-athletics-sports-properties-partnership [https://perma.cc/3W72-SFVC].} While he was not permitted to promote Dr. Pepper during official team activities, by the same token, his Dr. Pepper endorsement undoubtedly prohibited him from publicly consuming other brands of soft drinks. Consequently, he eschewed consuming Coca-Cola products, Coca-Cola products were not placed with him, and he was not imaged with Coca-Cola products. As a result of Mr. Williams’ NIL deal with Dr. Pepper, team sponsor Coca-Cola had limited ability to leverage the team’s biggest star.
B. Encroachment

While diminution of rights (i.e., the loss of some usage) is the most apparent form of sponsorship dilution, sponsor value can also be lost through fee-free entrance into the province of team sponsorship via NIL deals. Makers of consumer products that are usable in sports settings can insinuate themselves into official team activities or onto the field or court itself. For instance, while LSU’s star women’s basketball players cannot wear sponsor competitive product while playing, there is no prohibition against Angel Reese wearing a Reebok outfit during her tunnel walk or Flau’Jae Johnson wearing Puma gear when she is individually working out in the team’s weight room or running stairs in the arena, et cetera.

The most visible encroachment arises out of NIL endorsement of Apple’s Beats by Dre headphones. Its products have become ubiquitous in stadiums and arenas as part of players’ pregame warm-up rituals, during which they go through their paces and listen to music through the brand’s iconic headphones. To much fanfare, the brand signed a roster of 15 marquee football SAs to endorse its products, the Beats Elite Class, who promote Beats headphones, among other ways, by wearing them during pregame warm-ups, tunnel walks, team travel, and other activities.

131. These consumer products can include apparel, sporting goods, beverages, accessories, personal electronics, etc. By contrast, most team sponsored products are not useable by an SA in a participant environment. For instance, an SA cannot drive a car, eat a Big Mac, use a mobile phone, play a video game, take out insurance, bank, manage wealth, shave, book a trip, etc., during an athletic competition. However, absent a prohibition, an SA can certainly wear or use, indeed must wear and use, athletic footwear, personal equipment (e.g., specialty gloves, bats, field hockey and lacrosse sticks, protective pads, sport sunglasses to name a few), and accessories during athletic competitions.

132. Broadly, tunnel walks refer to an athlete’s entrance at a venue before a game spanning the pathway from exiting the team bus through the tunnel leading to the locker room. Tunnel walks are valuable marketing opportunities that take place on athletic department grounds that routinely garner media coverage. See Roberto Cordero, How NBA Tunnel Walks Became Fashion Marketing Moments, Bus. Fashion (Apr. 10, 2023), https://www.businessoffashion.com/articles/luxury/how-nba-tunnel-walks-became-fashion-marketing-moments [https://perma.cc/2VTJ-FW2Z] (tunnel walks as personnel branding opportunities have now been embraced at the collegiate level and star SAs frequently arrive for games in fashionable outfits, rather than team-issued gear, with the expectation of being photographed or filmed by the media during their walk-in hoping their entrance will make ESPN or a post on social media).

133. Personal workouts are not official team activities so would not be covered under “place and time” restrictions. See Alexander J. Burridge, Contract Basics for Every Student-Athlete NIL Deal, Bodman (Aug. 18, 2021), https://www.bodmanlaw.com/news/article-contract-basics-for-every-student-athlete-nil-deal/ [https://perma.cc/T8VV-KM3U]. Therefore, an SA would be free to engage in NIL activity when doing so (e.g., post, livestream, content creation) unless the institution has a prohibition against doing so from within an athletic facility. Id.

individual workouts. Such NIL activity devalues team sponsorship as sponsors pay a premium for the right for on-field and on-court promotion of their products while NIL parties do not. Of the 15 Beats endorsers, Caleb Williams is the only member of the class whose team counts Beats as a corporate partner. It is incalculable the amount of free exposure the Audemars Piguet brand receives from Shedeur Sanders’s now famous watch flex, much to the dismay of Colorado’s team sponsors who pay substantial amounts to have their products promoted on-field.

C. Dilution by Addition

Encroachment occurs not only through product placement with SAs but also through increasingly liberal access to institution IP and facilities provided to SAs to enhance their marketability. Without exception, either statutorily or by means of institution policy, SAs are not permitted to use institution IP in NIL activity without the prior approval of the institution. Early in the NIL era, schools were restrained in granting permission to SAs to use institution IP and assets because many laws did not address IP use, and there was uncertainty around what was permissible facilitation under state law and also under the NCAA’s

135. See, e.g., Michael Penix (@themp9), Instagram, https://www.instagram.com/themp9/?hl=en (University of Washington SA posting himself wearing team sponsored apparel and earphones amid teammates); Quinn Ewers (@quinn_ewers), Instagram, https://www.instagram.com/quinn_ewers/?hl=en (University of Texas SA posting himself arriving for a game and commencing his tunnel walk wearing earphones); Jalen Milroe (@milticketfour), Instagram, https://www.instagram.com/milticketfour/?hl=en (University of Alabama SA posting himself at the commencement of his tunnel walk wearing earphones); Shedeur Sanders (@shedeursanders), Instagram, https://www.instagram.com/shedeursanders/?hl=en (University of Colorado SA posting himself going through his pregame warm-up listening to music through his headphones); Malaki Starks (@mstarks24), Instagram, https://www.instagram.com/mstarks24/?hl=en (University of Georgia SA posting pre-game at his locker listening to music through his headphones).


137. See Salerno, supra note 69; see also Proud Partners of USC Athletics, supra note 130.

initial Interim NIL Policy, which provided little specifics on institutional involvement with NIL activities.\textsuperscript{139}

As the NIL landscape evolved, together with later enacted NIL laws (and revision of current laws), which addressed IP and facility usage\textsuperscript{140} and additional NCAA guidance,\textsuperscript{141} institutions loosened the reins on SAs’ access to school IP.\textsuperscript{142} Updated guidance from the NCAA made clear that providing access would not run afoul of the Association by stating that institutions are permitted to “provide stock, stored photo/video/graphics to an SA or NIL entity.”\textsuperscript{143} The NCAA’s updated guidance was a watershed moment that ushered in a dramatic increase of SA use of institution IP, each such use constituting a license. While the ability to leverage institution IP undoubtedly increases the marketability of SAs, unrecognized is the subtle impact it has on team sponsorship value. The impact is largely negative.

1. The Privilege of Team Sponsorship

An understanding of how SAs’ access to institution IP negatively impacts team partnership performance requires an understanding of corporate sponsorship and the benefit of a license. The essence of sponsorship is that the institution grants the sponsor the right to use school IP in connection with the advertisement, marketing, and promotion of the sponsor’s product/services. The grant in the Coca-Cola Sponsorship is representative of this fact: University grants to Sponsor a license to use the University Marks, for no additional royalties, for the purposes of marketing, advertising, or promoting Company and Company Beverages. Such license gives Sponsor the right to use the University Marks in or on all of Sponsor’s advertising, promotional and packaging materials and activities.\textsuperscript{144}

Often, the sponsor is granted the ancillary right to be the exclusive supplier of its category of product or services to the athletic department

\textsuperscript{139} California’s NIL law, as were other early state laws based on California’s statute, and the NCAA’s Interim NIL Policy were altogether silent on IP. See Cal. Educ. Code § 67456 (West 2021). The Interim NIL Policy merely provided that SA could engage in NIL activities consistent with the law of the state in which their school is located. Michelle Brutlag Hosick, NCAA Adopts Interim Name Image and Likeness Policy, Nat’l Collegiate Athletic Ass’n (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/H4QF-DVEF].

\textsuperscript{140} See supra Part VI.


\textsuperscript{142} See supra Part VI.

\textsuperscript{143} Nat’l Collegiate Athletic Ass’n, supra note 141.

\textsuperscript{144} Coca-Cola Sponsorship, supra note 42, at 5.
and its teams, such as the case with the Coca-Cola Sponsorship, which provides “[s]ponsor will have marketing, advertising, and promotional rights, exclusive with respect to the Beverage category.”

Typically, corporate sponsorship of this type involves long-term, multi-million dollar commitments to the institution.

A notch below nationally known sponsors are state-wide or region-wide brand sponsors such as banks, energy companies, utilities, and healthcare providers. These too are top-level sponsors and similarly enjoy exclusive category rights and are committed to multi-year, multi-million-dollar contracts. Beyond these classes of sponsors are professional service providers, casual restaurants, area-based manufacturing companies, and locally-owned miscellaneous small businesses. These types of sponsors too have

145. Id.
146. I.e. a nationally recognized brand.
147. Coca-Cola Sponsorship, supra note 42, at 1–2 (illustrating Coca-Cola’s commitment to Arizona State University is for ten years at an average annual rights fee payment of $2.2 million); see also Ohio State, Coca-Cola Extend Relationship, Ohio St. News (Sept. 14, 2018), https://news.osu.edu/ohio-state-coca-cola-extend-relationship [https://perma.cc/5ZGQ-4UPV] (describing Coca-Cola’s sponsorship with Ohio State University: a 15-year commitment valued at $84.7 million over the term); Pepsi Expected to Retain Pouring Rights, Providing Funds for Scholarships and More, Penn St. Univ. (Apr. 19, 2023), https://www.psu.edu/news/administration/story/pepsi-expected-retain-pouring-rights-providing-funds-scholarships-and-more [https://perma.cc/H5V4-KG2K] (describing the Pouring Rights contract between PepsiCo and Penn State University).
148. Huntington is the official consumer bank of The Ohio State University. See e.g., Banking Built for Buckeyes, HUNTINGTON, https://www.huntington.com/buckeyebanking [https://perma.cc/4RM8-BEXJ].
150. PSE&G is a proud partner of Rutgers Athletics. See e.g., We Light the Scarlet Knights, PSE&G, https://nj.pseg.com/safetyandreliabilityru [https://perma.cc/6D7D-DUGN].
153. Cheddar’s Scratch Kitchen and Rudy’s Real Texas Bar-B-Q are proud local restaurant partners of Texas A&M Athletics. See e.g., Texas A&M Athletics Local Restaurant Partners, 12th Man, https://12thman.com/sports/2022/7/18/texas-am-local-restaurants [https://perma.cc/6XFS-QCGE].
155. Double R Ranch is a proud sponsor of Boise State Athletics; Breeze Thru Car Wash is a proud sponsor of Colorado State Athletics; Washington Duke Club Inn & Golf Club is a local hotel partner of Duke Athletics. See e.g., Boise St. Univ., https://broncosports.com [https://perma.cc/XL7S-64LD]; Colo. St. Athletics, supra note 155; Local Hotel Partners of Duke Athletics (July 29, 2018), https://static.goduke.com/custompages/web-docs/a-z_guides/local_hotels.pdf [https://perma.cc/7K2Q-E5B5].
multi-year commitments and the right to use institution IP in their marketing, advertising, and promotion but may or may not enjoy category exclusivity. In total, the number of exclusive team sponsors for a Division I athletic program averages several dozen. Direct admission into that circle is highly selective and requires a substantial buy-in. The advent of NIL, however, provides an entry pass at a deep discount.

2. Side Door Entry

Each time an SA leverages institution IP, it ultimately inures to the benefit of the athlete’s NIL licensee. The IP typically manifests by way of team-identified apparel worn by an SA at personal appearances (e.g., autograph signings) and in images in social media posts or in advertisement, marketing, or promotional materials. Therein lies the rub. At the end of the day, a third party receives the benefit of using the institution’s IP in advertising, marketing, or promotion of its product or services. Whether the use is minute as a team logo on a polo shirt or a chyron, or full-blown, such as a player in full uniform, it is a use of school IP in marketing, which is a privilege of team sponsorship. It is an institution-approved use, and therefore a licensed use, and, hence, a license. If the beneficiary is within the product or service category of a team sponsor that has exclusive rights, then the permission given by the institution would typically constitute a breach of the team sponsor contract; however, because NIL laws permit

---


159. See supra notes 146–57 and accompanying text.

160. Jersey Mike’s Subs is a “Proud Partner of USC Athletics” and has exclusivity in the fast-food category. See Proud Partners of USC Athletics, supra note 130. This, no doubt, is why Caleb Williams appears in Wendy’s commercials wearing a faux USC football jersey rather than an authentic jersey that bears school trademarks. See Wendy’s, Wendy’s Commercial Late August 2023 “Two Quarterbacks” Featuring Caleb Williams, YouTube (Sept. 2, 2023), https://www.youtube.com/watch?v=joXOOPtvGCI [https://perma.cc/3Y57-NK2R]. Because California’s NIL law does not address IP use, the University was not able to grant Mr. Williams a license to use institution IP in his
an SA to obtain licenses and the SA can use the IP in her NIL activity, the terms in team sponsorship contracts that prohibit the licensing of a direct competitor are not violated. Obviously, a contract breach can greatly harm a team sponsor. However, even if a granted license does not result in a breach, it nonetheless harms each team sponsor.

Each permitted use of institution IP by a third party dilutes the value of a team sponsorship analogous to equity dilution. Pre-NIL, a typical athletic department had perhaps a few dozen businesses that could use institution IP in advertising, marketing, and promotion. With companies now able to leverage school IP through NIL deals, the number of parties that can use team trademarks has expanded exponentially. Adding insult to injury, those advertisers can tie into a school via NIL deals and receive that valuable right on more favorable terms than team sponsors. At most, these advertisers are required to compensate the institution for the right at “market rate.” Illustrative of such discounted benefit is the case of Texas A&M quarterback Conner Weigman, who signed an endorsement with Sawgrass Fishing Rods, a local College Station-based manufacturer. Under Texas’s revised NIL law, should Mr. Weigman elect, he could secure institution permission to use Texas A&M’s facilities, uniforms, trademarks, and other A&M indicia in connection with his fishing rods endorsement, provided Sawgrass is willing to compensate the university for the use in an amount consistent with market rates. The market rate is undoubtedly substantially less than the value of the endorsement right—which is, in turn, substantially less than a typical minimum six-figure price tag for a multi-year team sponsorship package—so the price for third-party use of institution IP is a bargain. Such is undoubtedly not lost on sponsors and potential sponsors.

161. That is commonly the case because either there is no team sponsor in the category with exclusive rights or the category is devoid of a team sponsor.


164. See Educ. §§ 51.9246(g)(5), (g-2)(2). Most uses will be fleeting and use IP only insofar as it appears on product worn by an SA (e.g., use of a photograph of an SA in team apparel to promote an appearance, in an advertisement, or in a post) as opposed to a stand-alone use of a team logo as team sponsors typically do.
VI. EVOLVING STATE NIL LAWS

A. Flipping on Facilitation and Putting Up Shields

Most states passed their NIL legislation in late 2020 on the heels of California’s seminal law or in the waning months of 2021 in the wake of the Supreme Court’s Alston decision and adhered to a cardinal tenet of the California law that institutions could not facilitate deals for their SAs or cause compensation to be directed to them, taking as a given that the NCAA bylaw that would emerge would prohibit such activity. After the NCAA ultimately issued an unanticipated bare-bones interim NIL policy in the days after Alston, followed 14 months later by a clarification and updated guidance, many states found themselves saddled with an NIL law that, surprisingly, was more restrictive than NCAA policies. Indeed, many pundits viewed schools in states without NIL laws to be advantaged over schools located in states that enacted NIL laws, causing lawmakers to rethink their statutes and undertake to amend or repeal them, with athlete recruitment at the heart of the reset.

Arkansas commenced the game-changing trend of permitting institutions and their aligned fundraising arms to be more directly involved in the NIL process. As part of this process, institutions could “identify, create, facilitate, and otherwise enable [NIL] opportunities” for SAs, including the ability to directly participate in discussions with third parties and be shielded from NCAA punishment, despite NCAA rules to the contrary. The amended Arkansas law also authorizes state-based collectives to directly compensate SA for the use of their NIL, meaning school-aligned collectives could themselves enter into NIL deals.

The next mover, Oklahoma, amended its law to permit its institutions to establish agreements with collectives to facilitate NIL activities and permit them to compensate, or cause to be compensated, current or prospective SAs. The revised Oklahoma law also includes a provision that shields its institutions from NCAA punishment for engaging in NIL activity protected under Oklahoma’s law that violates NCAA NIL rules.

Concurrent with Oklahoma’s movement, Texas amended its NIL law. Like the revised Arkansas and Oklahoma statutes, Texas revised its law to permit its institutions and their fundraising arms to provide greater

166. Id.
167. Id.
169. See id. § 4-75-1303(c).
171. Id. §§ 820.27(B)(2)–(3).
facilitation and become more directly involved with collectives and in the NIL process.\footnote{172} Further, the new law permitted the award of priority status and other perks to collectives’ donors and for contributions to NIL activities.\footnote{173} Lastly, like both the revised Arkansas and Oklahoma laws, the amended Texas statute also provides a shield for its institutions against NCAA enforcement of any rule, regulation, or any other requirement that penalizes state institutions for performing, participating in, or allowing an activity required or authorized by the new Texas law.\footnote{174}

Most recently, the state of Missouri joined in the vanguard of evolving its NIL law with its new statute, which one state legislator characterized as mimicking the revised laws in Texas, Oklahoma, and Arkansas.\footnote{175}

The key features of the refreshed law include: (1) permitting Missouri athletic department staff and coaches to “identify, create, facilitate, negotiate . . . or otherwise assist with opportunities for a student athlete to earn compensation from a third party” for the use of the SA’s NIL rights,\footnote{176} (2) allowing school officials and coaches to attend meetings between SA and a third parties where compensation is negotiated,\footnote{177} (3) permitting in-state high school recruits to start earning endorsement money as soon as they sign a letter of intent to enroll in an in-state college,\footnote{178} and (4) shielding against NCAA taking any adverse action against a state institution or its employees for engaging in activities permitted under the new law.\footnote{179} Less trumpeted in Missouri’s revised law and similarly lightly noted in the amended laws of Texas, Oklahoma, and Arkansas is the liberalized approach to SAs’ use of institution IP.

\section{Relaxing Access to Institution IP}

The ability to incorporate institution IP into NIL activity substantially increases the marketability of SAs. The integration of institution IP into advertising and content, for instance, the ability to wardrobe an athlete in a team apparel item, makes the identification of the endorser easier. An advertisement or post showing an SA in a sports setting

\begin{itemize}
\item \footnote{172} Tex. Educ. Code Ann. § 51.9246(m)(1) (West 2023).
\item \footnote{173} Id. § 51.9246(g-1)(2).
\item \footnote{174} Id. § 51.9246(c-1).
\item \footnote{175} Dave Matter, Missouri Lawmakers Revise State’s NIL Law, Expand College Coaches’ Role in Negotiations, St. Louis Post-Dispatch (May 9, 2023), https://www.stltoday.com/sports/college/mizzou/missouri-lawmakers-revise-states-nil-law-expand-college-coaches-role-in-negotiations/article_56ee420a-ee95-11ed-bbf8-077630d774d.html [https://perma.cc/4XVX-6EHL].
\item \footnote{176} Mo. Ann. Stat. § 173.280 4(2)(b) (West 2023).
\item \footnote{177} Id.
\item \footnote{178} Id. § 173.280 16(1)(b).
\item \footnote{179} Id. § 173.280 9(5). In March 2024, Oregon joined the list of states that have amended their NIL law to shield its schools and their SAs from NCAA punishment for having engaged in activities permitted by the state’s NIL law. H.B. 4119, 82nd Legis. Assemb., Reg. Sess. (Or. 2024). In April 2024, Virginia followed in amending its NIL law to bar the NCAA from taking any adverse action against any school within the state (or its affiliated foundation or collectives) for any activity permitted by the statute. H.D. 1505, 2024 Gen. Assemb., Reconvened Sess. (Va. 2024).
(e.g., at a venue) and engaged in an activity—practicing, doing drills, working out, moving about campus—180—is more engaging than watching a player simply holding up a product and speaking to a camera. It also has a mental health benefit. It reduces the anxiety and stress of SAs as it lessens and can eliminate the need to act in commercials. Content can be based largely on a video of an athlete doing things they regularly and naturally do and talking about it.

Immersed in sports settings and engaged in athletic activities is authentic to SAs’ lives and lifestyles, and they should rightly be able to put that on display. However, there should be recognition that there is an intersection between rights sought by SAs from an institution and rights granted by an institution to other parties, and a balance should be struck between the two. Part VI below further examines the tension among these three stakeholders in the endorsement game—SAs, institutions, and team corporate sponsors—and recommends a compromise to their competing interests.

Texas’s revised law removed the prohibition in its inaugural NIL law against SAs’ use of institution IP.181 The law now permits SAs to use in connection with NIL deals their school’s uniform, facilities, registered trademarks, official logo, and other indicia subject to school approval and further subject to a use fee consistent with market rate.182 Following the Texas playbook, Oklahoma amended its NIL statute regarding IP use in lurching from not addressing SAs use of IP to providing that “[a] postsecondary institution may receive compensation for the use of its institutional marks or facilities in conjunction with a student athlete’s [NIL] activities.”184 Missouri’s revised NIL law similarly lurched from barring IP use to mandating that its institutions establish a process for licensing SAs the use of school IP:

Develop and adopt a process for granting to a student athlete, or to a third party for use with a student athlete, a license to use such institution’s or third-party’s unique identifiers when earning or attempting to earn compensation from the use of such student athlete’s name, image, likeness rights, or athletic reputation consistent with its policies regarding licensing of its unique identifiers.185

Missouri law goes further regarding the use of institution IP than any other law. It does not require that the institution be compensated for the use of its IP; it merely states it “may charge a reasonable fee.”186 Quietly, these shifts in SAs’ access to IP too are game-changing and

---

180. See Beats by Dre Commercial, supra note 160.
183. Id. § 51.9246(g-2)(2).
186. Id. § 173.280(5)(c).
greatly consequential. Missouri’s law, the latest among the first-movers, is now at the cutting edge of NIL regulation and likely the new template for late-moving states refreshing their NIL laws to remain competitive in athlete recruitment. With Oklahoma and Texas joining the Southeastern Conference in the coming playing year, and Arkansas, Missouri, and Texas A&M subject to these progressive new NIL laws and already SEC members, undoubtedly, the other states represented in the conference will amend their NIL laws and policies to, at a minimum, level up to those of Arkansas, Oklahoma, Texas, and Missouri. This will likely be quickly followed by states within the Big Ten Conference, then by states within the Big Twelve Conference and Atlantic Coast Conference, resulting in a virtual nationwide loosening of IP access. The threat posed by expanded access to IP to athletic program wellness is not well or widely understood.

Ungauged access to school IP is detrimental to team sponsors and will undoubtedly erode corporate sponsorship, which, ultimately, will negatively impact SAs at large. The adverse impact of relaxing access to IP lies in that it gives companies and brands that are not corporate sponsors the ability to directly and prominently associate with the school, thus confusing the sponsorship message of exclusivity. Illustrative is the all-but-certain soon appearance in NIL marketing of an SA in full game uniforms on the home field or home court. Picture: a brand ambassador in her USC softball uniform pictured under “Tommy Trojan,” a kitted Notre Dame football player hitting the “PLAY LIKE A CHAMPION TODAY” sign on his way out to the field, a Boise State Bronco going through a personal workout on THE BLUE, a Wolverine running the stairs at “The Big House” with “The Victors”

189. See supra Section VII.B.
190. See supra Section VII.B.
playing as the background music. The use of team uniforms and highly recognizable assets—venues, campus landmarks, et cetera—enables any marketer to create highly-produced and polished advertising, marketing materials, and content that have the look and feel of corporate sponsor advertising. The increasingly growing discussion that will be had in budget planning meetings of companies currently or potentially active in the college sports marketplace is whether an NIL endorsement through which team uniforms and trademarks can be utilized is a better value than a corporate sponsorship.

The key benefits of corporate sponsorship are the license to use institution IP in advertising and marketing, exclusivity within a business category, use and promotion of sponsors’ product/services, and access to game tickets. If an SA can be shown in highly visible team-identified wardrobe (e.g., game uniform or warm-up suit), in an identifiable university setting, and using the company’s product, and the deal cost is a fraction of a corporate sponsorship, there has to be significant value-added in corporate sponsorship for it to prevail over an NIL deal with a star SA. When the ticket access benefit is removed—as typically game tickets can be easily sourced, if and when needed, through brokers or the secondary market—the difference in what a typical corporate sponsor receives versus what the benefits an NIL licensee receives is the use of a designation as an “Official Sponsor” and in-venue media such as signage, public address, and scoreboard recognition.

VII. THE CASE FOR ENHANCED SPONSOR PROTECTION

A. Chronic Foot Problems

The relaxation on IP use, as discussed above, together with trend ing lax protection of athletic department marketing partners, is inconspicuously fueling a slow-moving, but capable of rapidly accelerating, decline in corporate sponsorship. This Article previously discussed


196. See, e.g., UCLA Contract, supra note 72, at 3, 7, 9. Without exception, corporate sponsorship agreements do not convey rights to use individual SAs in sponsor advertising.

197. See supra note 79 and accompanying text.

198. See supra note 79 and accompanying text.

199. Given the typical multi-year length of sponsorship agreements, see supra text accompanying notes 146–57, it will take several years before institutions begin to experience a spike in non-renewals and/or renewed agreements at decreased cash compensation levels. However, this could quickly accelerate should a federal law (or state law) be passed that confers upon SAs the right to wear footwear of their choice in competition. Product supply contracts with footwear companies universally grant them an immediate right to terminate if team members fail to wear supplied products. See Kansas Contract,
how expanded access to IP can negatively impact corporate sponsors,\textsuperscript{200} and later examines the increasing decline in sponsor protection\textsuperscript{201} and the deleterious effect of it on sponsor retention.

Though the loosening of restrictions to enable SAs to maximize NIL opportunities is laudable, many measures taken have an adverse effect on sponsors. Institutional actions range from non-enforcement of NIL policy benefitting a competitor of a sponsor to actual breach of a sponsorship agreement.\textsuperscript{202} Surprisingly, such occurrences are most prevalent and apparent in the business categories of a team’s top sponsors—beverage sponsors, quick service restaurants (i.e., fast-food), and on-field product suppliers.\textsuperscript{203} With regard to non-compliance with policy, many institutions have a stated policy that they “will not approve the use of [school] marks in connection with NIL activities that . . . involve entities competing with our sponsors . . . .”\textsuperscript{204} Notwithstanding policy, SAs are permitted to engage in NIL activities wearing school-identified apparel.\textsuperscript{205}

\textsuperscript{200} See supra Section VII.B.
\textsuperscript{201} See infra notes 203–11 and accompanying text.
\textsuperscript{202} See infra notes 208–09 and accompanying text.
\textsuperscript{203} See supra notes 111–116, 126–29 and accompanying text.
\textsuperscript{205} See, e.g., Kane Footwear (@kanefootwear), Instagram (Dec. 27, 2023), https://www.instagram.com/kanefootwear/p/C1XPBP5rsZD/?img_index=1 [https://perma.
In the past season, casual shoe brand Hey Dude signed 12 NIL agreements with SAs across 8 FBS schools, schools outfitted by NIKE or adidas, each school granting Hey Dude a retail product license. Putting aside the question of whether the license granted to Hey Dude is a breach of the exclusive rights granted to NIKE and adidas, respectively, each of the endorsees appear in advertising in which their respective school trademarks appear, and in one instance athletic department staff and the head football coach appear in advertising for Hey Dude footwear, an indisputable breach of the relevant product supply agreement. Similarly, recovery shoe brand Kane Footwear signed five NIL agreements with SAs across five FBS schools outfitted by NIKE. Several endorsees appear in Instagram reels, where their school’s marks appear.

There is nothing new to footwear suppliers being underprotected. Proponents of open market NIL have taken particular aim at footwear sponsors since the dawn of the NIL era. An early commentator aptly observed that the no-conflict provision in California’s Fair Pay to Play Act “eliminates what might be the most common use of the new rights[—]to endorse the product by wearing it in the setting where the athlete is most likely to be seen by a potential consumer.”

cc/KLR3-MPHZ] (picturing the first image in an Instagram post from company Kane Footwear of USC quarterback Calen Bullock wearing a USC-branded shirt and the company’s footwear); Kane Footwear (@kanefootwear), Instagram (Dec. 27, 2023), https://www.instagram.com/kanefootwear/p/C1XPBP5rsZD/?img_index=5 [https://perma.cc/MCT2-EMN4] (displaying a different image of Calen Bullock from Kane Footwear’s Instagram post).


208. See, e.g., Quinn Ewers (@quinn_ewers), Instagram (Nov. 27, 2023), https://www.instagram.com/p/C0K2acpuw0C/?hl=en [https://perma.cc/ZYS3-PEKQ].

209. See POSTGAME, Jayden Daniels x HEYDUDE x Postgame NIL, YOUTUBE (Dec. 5, 2023), https://www.youtube.com/watch?v=uP2EG9p02n4 [https://perma.cc/EE2Y-E3VF].


212. See Barrett Carter (@bszn) & Kane Footwear (@kanefootwear), Instagram (Sept. 16, 2023), https://www.instagram.com/kanefootwear/reel/CxQepAjLdj3/ [https://perma.cc/4YVF-66YJ]; see also Kane Footwear (@kanefootwear), Instagram (Sept. 2, 2023), https://www.instagram.com/reel/CwsQWasLvfz/ [https://perma.cc/QGA7-U94C]; see also Kane Footwear, supra note 205.

213. Bank, supra note 58, at 116 (while the commentator does not specifically identify footwear as the endorsed product, one must assume that to be the item as the only other product SAs wear in competition is the team uniform which, of course, must be identical to that worn by every team member); see also Kraft, supra note 17, at 605 (comparing how SAs face more limitations in their ability to earn NIL compensation than
initial NIL law singled out footwear sponsors as the sponsorship category where neither the no-conflict provision nor time-and-place restrictions would apply.\(^{214}\) When Missouri undertook refreshing its NIL law, legislators reportedly considered an amendment to the law, but did not pass it, that would have permitted SAs to wear shoes of their choice in official team activities.\(^{215}\) Several proposed federal laws either incorporated a footwear exclusion or used other mechanisms to effectively permit SAs to wear their preferred shoe in competition.\(^{216}\) The 2023 fall sports season saw renewed calls for footwear freedom of choice. Ramogi Huma has stated that college athletes should be able to wear footwear of their choice and that barring them from doing so “prevents athletes from achieving their full NIL earning potential because they can’t wear the shoes in competition, when they get the most attention.”\(^{217}\) Harper Murray, a top player on Nebraska’s top-ranked volleyball team, has lamented her inability to wear Avoli shoes (her endorsed brand) because of the Cornhuskers’ sponsorship with adidas.\(^{218}\) Max Staiger, Puma’s head of basketball, has expressed the wish that its ambassadors “could wear the [Puma] brand on the court . . . [and] thinks eventually the model could shift to one similar to that of the NBA, where players wear uniforms under a league-wide contract but have their own shoe deals.”\(^{219}\)

There is no debate that prohibiting SAs from wearing or using personally endorsed products during official team activities inhibits their NIL opportunities for precisely the reasons stated by Mr. Huma above—they cannot use the product at the times when it would receive the most attention. It is not surprising that the footwear/apparel category should be singled out for exclusion from statutory protection. Game footwear and apparel are the most highly visible products in the collegiate sports landscape and the most active and lucrative endorsement areas in the universe of consumer products with teenage athletes signing multi-million-dollar endorsement agreements commonplace.\(^{220}\) It is also the product area that is most authentic to SAs and professional athletes who can, for example, wear a particular shoe brand on the field to earn NIL money.

\(^{214}\) See supra note 106 and accompanying text.

\(^{215}\) See Olson, supra note 17.

\(^{216}\) See supra notes 90–96 and accompanying text.

\(^{217}\) See Olson, supra note 17.

\(^{218}\) Id.


where they are most credible. By the same token, the footwear and apparel category is unique among sponsor categories because its products are indispensable elements of every sport—they are required to compete. Every sport requires a uniform, and all but swimming and gymnastics require footwear. Moreover, no corporate partnership is more central to the identity of a college athletic program than its relationship with its footwear/apparel supplier.221 Indeed, in the recruiting world, schools are referenced as NIKE schools, adidas schools, and Under Armour schools.222 Annually, at the commencement of the NCAA Men’s and Women’s Basketball Tournament, it is reported nationally which shoe brands sponsor which teams in the tournament.223 While SAs should be enabled to capitalize on NIL, it should not be at the expense of athletic team supporters, as is the case for some measures taken in NIL reform or will be the case with other reforms being considered.

B. Athletic Program Wellness and Student-Athlete Opportunities

Corporate sponsor support plays a critical role in the health of athletic departments and the availability of opportunities for SAs and non-athlete students, and they merit protection because of that. Footwear and apparel suppliers, the most besieged class of corporate sponsors, have an outsized positive impact on athletic programs,224 and pains should be taken to maintain their support rather than actions and policies that likely will decrease or lose their support—the prime measures being providing competitors with the ability to use IP and, the existential danger, permitting SAs to wear/use competitor product while engaged in official team activities. For all sponsors, eliminating time-place restrictions would de jure render exclusive sponsorships non-exclusive—decimating the value of such deals. Indeed, even with-

---

221. See Goldberg & Kettell, supra note 41, at 1.
224. See Goldberg & Kettell, supra note 41, at 1 (establishing that “[f]ew relationships are as central to a college athletic department’s identity as the relationship with a footwear, apparel, and equipment partner.”).
out the ability of a competitor to have its product used in competition, a competitor simply having the ability to leverage school IP undermines sponsor exclusivity. As discussed below, the loss or decrease of sponsor support, particularly that of footwear and apparel suppliers, would have a significant negative impact on opportunities for all SAs, and this Article recommends a swing back the other way and upgrading from the ineffectual no-conflict approach to an absolute bar on SAs entering into NIL deals with a sponsor competitor.

Much is made of the gargantuan amounts of revenue generated by college sports, and rightly the fairness of SAs participating financially in this multi-billion-dollar industry, but little has been noted about where sponsors fit in other than the baseless assertion that these companies make millions off the performance of college athletes. To start, exceedingly few athletic departments are financially self-sufficient. The most recent annual NCAA report on intercollegiate finance revealed that of the 1,100 programs across the three divisions, only 25 programs—all in Division I—generate revenue that exceeds expenses. Most programs, even the most ostensibly successful ones, operate at a massive annual deficit—from UCLA, which posted a $28 million loss for the 2022 fiscal year, to the University of Connecticut with its men's basketball national championship team, which ended its 2022 fiscal year with a $53 million deficit, to Big Ten member Rutgers University, which rang up a staggering $73 million.

Overwhelmingly, athletic departments operate at a deficit. The majority of departments' operating budgets, over 60%, come from a combination of institution and government support, donor contributions, ticket sales, and student fees. Every dollar is important as it reduces the


229. See infra image accompanying note 230.
deficit and the subsidy required from the school’s central fund to meet the operating expenses of the athletic program.

**NCAA Overall: Where the Money Comes From**

On an NCAA overall basis, of the approximately 32% of the revenue that comes from third parties, royalties and licensing revenue is second only to media deal payouts. At the individual school level, licensing and sponsorship revenue is often on the order of magnitude of media rights payouts and, sometimes, exceeds media revenue. Footwear and apparel sponsorships often constitute the lion’s share of licensing revenue.

---

231. *Id.*
232. For NCAA membership finance reporting purposes, revenue derived from licensing and sponsor activities is reflected in a line-item category captioned “Royalties, Licensing, Advertisement and Sponsorships” (“licensing and sponsorship”) and includes the value of in-kind products and services provided as part of sponsorship agreements. See Ohio St. Univ., NCAA Membership Financial Reporting System 5, 7, 29 (2023), https://news.osu.edu/download/d3729c7e-a2c4-4870-9901-bcf0e475c5ef/23ncaamembershipreportfinal.pdf [https://perma.cc/FGC2-Y973].
and sponsorship revenue. At some schools, however, their outfitting deal is significantly outsized and by itself constitutes the largest source of sponsor revenue. For instance, the value of the University of Texas-NIKE deal is over $250 million. Ohio State's outfitting agreement with NIKE is reportedly valued at $252 million, while NIKE's supply deal with the University of Michigan has a reported value of $169 million. The agreements adidas has with the University of Kansas and the University of Washington are valued at $196 million and $119 million, respectively, while the recently signed contract between Notre Dame and Under Armour is reported to be worth $100 million.

234. See e.g., Tony Garcia, University of Michigan Athletic Department: $4 million Surplus for 2023 Fiscal Year, DET. FREE PRESS (Jan. 30, 2024, 4:44 PM), https://www.freep.com/story/sports/college/university-michigan/wolverines/2024/01/30/michigan-wolverines-athletic-department-surplus-2023-fiscal-year/72410485007/ [https://perma.cc/DV4T-2E6M]. The University of Michigan reported $229,561,279 in operating revenue for the 2022–23 fiscal year of which $65,106,623 was derived from ticket sales. Id. The next three largest revenue streams came from media rights contracts ($47,879,025), donor contributions to athletics ($42,691,080), and licensing and sponsorship ($33,027,615). Id. Of the approximately $33 million derived from licensing and sponsorship, one can calculate that approximately 30% of such revenue is attributable to compensation from the NIKE Contract. See Michigan Contract, supra note 51, at ¶ 6, 8.

235. See e.g., Michigan Contract, supra note 51, at ¶ 6, 8 (showing NIKE accounts for more than 30% of the school’s annual licensing and sponsorship revenue); Seventh Amendment to Athletics Equipment Agreement Between Univ. of Tex. at Austin and NIKE USA, Inc., Nov. 24, 2015, https://www.documentcloud.org/documents/2940176-Texas-Nike-contract-Jan-2016 [https://perma.cc/ZNU4-QV75] [hereinafter Texas Contract] (showing NIKE accounts for an annual combined base cash compensation, royalty payment guarantee, and product consideration equal to well over 20% of the school’s total annual licensing and sponsorship revenue).


Such contracts, and even those of substantially less value, commonly provide opportunities and benefits to both SAs and the entire student body. For instance, typically, outfitting deals for Power Five programs provide for paid summer internships at the sponsor’s corporate headquarters, as do other major sponsorship deals. NIKE’s deal with the University of Texas, for example, provides for funding of “internships (paid at market rate) for two (2) student-athletes and two (2) undergraduates . . .” Ohio State’s sponsorship with Coca-Cola provides for six internships per year. Under the University of Louisville’s deal with adidas, the company pays EXOS to provide sports performance consulting services to SAs program-wide. The University of North Carolina’s outfitting deal with NIKE provides the men’s and women’s basketball and soccer teams with the opportunity to participate in select invitational tournaments against other elite teams (e.g., the Phil Knight Invitational Tournament). Deals often furnish products for intramural programs. Larger deals commonly have an academic and communal footprint. For instance, NIKE’s agreement with the University of Texas calls for the company to annually spend an average of $1.5 million in support of “University initiatives outside the Athletics Department,” while the company’s deal with Ohio State provides an annual $1 million cash contribution to a Student Life endowment. Coca-Cola provides

242. See, e.g., Kansas Contract, supra note 43, at § 3.C; Official Outfitter Agreement Between Under Armour, Inc. and Auburn Univ., §3.12, July 1, 2016, https://www.scribd.com/document/505830007/Auburn-UnderArmour-2016-2025?doc_id=505830007&download=true&order=631139682 [https://perma.cc/V2H2-MCRX]; Wisconsin Contract, supra note 199, ¶ 3.1.2. Typically, these opportunities go to SA in non-revenue sports and students that are not varsity sport athletes as football and basketball players invariably spend their summer on-campus because of team activities or the need to take summer courses.


247. Id.

Ohio State with over $4 million in scholarships and other educational benefits and UCLA with $3 million in scholarships, while Penn State’s recently signed Pepsi sponsorship boasts that it provides additional monies to support student initiatives and strategic priorities, such as scholarships, student projects, research, and sustainability goals.

While permitting SAs to enter into deals with competitors of team sponsors certainly is a significant benefit to SAs, it only benefits the few stars in any program, and that is substantially outweighed by the financial loss to the athletic department and opportunities and benefits to students at large and the school community.

The foregoing levels of support by footwear companies and other major sponsors, and indeed the current level of support across the board, cannot be sustained, much less expected to increase, in the changed landscape where players can be signed to endorsements by competitors. Moreover, should federal law enshrine the right of SAs to wear footwear of their choice in official team activities, or the law of any state be amended to permit it, the market would irreversibly crater.

Tens of millions of dollars would be withdrawn from athlete department budgets that could not be replaced as all footwear and apparel sponsors would be subject to the same risk. Why would any brand pay $1 million to $10 million a year in cash and provide gratis product to essentially sponsor a school’s football and basketball program when the brand might not be able to leverage the team’s top players? Suppliers will not. NIL, as now unchecked in certain ways, has placed the team footwear and apparel supplier paradigm on the road to a generational reset. The future of uniform supply is one where the top half programs

---

249. See Ohio State, Coca-Cola Extend Relationship, supra note 244.
252. If this right expansion occurred via federal action, then, of course, this standard would be nation-wide. If this right expansion came about via amendment of a state law, presumably the change would spread across other states as the first-moving state would have a significant recruiting edge as the footwear endorsement rights for SA and prospective SAs committed to institutions in such state would soar, causing other states to follow suit.
253. See D’Alessio, supra note 46. The actual cost to suppliers to sponsor a college team far exceeds the revenue generated directly by these deals, which is primarily through jersey sales. See Michael Smith, OneTeam, Fanatics Building Major College Group Licensing Business, ‘but Nobody Is Getting Rich Off Jerseys,’ Sports Bus. J. (Jan. 30, 2023), https://www.sportsbusinessjournal.com/Journal/Issues/2023/01/30/Ufront/collegiate-licensing.aspx [https://perma.cc/RQX9-MUMP] (noting the multiple royalties that must be paid and the fickle nature of the marketplace for jerseys). While team outfitters do derive meaningful benefits from these agreements, the reality is that no brand makes a significant profit off these deals. See id.
in the “Power Four,” plus Notre Dame, will continue to be able to secure outfitting deals that pay cash, albeit at sharply reduced levels, and meet all their product needs. The conference bottom-half programs would likely only secure outfitting deals covering product needs for their revenue sports (i.e., football and men’s and women’s basketball) and perhaps with a modest base compensation payment. The school’s Olympic sports would likely be left to secure deals with sports specialty brands, for example, swimming brands, tennis brands, golf brands, et cetera, and/or to purchase product at a discount from the football/basketball team outfitter. Programs outside of the Power Four conferences, with the exception of the several prominent basketball-led institutions (e.g., UConn, Houston, Gonzaga, Villanova, Creighton), will, depending on any prowess they have in football or basketball, suffer the plight of non-competitive Power Four schools. Alternatively, these programs will be reduced to non-cash paying outfitting deals or the team sales deal lower division schools rely upon.

In the worst-case scenario, where SAs can wear the footwear of their choice, athletic departments will find themselves in a dystopian landscape. The all-sport outfitting deal will have gone virtually extinct. At best, the 10–15 schools that field a football team that perennially qualifies for the 12-team College Football Playoffs will maintain their all-sport deals. Base compensation, though, will be less than today’s amounts and heavy on progressive performance bonuses—World Cup-style team deals will be the model. Deals will include reduction rights based upon SAs that have signed NIL deals with a sponsor’s competitor. The provisions will be similar in structure to the spitting reduction tables, which, for more than a generation, have been standard in outfitting contracts, i.e., $V if QB1 has opted-out, $W if RB1 has opted-out, $X if Rec1 has opted-out, $Y if Edge Player1 has opted-out, and $Z if DB1 has opted-out. Basketball player reduction will be prorated.

C. Recommendations

Despite the original intent of the NIL founders to protect team sponsors from the exercise of the newly established rights, as evidenced in the “no conflict” provision in California’s seminal law, the measures taken have been largely ineffective. The gaps and loopholes in the protections

254. As a result of conference realignment and the collapse of the Pac-12 Conference, the Power Five has been transformed into what is now the Power Four. Ralph D. Russo, AP Sports Story of the Year: Realignment, Stunning Denise of Pac-12 Usher in Super Conference Era, ASSOCIATED PRESS (Dec. 18, 2023, 8:39 PM), https://apnews.com/article/conference-realignment-e0356ca1c9cf5ba2630e7b23a1a06ed [https://perma.cc/JY6Z-AN8G].
255. See GOLDBERG & KETTEL, supra note 41.
256. See id.
257. See Kansas Contract, supra note 43, at 6–8; see also Wisconsin Contract, supra note 199, at ¶ 3.1.2.
have manifested. Despite no-conflict language in applicable state laws, team-exclusive sponsors find themselves sharing the spotlight in their product category with competitors. The products of NIL partners that have not contributed a dime to an institution’s athletics can be found on the field and on-court alongside the products of a team’s exclusive suppliers that have paid a substantial premium for such product exposure opportunity. Newly relaxed and expanded access to institution IP delivers rights to NIL partners that are on par with those previously enjoyed only by team sponsors. In the wake of amended laws in several states that have raised the bar on best of breed in NIL, striving to “keep up with the Joneses” as one state representative put it when introducing an amendment to his state’s law, many states are now revisiting their NIL laws, which provides opportunities to shore-up sponsor protection. States would be wise to seize that opportunity as, after three years of NIL, sponsors are now assessing the value of corporate sponsorship relative to NIL investment.

Adoption of a slate of suggested measures would go a long way in protecting the value of corporate sponsorship in the NIL age. First and foremost, key sponsor categories—at the very least, on-field/on-court product suppliers, soft drinks, and sports drinks, which are among the product categories with the most college sponsorships and multi-year, multi-million-dollar commitments—should be grouped into a restricted deal category along with vice products rather than being handled through no-conflict provisions. By placing exclusive suppliers in a restrictive deal category, SAs simply will not be solicited by companies that compete with team sponsors. Both SAs and competitor companies would know that an NIL agreement cannot be entered into because of an absolute bar as contrasted with the current circumstances where it is within the discretion to approve an SA NIL deal with a team sponsor competitor. As seen in the situation of the LSU women’s basketball

258. See supra notes 110–13 and accompanying text.
259. See supra notes 132–33 and accompanying text.
260. See supra Section VI.B.
262. It is common practice among sports marketers to review their sponsorship portfolio in line with a strategic plan covering a three-to-five-year period. Now, with a full three-year sample of NIL activity, as marketers assess their sponsorships portfolios, they are doing so with the benefit of research data on NIL performance over a meaningful span. They can make determinations of return on investment on team sponsorship versus return on investments made in NIL.
264. See supra notes 42, 46, 236–41, 244, 250–51 and accompanying text.
265. Instituting a statutory bar would remove coaches and athletic directors from the difficult position no-conflict provision places them within, such as telling an SA she
team, a no-conflict provision does not prevent an SA from entering into a deal with a team sponsor competitor,\textsuperscript{266} and that is what is needed. While blocking any sponsor categories limits opportunities by limiting potential suitors, it does not foreclose opportunities in the categories. SAs are free to pursue endorsement opportunities that complement, rather than conflict with, the team sponsor in each category.\textsuperscript{267} Indeed, team sponsors, particularly in the footwear/apparel category and beverage category, have been especially active in the NIL space, signing SAs on teams that they sponsor.\textsuperscript{268} Quantitatively, the lost opportunities are minimal as, frankly, competitors are only interested in signing team stars, of which there are but a few at any program.

Second, there should be a limitation on institution IP that an SA can pass through to an NIL licensee for use in connection with an athlete’s endorsement. Team logos and uniforms (game and practice) are the crown jewels of athletics IP portfolio. Team sponsors should be the only third parties permitted to use these assets. Limiting their use to sponsors would maintain team sponsor advertising and marketing material distinctive from non-sponsor advertising. Whereas sponsors that secure NIL rights could show a team member in uniform, an NIL licensee would only be able to show an SA wearing non-performance garb, such as polo shirts, tees, hoodies, and ball caps. Further, SAs should not be permitted to allow their NIL sponsors to use a school logo on a stand-alone basis. Their use should be limited to depicting school trademarks only insofar as they authentically appear on items worn or used by an SA (e.g., apparel, balls) or fixed on facilities, fixtures, or equipment. This restricted use of school IP strikes a balance between providing support and facilitation of SA NIL activities and not leveling team sponsors.

cannot enter into a lucrative deal because of a team sponsorship or telling a team sponsor that is paying the institution millions of dollars that a star team member will be promoting a competitor brand or, where IP use can be passed through to the NIL partner, that the competitor will be able to use institution IP in advertising and marketing its brand.

\begin{itemize}
\item \textsuperscript{266} See \textit{LSU Contract}, supra note 105. Moreover, no-conflict provisions are of little value because rare is the NIL endorsement that calls for SA performance during official team activities.
\item \textsuperscript{267} See Part III.
\end{itemize}
Lastly, SAs should not be permitted to leverage game venues or grounds for photo shoots or filming in connection with advertisements, marketing materials, or content. Like team logos and uniforms, stadiums and arenas are the crown jewels of athletic facilities. They are school identifiers and landmarks. Some are icons—The Big House,269 The Horseshoe,270 Pauley Pavilion,271 Cameron Indoor Stadium,272 THE BLUE,273 Allen Fieldhouse,274 The Checkerboard Endzone,275 the Hedges276—and are authentic to SA life. There are ample other settings and locations that are also authentic to SA life, e.g., practice fields and facilities, weight rooms, and dorms, which provide the look and feel of life on campus but are not the main stage. Like team logos and uniforms, the use of signature or iconic assets in advertising and marketing should be limited to team sponsors. This will also maintain a distinctiveness between sponsor advertising and NIL licensees while also providing sponsors with a distinctive premium platform that will be recognized as a value-add of sponsorship.

VIII. Conclusion

The NIL landscape continues to shift violently. The current movement is toward relaxing restrictions to increase institution facilitation and support of NIL and provide SAs with greater opportunities. One of several ways in which this is being carried out is by reducing the protection of team sponsors through permitting star athletes to sign with sponsor competitors despite schools having the discretion to adopt a policy prohibiting such signings.277 Another way is through the elimination of restricted categories.278 A further means is through providing SAs with access to school IP, which they are able to pass through the use rights to NIL partners to leverage in connection with their deals.279 These advents are eroding the value of team sponsorship.280 Especially impacted thus far are footwear and apparel sponsors,281 and these sponsors will potentially be even more dramatically impacted should either

269. The Michigan Wolverines football stadium.
270. The Ohio State Buckeyes football stadium.
271. The homecourt of the UCLA Bruins.
272. The homecourt of the Duke Blue Devils.
273. See supra note 193 and accompanying text.
274. The homecourt of the Kansas Jayhawks.
275. The signature end zone at Tennessee’s Neyland Stadium.
276. The privet hedges that surround the football field at Georgia’s Sanford Stadium.
277. See supra note 59.
278. For example, Missouri’s recently amended law which, unlike the NIL laws of many states, does not explicitly prohibit SAs from contracting with industries or third parties that conflict with the values of their school. Mo. Ann. Stat. § 173.280 (West 2023).
279. See supra Section VI.B.
280. See supra Section VI.B.
281. See supra Section V.A.1.
of the two now-pending federal bills pass into law.\textsuperscript{282} If this tide is not stemmed and team sponsor protection is not enhanced, corporate sponsorship, particularly by footwear companies, will gradually decline in favor of NIL play or rapidly decline if unrestricted NIL is enshrined into federal law. In either event, the loss of corporate sponsorship will result in a corresponding loss of opportunities for SAs and non-athletes as well.\textsuperscript{283} It will be cruelly ironic if unfettered NIL becomes the cause of death of the geese that lay golden eggs for all.

\textsuperscript{282} See \textit{supra} notes 97–101 and accompanying text.
\textsuperscript{283} See \textit{supra} Section VII.B.