



# LEGAL AND ECONOMIC OVERVIEW

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## What's Ahead

Litigation Summary

Economic Issues

Legislation Summary

Market Analysis Project

*Jot down key questions and key take-aways*

# WHO WE ARE

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# LITIGATION SUMMARY



# WHAT IS NAME, IMAGE, AND LIKENESS (NIL)?

## Publicity Rights Primer

- Created by State Law and Recognized in more than 40 states (statutory or common law) (Cal. Civ. Code § 3344)
- Prevents the unauthorized use of NIL for commercial purposes
- Exceptions: news reporting, public affairs/commentary, sports broadcast or account, political campaigns, and incidental use associated with advertising of exempted uses

## College Athlete Efforts to Control the Use of NIL and be Compensated for Such Use

2009:  
*Keller v. Electronic Arts, Inc. et al.*

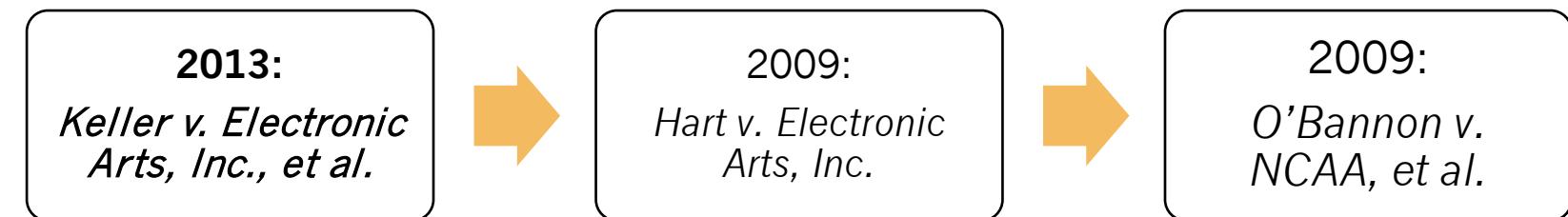


2009:  
*Hart v. Electronic Arts, Inc.*



2009:  
*O'Bannon v. NCAA, et al.*

# LITIGATION SUMMARY



**Plaintiffs:** Samuel Keller (former college football player at Arizona State and Nebraska) and other current/former Division I college football players

**Main Defendants:** Electronic Arts, Inc. (aka, “EA”); NCAA; and Collegiate Licensing Company

**Complaint (2009, May 5):** EA violated California right of publicity law by using Keller’s NIL in EA’s *NCAA Football* video game series; NCAA violated Indiana right of publicity law when it knowingly approved EA’s use of plaintiffs’ likeness.

## Summary Outcome:

- California District Court (2010, February 8): EA’s use of Keller’s identity is not sufficiently transformative to bar claims as a matter of law under First Amendment = Motion to Dismiss denied.
- Ninth Circuit Court of Appeals (2013, July 31): Under Transformative Use test, EA’s use of Keller’s identify does not qualify for First Amendment protection as a matter of law. Affirmed District Court decision.

# LITIGATION SUMMARY

2013:  
*Keller v. Electronic Arts, Inc., et al.*

2013:  
*Hart v. Electronic Arts, Inc.*

2009:  
*O'Bannon v. NCAA, et al.*

**Plaintiffs:** Ryan Hart (former college football player at Rutgers) and other current/former Division I college football players

**Main Defendant:** Electronic Arts, Inc.

**Complaint (2009, June 12):** EA violated New Jersey right of publicity laws by using Hart's NIL in EA's *NCAA Football* video game series without consent

## Summary Outcome:

- New Jersey District Court (2011, September 9): EA's use of college football player's NIL was sufficiently transformative to be protected by the First Amendment from Hart's ROP claims = granted summary judgment to EA.
- Third Circuit Court of Appeals (2013, May 21): EA did not sufficiently transform Hart's identity (likeness and biographical information). Interactive features also did not satisfy Transformative Use test. The First Amendment does not protect non-consensual use of player's NIL in commercial video games = Reversed and remanded.

# NCAA STUDENT-ATHLETE NAME & LIKENESS LICENSING LITIGATION

2013:

*Keller v. Electronic Arts, Inc., et al.*



2013:

*O'Bannon v. NCAA, et al.*

**2013, July:** *Keller & O'Bannon* Consolidation into *NCAA Student-Athlete Name & Likeness Licensing Litigation*.

**Claims/Plaintiffs:** (1) Right of Publicity Plaintiffs and (2) Anti-Trust Plaintiffs

**2013, July:** Class Certification Sought and Current College Athletes Added to the Consolidated Complaint

**2013, October 25:** Right of Publicity Claims Settled (EA = \$40 million/NCAA = \$20 million). ROP claims dismissed against EA, CLC, & NCAA

**2013, November:** Class Certification for Injunctive and Declaratory Relief Granted

**2014:** Cases Unconsolidated, NCAA and Anti-Trust Claims (*O'Bannon v. NCAA*) proceed to trial

# LITIGATION SUMMARY

2013:  
*Keller v. Electronic Arts, Inc., et al.*

2013:  
*Hart v. Electronic Arts, Inc.*

2015:  
*O'Bannon v. NCAA, et al.*

**Plaintiffs/Complaint (2009, July 21):** Edward O'Bannon Jr. (former men's basketball player at UCLA), on behalf of current and former Division I men's basketball and football college athletes. NCAA rules prohibiting college athletes from receiving compensation for the use of their NIL are subject to antitrust laws and are an unlawful restraint of trade or commerce

**Main Defendant:** NCAA

**Summary Outcome:**

**California District Court**

- Motion for Summary Judgment (2014, April 11) clarifies affirmative defenses and evidentiary burdens for anti-trust claims focuses on whether NCAA restraints were unreasonable
- Bench Trial (2014, June 9-27): NCAA cannot prohibit member schools from providing scholarships up to full cost of attendance; Permitting athletes to receive deferred compensation from licensing revenues is less restrictive way to meet NCAA goals; Receiving compensation from third party endorsements is not less restrictive alternative

**Ninth Circuit Court of Appeals (2015, September 30):** Prohibition on scholarship limits (affirmed); NIL deferred cash payments by schools to athletes, "untethered to education expenses", is not a viable alternative (reversed)

# IMPACT OF KELLER AND O'BANNON CASES

Direct cash payments from schools to college athletes would not achieve NCAA goals to protect against commercial exploitation; and preserve amateurism

Amateurism as a pro-competitive justification for a restraint requires **evidence** that maintaining amateurism (and no pay to play) increases overall consumer demand for college sports or helps to enhance the integration of athletes into the educational experience

Economic Evidence becomes central component for *O'Bannon* trial, and later cases challenging grant-in-aid rules.

Backdrop for SB 206



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# QUESTIONS & ANSWERS

Litigation Summary:  
Publicity Rights and NIL Litigation



## Follow Up

# WRAP-UP DISCUSSION

Litigation Summary:  
Publicity Rights and NIL Litigation

# ECONOMIC ISSUES



# ROLE OF ECONOMIC INJURY ARGUMENTS

## Section 1 of the Sherman Anti-trust Act

“Every contract, combination in the form of trust, or conspiracy, in restraint of trade or commerce.....is declared to be illegal.”

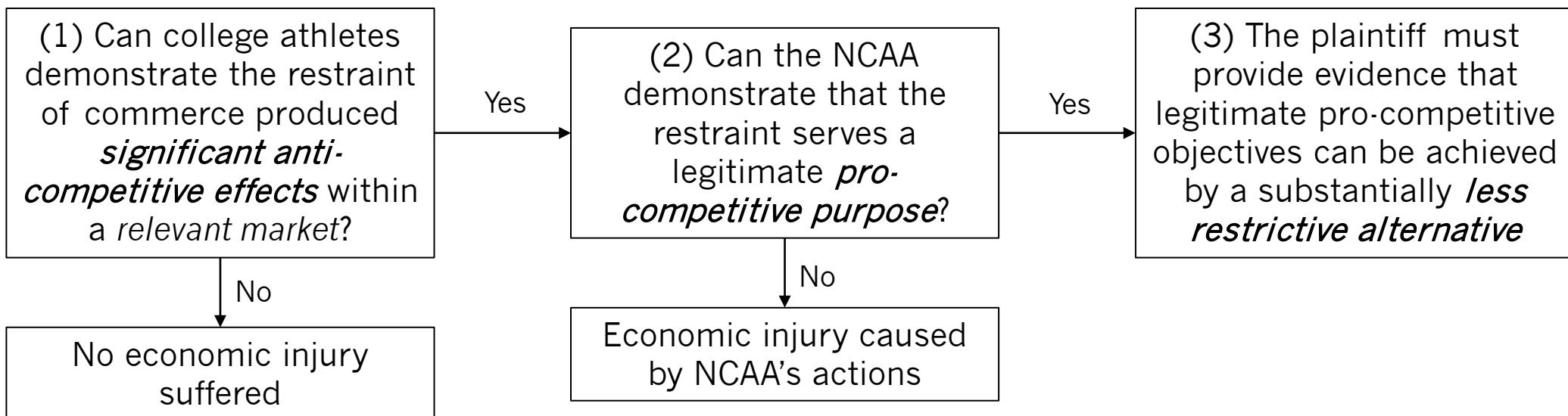
“The modern legal understanding of commerce is broad, including almost every activity from which the actor anticipates economic gain. That definition surely encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain.”

– Circuit Judge Bybee, *O'Bannon v. NCAA*

# PROVING ECONOMIC INJURY

When assessing whether the NCAA violated federal anti-trust law, the court applied the **Rule of Reason Analysis**

Enables court to balance anti- and pro-competitive effects of NCAA's NIL/compensation rules



# PRIMARY ECONOMIC TAKEAWAYS

The NCAA's compensation rules violated federal anti-trust laws and caused *economic injury* to Division I football and basketball players.

Economic evidence showed *consumer demand for college sports increased* even after the NCAA loosened restrictions on full cost of attendance scholarships.

Survey evidence presented in this litigation suggests an increase to non-cash education-related benefits to college athletes *would not negatively impact college sport consumer behavior*.

Amateurism *may provide some legitimate pro-competitive purpose for the NCAA* by allowing for a distinction between amateur and professional sports, thereby broadening consumer choice.

Limits on non-cash education-related benefits are mostly prohibited, while *limits on direct cash compensation for non-education purposes remain intact*.

# SPECTRUM OF CHALLENGES

*O'Bannon v. NCAA*    *Alston v. NCAA*    *House v. NCAA*

Court of Appeals Decision	2015	2020	Pending
Athletes Covered	Division I men's football and basketball	Division I men's football, men's and women's basketball	All Division I athletes
Rules Challenged	Publicity Rights (NIL)	Grant-in-Aid Caps	Publicity Rights (NIL)



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# QUESTIONS & ANSWERS

Economic Issues:  
Role of Economic Injury Arguments  
in NIL Litigation



## Follow Up

# WRAP-UP DISCUSSION

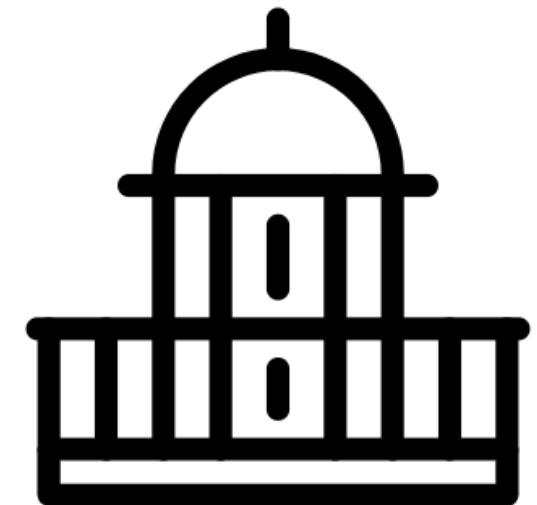
Economic Issues:  
Role of Economic Injury Arguments  
in NIL Litigation

5 min



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# LEGISLATION SUMMARY



# OVERVIEW OF STATE NIL LEGISLATION

Comparison Table

<b>State Legislation</b>	<b>Athlete Terminology</b>	<b>Educational Institutions Covered</b>	<b>Notice Requirements</b>	<b>Team Contract Conflicts &amp; Disclosures</b>	<b>Enforcement</b>
California (SB 206)	"Student" and "Student Athlete"	Institutions of higher education (IHE) (except community colleges) are any campus of University of California or the California State University, independent institution of higher education; or a private IHE	Athlete shall disclose contract to an official of the institution, to be designated by the institution	Athlete shall not enter into contract if a provision of the contract is in conflict with provision of athlete's team contract.  Institution asserting a conflict shall disclose the relevant contractual provisions that are in conflict; team contract shall not prevent athlete from using NIL for commercial purposes when the athlete is not engaged in team activities.	No Express Remedies or Enforcement Mechanisms.
Colorado	"Student Athlete"	All Public and Private Educational Institutions in Colorado	Contract must be disclosed to AD within 72 hours or before next scheduled event, whichever is earlier (UAAA)	Athlete may not enter into contract in conflict with Team Contract; IHE must disclose relevant contractual provisions of the Team Contract in instances of claimed conflict	<b>Athletes</b> may seek <b>injunctive relief</b> for violations of the Act
Florida	"Intercollegiate Athlete"	All public universities, Colleges in Florida System, and private universities receiving	Contract must be disclosed in the manner designated by the university	Athlete may not enter into contract in conflict with Team Contract; IHE must disclose relevant terms of the Team Contract in instances of	No Express Remedies or Enforcement Mechanisms. However, no athlete contract can extend beyond

See document in chat.



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# QUESTIONS & ANSWERS

Legislation Summary:  
State Comparison



## Follow Up

# WRAP-UP DISCUSSION

Legislation Summary:  
State Comparison

# MARKET ANALYSIS PROJECT



# NIL VALUE MARKET ANALYSIS

**NIL Value** = the economic value associated with an individual's publicity rights

Social media platforms provide athletes with the ability to brand themselves and, therefore, allow for effective examination of NIL value



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How Much Is NIL Worth To Student Athletes?  
BY AJ MAESTAS, JASON BELZER



Features Solutions Pricing Blog About Get Demo Contact

## NIL Earning Potential of Nebraska Volleyball

### Student-Athletes

June 18, 2020

Sam Weber

### FiveThirtyEight

Politics Sports Science Podcasts Video

Our 2020 Election

MAY 15, 2020, AT 7:00 AM

**How Much Money Could Student-Athletes Make As Social Media Influencers?**

# NIL VALUE MARKET ANALYSIS

## Overview of Methodology

Collect list of athletes participating in California Community College Athletic Association (CCCAA)

Collect social media handles (Twitter and Instagram) associated with CCCAA athletes

Apply a weighted value that estimates social media influence, based on:

- Followers
- Engagements per post
- Impressions per post

Calculate estimated NIL value of CCCAA athletes

Summarize NIL value estimates



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# QUESTIONS & ANSWERS

Market Analysis Project:  
NIL Value for California  
Community College Athletes

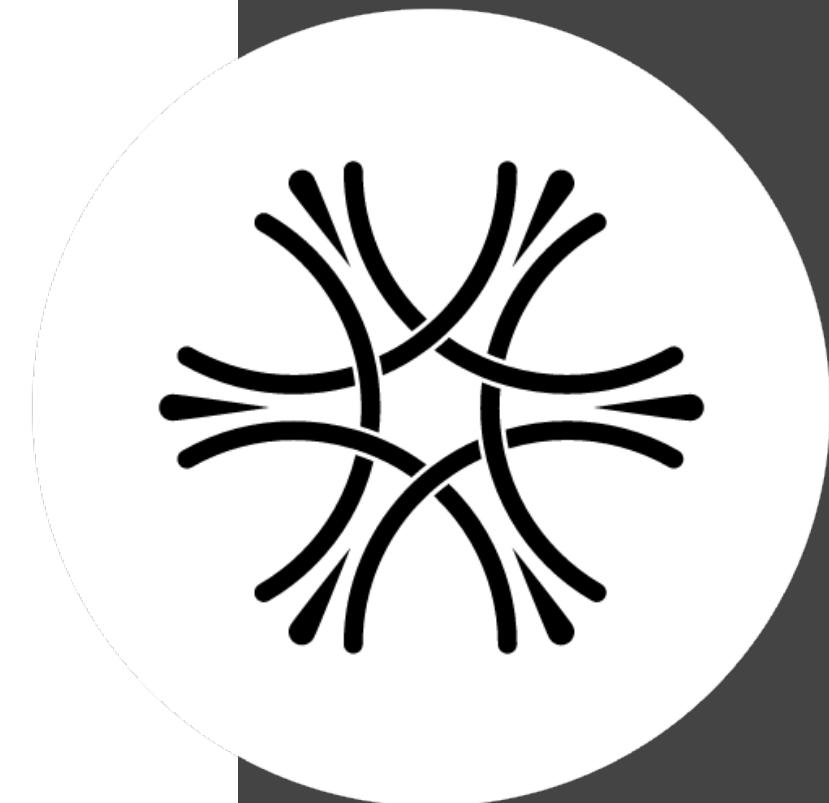


## Follow Up

# WRAP-UP DISCUSSION

Market Analysis Project:  
NIL Value for California  
Community College Athletes

# INTEGRATING THE CONVERSATION



What's one thing you're taking away from these presentations?

Brian Harper

Dr. Erika Endrijonas

Dr. LeBaron Woodyard

Gabriella Knudsen

Genaro Treo

Hayley Hodson

Jennifer Cardone

Joycie Kaliangara

Juliana Garcia

Randy Totorp

Rob Dewar

Stephen Kodur

Susan Armenta

Taylor DeBenedictis

# CONTINUING THE CONVERSATION



*Answer on Padlet, see link in chat.*