Texas Law Review Online
Volume 103 | 2025

Regulating College Sports and Collateral Estoppel

*Scott White, Sam C. Ehrlich, & Ryan Rodenberg**

Introduction

The long-awaited and long-debated settlement to the *House v. National Collegiate Athletic Ass'n*[1] antitrust litigation would stand to radically change college sports if given final approval.[2] A labor market, long restricted by the NCAA's conception of amateurism, would suddenly provide for the possibility of direct revenue sharing with college athletes to the level some might call "pay-for-play."[3]

---

* Doctoral Candidate, Florida State University, J.D., University of Tennessee College of Law; Assistant Professor of Legal Studies, Boise State University; Professor, Florida State University.

1. *In re* Collegiate Athlete NIL Litig. 545 F.Supp.3d 804 (N.D. Cal. filed June 15, 2020) (No. 20-CV-03919) [*hereinafter House v. NCAA*]. While the settlement includes three separate actions—House v. NCAA; Hubbard v. Nat'l Collegiate Athletic Ass'n, No. 23-CV-01593 (N.D. Cal. filed Apr. 4, 2023); and Carter v. Nat'l Collegiate Athletic Ass'n, No. 23-CV-06325 (N.D. Cal. filed Dec. 7, 2023)—we refer to the settlement collectively as the "*House* settlement" due to that phrasing in the popular press. *See, e.g.,* Kristi Dosh, *10 Things To Know About the NCAA's House Settlement*, FORBES (May 24, 2024), https://www.forbes.com/sites/kristidosh/2024/05/24/10-things-to-know-about-the-ncaas-house-settlement/ [https://perma.cc/22XS-WTFM].

2. The settlement was given preliminary approval on October 7, 2024 and is tentatively scheduled for a final approval hearing on April 7, 2025. Order Granting Plaintiff's Motion for Preliminary Settlement Approval as Modified, at 2, 10, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Oct. 7, 2024) (No. 20-CV-03919).

3. *See, e.g.,* Michael McCann, *NCAA Shrinks in Importance as College Sports Turns Pro*, SPORTICO (Sep. 23, 2024), https://www.sportico.com/law/analysis/2024/ncaa-house-settlement-college-sports-pro-1234798097/ [https://perma.cc/E4L2-VYWB].

But for how much the particulars of the settlement have already been debated within the popular press and emerging literature, there are still substantial questions as to the settlement's reach: namely, the extent to which it would insulate the college sports industry from antitrust litigation moving forward. While the parties believe that the *House* settlement will protect the NCAA from future legal challenges given the broad release language and injunctive classes, others are less sure.[4] Indeed, the NCAA has already tried and failed to consolidate into the *House* docket two parallel but separate antitrust cases challenging different amateurism rules. Nevertheless, the NCAA remains adamant that at least one of those cases—*Fontenot v. NCAA* —will be included within the settlement's release.[5]

In this article, we address the scope of any legal protection that would be provided to the NCAA by the *House* settlement through the lens of collateral estoppel—a broad theory that generally "precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment."[6] In doing so, we explore the potential application of collateral estoppel to both settlement parties (including opted-in class members) and

---

4. *See, e.g.,* Pete Thamel & Dan Murphy, *Why an NCAA Antitrust Settlement Will Leave Lots of Questions Unanswered*, ESPN (May 16, 2024), https://www.espn.com/college-football/story/_/id/40158775/ncaa-house-antitrust-settlement-billions-dollars-unanswered-questions [https://perma.cc/686W-XUYD]; Eric Prisbell, *After House Settlement Filing, a Deep Dive into an Unsettled State of Play*, ON3 (Jul. 30, 2024), https://www.on3.com/nil/news/after-house-v-ncaa-settlement-filing-a-deep-dive-into-an-unsettled-state-of-play/ [https://perma.cc/3RLA-BTUE].
5. Motion for Preliminary Settlement Approval at 28, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jul. 26, 2024) (No. 20-CV-03919); *see infra* note 22 and accompanying text.
6. Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 590 U.S. 405, 411 (2020) (citing Allen v. McCurry, 449 U.S. 90, 94 (1980); Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979)).

settlement nonparties (such as opted-out class members). In this regard, we discuss the overall fairness of the settlement in light of preexisting class objections[7] and the extent to which the NCAA would still need help from Congress to fully shelter itself moving forward even if the settlement is approved.

I. Overview of the *House v. NCAA* Settlement

The *House* settlement seeks to settle three separate but interrelated cases filed by the same group of plaintiffs' attorneys. The settlement's namesake, *House v. NCAA*, challenges on antitrust grounds NCAA rules forbidding athletes from using their names, images, and likenesses (NIL) for profit.[8] The *House* plaintiffs seek damages for economic injuries caused by the NCAA's blanket ban on NIL activities before July 1, 2021, and they also challenge the NCAA's prohibition on schools directly paying athletes for NIL use in game broadcasts. The later-filed *Hubbard v. NCAA* seeks damages for rules barring athletes who played prior to the Supreme Court's decision in *NCAA v. Alston*[9] from receiving $5,980 per-year academic-incentive payments called "*Alston* awards" allowed following the Court's affirmance of the district court's injunction.[10] Finally, *Carter v. NCAA* claims that the entire NCAA

7. *See infra* notes 26–30 and accompanying text.

8. *See generally* Second Consolidated Amended Class Action Complaint, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jul. 26, 2024) (No. 20-CV-03919). The plaintiffs also added a claim challenging NCAA per-sport scholarship limits in this amended complaint for settlement purposes. *Id.* at 95; *see also* House v. NCAA, 545 F.Supp.3d 804, 820 (N.D. Cal. 2021) (denying defendants' motion to dismiss).

9. 594 U.S. 69 (2021).

10. Complaint, Hubbard v. NCAA, No. 23-CV-01593 (N.D. Cal. Apr. 4, 2023).

amateurism scheme violates antitrust law by fixing compensation for athletic services at $0.[11]

Along these lines, the settlement seeks to secure legal and/or equitable relief towards each of these three claims. For monetary relief, the settlement would require the NCAA and Power Five conferences to pay a total of $2.576 billion to three classes of athletes.[12] Of this sum, $1.976 billion is earmarked for NIL damages claims, allocated proportionally across three categories: $1.815 billion for broadcast NIL, $71.5 million for videogame NIL, and $89.5 million reserved for individually-proven "Lost NIL Opportunities" claims.[13] The remaining $600 million is earmarked for payment for athletic participation, with 75 percent reserved for Power Five football players, 15 percent reserved for Power Five men's basketball players, five percent reserved for Power Five women's basketball players, and the remaining five percent reserved for all other Division I athletes.[14]

The injunctive relief portion of the settlement can be divided into three parts. First, and most notably, the NCAA and Power Five conferences agreed to allow schools to share certain categories of athletic revenue with athletes up to a cap of twenty-two percent of the average revenue of Power Five schools.[15] Second, the NCAA agreed to eliminate scholarship caps, replacing them

11. Complaint, Carter v. NCAA, No. 23-CV-06325 (N.D. Cal. Dec. 7, 2023).

12. Motion for Preliminary Settlement Approval at 8, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jul. 26, 2024) (No. 20-CV-03919).

13. *Id.* at 11.

14. *Id.* at 12–13.

15. Stipulation and Settlement Agreement (Injunctive Relief Settlement) at 9, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jul. 26, 2024) (No. 20-CV-03919). This has been estimated at $20–22 million per school for the settlement's first effective year. Pete Nakos, *House v. NCAA Long-Form Settlement Expected to be Filed Next Week*, ON3 (Jul. 18, 2024), https://www.on3.com/os/news/house-v-ncaa-long-form-settlement-revenue-sharing-expected-to-be-filed-next-week/ [https://perma.cc/N3V4-FDK8].

instead with roster limits (through which schools can offer any number of scholarships to rostered players up until the roster limit).[16] Third, the plaintiffs allowed the NCAA the right to adopt rules requiring that athlete NIL deals be for "a valid business purpose" with compensation at a fair market value for the service—or, in other words, not operate as a work-around to pay for enrollment at a particular institution.[17] All disputes as to the terms of the agreement will be handled by the court or a third-party special master appointed by the court in its stead.[18]

In return, the settlement would release (for injunctive and damages classes) all specific claims "on account of, arising out of, or resulting from any and all previously existing NCAA and conference rules regarding monies and benefits that may be provided to student-athletes by the NCAA, Division I conferences and/or Division I Member Institutions" relating to "any NCAA or conference limitations on the numbers of scholarships allowed or permitted in any sport."[19] It would also release claims

16. Stipulation and Settlement Agreement (Injunctive Relief Statement) at 18, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jul. 26, 2024) (No. 20-CV-03919); *see also* Ross Dellenger, *New College Sports Roster Limits Revealed as House Settlement Expands Scholarship Numbers*, YAHOO SPORTS (Jul. 26, 2024), https://sports.yahoo.com/new-college-sports-roster-limits-revealed-as-house-settlement-expands-scholarship-numbers-210542040.html [https://perma.cc/U26D-RL3J].

17. Stipulation and Settlement Agreement (Injunctive Relief Settlement) at 19, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jul. 26, 2024) (No. 20-CV-03919).

18. *Id.* at 21.

19. Stipulation and Settlement Agreement at 10–11, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jul. 26, 2024) (No. 20-CV-03919). Interestingly, however, plaintiffs' attorney Jeffrey Kessler told *Front Office Sports* in late-January 2025 that the roster limits—a source of major contention for many objectors—would *not* be covered by this release and thus could be the subject of future litigation. Amanda Christovich, *House v. NCAA Objections Highlight Three Major Concerns*, FRONT OFFICE SPORTS (Jan. 30, 2025), https://frontofficesports.com/house-v-ncaa-objections-highlight-three-major-concerns/ [https://perma.cc/Z8P5-8CNQ]. It seems unlikely that the NCAA

for any other subjects addressed by new NCAA and conference rules specifically allowed by the settlement (for injunctive classes only).[20] Damages claims for damages class members would only be released to those athletes who do not opt out, while injunctive claims for injunctive class members would be released by all athletes regardless of whether they opt out. For example, the plaintiffs acknowledged in their Motion for Settlement that the settlement would release the claims made in a related lawsuit, *Fontenot v. NCAA*,[21] due to its overlap with claims raised in *Carter*.[22]

---

would agree with this assessment of the scope of the settlement release.

20. *Id.*

21. No. 23-CV-03076 (D. Colo. Oct. 23, 2024).

22. Motion for Preliminary Settlement Approval at 28, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jul. 26, 2024) (No. 20-CV-03919); *see* Eric Prisbell, *Judge Rules Fontenot v. NCAA Case Will Proceed Outside of House Settlement*, ON3 (May 23, 2024), https://www.on3.com/os/news/judge-rules-fontenot-v-ncaa-case-will-proceed-outside-of-house-settlement/ [https://perma.cc/SBA5-VTXD] (comparing the claims of *Fontenot* and *Carter*). This release is understandably a primary basis for an objection to the settlement filed by the *Fontenot* plaintiffs. *See infra* notes 28–30 and accompanying text (citing further discussion of the *Fontenot* objection). However, the plaintiffs did in response to another objection file amended proposed settlement notices that indicated that claims in two other lawsuits—*Choh v. Brown University* and *Johnson v. NCAA*—would *not* be released by the settlement. Revised Long Form Notice at 5-6, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Aug. 28, 2024) (No. 20-CV-03919); *see generally* Choh v. Brown University, No. 23-CV-00305 (D. Conn. filed Oct. 10, 2024) (claiming that the Ivy League's league-wide bans on all athletic-related aid, including athletic scholarships, violate antitrust law); Johnson v. NCAA, No. 19-CV-05230 (E.D. Pa. filed Dec. 28, 2021) (claiming minimum wage and overtime violations under the Fair Labor Standards Act while arguing that Division I athletes are statutory employees of their attended schools and the NCAA jointly); *see infra* notes 23–25 and accompanying text (discussing the *Choh* objection).

Questions surrounding the preclusive effect of the *House* settlement were raised by objectors prior to the settlement's preliminary approval. The terms of the settlement would permit conferences to implement their own conference-wide limits on scholarships and roster sizes, which concerned the plaintiffs in *Choh v. Brown University*,[23] a parallel case challenging the Ivy League's scholarship restrictions. The *Choh* plaintiffs are challenging the limits of conference power, and the *House* settlement includes provisions that provide conferences with considerable leeway in how they implement roster limits.[24] The *Choh* lawsuit, along with the FLSA and employment-related claims in *Johnson v. NCAA*, were exempted from the House settlement in a revised agreement.[25] The *Choh* plaintiffs withdrew their objection when this change was made, but other objectors remained.

Another group of objectors, led by Grace Menke, a former rowing captain at Yale University, claimed the settlement inadequately represented the interests of athletes, particularly those outside of football and men's basketball.[26] They claimed the

23. 2024 WL 4465476 (D. Conn. filed Oct. 10, 2024) (No. 23-CV-00305). Judge Alvin W. Thompson granted the Ivies' motion to dismiss in October 2024, but this dismissal was appealed to the Second Circuit Court of Appeals. Choh v. Brown Univ., No. 24-2826 (2d Cir. filed Oct. 25, 2024); *see also* Appellants Choh's and Kirk's Opening Br., No. 24-2826 (2d Cir. Jan. 27, 2025).

24. Stipulation and Settlement Agreement (Injunctive Relief Settlement) at 18, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jul. 26, 2024) (No. 20-CV-03919) ("Conferences each maintain the right to unilaterally reduce the number of sports Member Institutions within their respective conferences are required to offer, the number of sports sponsored by the conference, and/or the roster limits within their conference . . . .").

25. Revised Long Form Notice at 5–6, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Aug. 28, 2024) (No. 20-CV-03919).

26. Objection to Settlement Agreement and Opposition to Motion for Preliminary Settlement Approval at 7, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Aug. 9, 2024) (No. 20-CV-03919).

settlement added legal protection to the NCAA's conduct rather than addressing the core issue:

> The complaint alleges that the NCAA maintained an illegal price-fixing cartel. Instead of remedying that violation, the Settlement simply establishes a new cartel with different terms. A remedy that merely repeats the original illegal conduct is no remedy at all. The Settlement's release is equally troubling. For four years, the parties have litigated claims based on price-fixing relating to student-athlete ***NIL rights***. But the release sweeps in ***all*** claims arising out of the NCAA and conference rules—including, among others, claims that athletes are entitled to be ***paid a fair wage*** for their labor.[27]

A third group of objectors, led by the plaintiffs in *Fontenot*, claimed that certain class members, particularly those who had claims related to broadcast revenue sharing, were not adequately represented in the settlement process.[28] They also claimed that the terms of the settlement were unfair, particularly in regard to future athletes who "have no voice . . . in [the] approval process."[29] This issue was raised by Judge Wilken in a hearing on the settlement agreement when she asked plaintiff's counsel whether a hypothetical "six year-old playing kickball on the asphalt" would be bound by the *House* settlement agreement.[30]

Such questions have stretched into objections filed in advance of the settlement's scheduled April 2025 final approval hearing, including by a heavy hitter: the United States

27. *Id.* at 1 (emphasis in original).

28. Plaintiffs in the Colorado Cases' Response in Opposition to Motion for Preliminary Approval at 5–8, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Aug. 9, 2024) (No. 20-CV-03919).

29. *Id.* at 21.

30. Michael McCann, *NCAA House Settlement Not Approved, Faces Fire in Hearing*, SPORTICO (Sep. 5, 2024), https://www.sportico.com/law/analysis/2024/ncaa-house-settlement-not-approved-1234796270/ [https://perma.cc/Q6JW-SUKP].

Department of Justice (DOJ).[31] In a statement of interest, the DOJ argued that the settlement "may not 'cure the ill effects of the illegal conduct[] and assure the public freedom from its continuance'" and instead would "allow[] the NCAA, an adjudicated monopsonist, to continue fixing the amount its member schools can pay students for the use of their [NIL]."[32] Adding to this concern, the DOJ included as an exhibit an email to DOJ attorneys from NCAA attorney Rakesh Kilaru where Kilaru took "the position that it may use the Proposed Settlement in the future as a defense to antitrust liability in a case brought by a future plaintiff seeking to achieve more fulsome protection for the free and fair market opportunities of student athletes than the Proposed Settlement affords."[33] As such, the DOJ argued that even if the court were to ultimately approve the settlement, "it should make clear that doing so is not a ruling on the legality of the Salary Cap Rule such that the approval could be used as a defense in future litigation."[34]

---

31. Statement of Interest of United States of America, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jan. 17, 2025) (No. 20-CV-03919). It must, of course, be said that this brief was filed in the last moments of the Biden administration and that the brief may not reflect the feelings of the new Trump-era DOJ. *See, e.g.*, Michael McCann, *Biden DOJ Files Last Minute Statement of Interest in House Case*, SPORTICO (Jan. 17, 2025), https://www.sportico.com/law/analysis/2025/biden-doj-ncaa-house-case-1234824481/ [https://perma.cc/X2PJ-ATFF] (arguing that "the DOJ waiting until the last full workday before president-elect Donald Trump is sworn into office will likely discount [the statement's] influence."). As of this writing, the DOJ has made no moves to rescind or otherwise contradict this filing.

32. Statement of Interest of United States of America at 2, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jan. 17, 2025) (No. 20-CV-03919) (citing United States v. Gypsum Co., 340 U.S. 76, 88 (1950)).

33. *Id.* at 10.

34. *Id*; *see also* Objections to Settlements on Behalf of Certain African American Former D1 NCAA College Athletes at 6–7, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jan. 31, 2025) (No 20-CV-03919) (echoing the DOJ's concern about the preclusive effects of the settlement).

These objectors have one thing in common: They all expressed concern about the preclusive effects a settlement in *House* could have on future litigation involving the NCAA. In the next section, we explore the doctrine of collateral estoppel and the extent to which it could preclude future litigation in college sports.

II. Collateral Estoppel and College Sports Litigation

Collateral estoppel "precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment"[35] While principles of preclusion are "designed to prevent duplicative litigation where individual issues or claims have already been adjudicated,"[36] such principles usually only attach to the parties actually involved in the prior litigation. Nonparties are generally not so bound, but the "bramble bush of collateral estoppel" is nuanced.[37]

The parameters of collateral estoppel—a term that is often used interchangeably with the phrase "issue preclusion"[38]—were explored in-depth by the Supreme Court in *Taylor v. Sturgell*,[39] a 2008 unanimous ruling written by Justice

35. Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc., 590 U.S. 405, 411 (2020) (citing Allen v. McCurry, 449 U.S. 90, 94 (1980); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979)).

36. Alexandra Bursak, *Preclusions*, 91 N.Y.U. L. REV. 1651, 1652 (2016).

37. Quinn v. Monroe County, 330 F.3d 1320, 1328 (11th Cir. 2003).

38. The Supreme Court has recognized that "[t]he preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years." Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984). The Third Circuit observed that "while it has been suggested that 'issue preclusion' has replaced the term 'collateral estoppel,' the latter term is still very much in use." Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc., 571 F.3d 299, 309 n.11 (3d Cir. 2009) (internal citations omitted).

39. 553 U.S. 580 (2008). The Seventh Circuit recently described *Taylor* as "a particularly appropriate lodestar because it is the Court's most recent thorough exploration of nonparty issue preclusion." Cannon v. Armstrong Containers, Inc., 92 F. 4th 688, 708 (7th Cir. 2024).

Ginsburg.[40] *Taylor* involved repetitive litigation by two different plaintiffs seeking the same government records from the Federal Aviation Administration under the Freedom of Information Act.[41] Professor Samuel Issacharoff described the procedural history succinctly: "Taylor sought to press the exact same claim for the same information based on the same legal theory pursued by the same lawyer in order to restore what may have been the same aircraft."[42]

In *Taylor*, the Supreme Court recognized the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party."[43] However, the Supreme Court acknowledged that there are exceptions to this general principle and observed that "[i]n this case, we consider for the first time whether there is a 'virtual representation' exception to the general rule against precluding nonparties."[44] Specifically, the Supreme Court posited that the "rule against nonparty preclusion" is subject to six categories of exceptions:[45]

> (1) nonparty agreement to be bound in a prior action; (2) nonparty control over the prior action; (3) adequate representation of the nonparty by the party to the judgment in the prior action; (4) a substantive legal relationship between the party to the judgment in the prior action and the nonparty; (5) relitigation of the prior action

40. *Taylor*, 553 U.S. at 884. Indeed, "while some courts use res judicata as a synonym for claim preclusion, others use it as a broader term that encompasses both claim and issue preclusion." Bursak, *supra* note 36, at 1657. For purposes of this article, our use of the term "collateral estoppel" is narrow and equivalent to the phrase "issue preclusion."

41. *Taylor*, 553 U.S. at 885.

42. Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 198 (2008).

43. *Taylor*, 553 U.S. at 884 (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)). The Supreme Court also recognized that "preclusion is, of course, subject to due process limitations." *Id.* at 891 (citing Richards v. Jefferson County, 517 U.S. 793, 797 (1996)).

44. *Taylor*, 553 U.S. at 884.

45. *Id.* at 893.

> through a proxy; and (6) the existence of a special statutory scheme providing for nonparty issue preclusion.[46]

Finding none of the six exceptions applicable, the Supreme Court rejected the defendant's "virtual representation" preclusion argument for several interlocking reasons, most prominently citing "the general rule that a litigant is not bound by a judgment to which she was not a party."[47] In addition, the Supreme Court found that "[a]n expansive doctrine of virtual representation . . .would 'recogniz[e], in effect, a common-law kind of class action.'"[48] Such recognition would, in turn, violate due process protections and allow courts to "create *de facto* class actions at will."[49]

The extent to which the collateral estoppel doctrine will preclude future litigation related to the *House* settlement agreement remains an open question—the answer to which impacts the future rights of both parties and nonparties to the settlement. Parties to the settlement, including opt-in members to the plaintiff's class, are generally bound by the terms of the settlement.[50] Settlements will typically include language addressing or precluding litigation of specific claims in the future, and these releases can have a wide scope.[51]

On the other hand, the Supreme Court has expressed concern about binding non-class members in "those cases where it cannot be said that the procedure adopted[] fairly insures the protection of the interests of absent parties who are to be bound

---

46. Cannon v. Armstrong Containers, Inc., 92 F.4d 688, 708 (7th Cir. 2024) (citing *Taylor*, 553 U.S. at 893–95, 898).

47. *Taylor*, 553 U.S. at 898–901.

48. *Id.* at 901 (quoting Tice v. Am. Airlines, Inc., 162 F.3d 966, 972 (7th Cir. 1998)).

49. *Id.* (quoting *Tice*, 162 F.3d at 973).

50. *See* Andrew S. Tulumello & Mark Whitburn, *Res Judicata and Collateral Estoppel Issues in Class Litigation, in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 605, 613 (Marcy Hogan Greer ed., 1st ed. 2010) ("Settling parties in class actions generally have latitude to set the scope of the settlement's release.").

51. *Id.* at 613–14 ("[C]laims can be released even if they were not pursued by the named plaintiffs at all or are asserted against parties not named as defendants in the settled action.").

by it."[52] This assessment is based on the settlement procedure,[53] and one central argument of the *House* objectors is that the settlement procedure does not adequately represent the interests of their respective groups.[54] Ultimately, the adequacy and fairness of the settlement procedure will be a key question in future antitrust litigation involving the NCAA.

III. The NCAA's Position on Collateral Estoppel

The NCAA's investment in the *House* settlement may be based upon a belief that this settlement could preclude athlete-plaintiffs from filing antitrust lawsuits in the future. The NCAA explicitly made this argument in *Brantmeier v. NCAA*.[55] In that case, tennis player Reece Brantmeier challenged the NCAA's rules prohibiting athletes from accepting prize money in non-collegiate competition.[56] In its reply to Brantmeier's complaint, the NCAA argued:

> The claims of the Plaintiff and others claimed to be members of the putative class are barred, in whole or in part, by collateral estoppel to the extent that the claims were previously adjudicated in *Nat'l Collegiate Athletic Ass'n v. Alston*, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, *Marshall v. ESPN*, *House v. Nat'l Collegiate Athletic Ass'n, Hubbard v. Nat'l Collegiate Athletic Ass'n*, *Carter v. Nat'l Collegiate Athletic Ass'n*, and/or *Fontenot v. Nat'l Collegiate Athletic Ass'n,* or to the extent they are adjudicated in any other litigation brought by Plaintiff

52. Hansberry v. Lee, 311 U.S. 32, 42 (1940).

53. *Id.* at 44.

54. *See supra* notes 23–30 and accompanying text (discussing objectors to the *House* settlement).

55. Answer to Complaint at 42–43, Brantmeier v. Nat'l Collegiate Athletic Ass'n, No. 24-CV-00238 (M.D.N.C. June 26, 2024). Indeed, the *Brantmeier* plaintiffs filed an objection to the *House* settlement, arguing that the settlement's broad and ambiguous release "may be misconstrued to encompass claims" in the *Brantmeier* litigation. Objection to Settlement *In re* Collegiate Athlete NIL Litig. at 1, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jan. 31, 2025) (No. 20-CV-03919).

56. Complaint at 2, Brantmeier v. NCAA, No. 24-CV-00238 (M.D.N.C. Mar. 18, 2024).

> and/or members of the putative class against the NCAA that reaches final judgment before a judgment is rendered in this action.[57]

The list of cases cited by the NCAA included cases that had been resolved on the merits nearly a decade earlier, such as *O'Bannon*[58] and *Marshall*,[59] but also included the parallel cases of *House*, *Hubbard*, *Carter*, and *Fontenot*, which, in the NCAA's legal theory, could be preclusive if they "[reach] final judgment before a judgment is rendered [in *Brantmeier*]."

The breadth of this argument is notable because it signals that the application of collateral estoppel will be a recurring issue in litigation involving the NCAA. The NCAA is raising this defense already, and, given the scope of the injunctive relief and class structure in the *House* settlement, it is worth analyzing the extent to which a potential settlement would preclude actions in future cases.

IV. Analysis

How will collateral estoppel apply to future litigation involving horizontal restraints between NCAA member institutions? The answer to this question will depend on the precise issue(s) being litigated, the identity of the litigants, and the role of the litigants in prior litigation.

The Supreme Court's wariness of precluding nonparties should provide some hope to plaintiff attorneys. The *Taylor* court stated a general principle that plaintiffs suing the NCAA will likely cite in the future: "a litigant is not bound by a judgement to which she was not a party,"[60] a notion the Court based on a "deep-rooted historic tradition that everyone should have his own day in court."[61]

---

57. *See* Answer to Complaint at 40, Brantmeier v. NCAA, No. 24-CV-00238 (M.D.N.C. June 26, 2024) (internal citations omitted).
58. 802 F.3d 1049 (9th Cir. 2015).
59. 668 F. App'x 155 (6th Cir. 2016).
60. Taylor v. Sturgell, 553 U.S. 880, 898 (2008).
61. *Id*. at 892–93 (quoting Richards v. Jefferson County, 517 U.S. 793, 798 (1996)).

In terms of the potential preclusive effects of a *House* settlement, future plaintiffs will likely argue that the principle precluding nonparty collateral estoppel should apply to any litigant not directly involved in the *House* settlement negotiations. On the other hand, the NCAA and other defendants could argue that the class certification process in *House* was expansive enough to preclude claims of plaintiffs who did not affirmatively opt out of the settlement class, and this argument may prevail if courts consider all members of the settlement class to be a party to the *House* settlement.[62] In some cases, such as *Fontenot*, the injunctive relief class could be construed to include plaintiffs who opted out and opposed the proposed *House* settlement agreement,[63] which creates further complications. Specifically, the court in *Fontenot* may have to assess the extent to which the injunctive relief sought by the plaintiffs overlaps with concessions made by the NCAA in the *House* settlement. This could ultimately impact the NCAA's exposure to injunctions and monetary damages.

Plaintiffs who opt out or oppose the settlement agreement will have an easier path to defending claims against collateral estoppel than those who do not. Consider the exceptions outlined in *Taylor*, particularly "(1) nonparty agreement to be bound in a prior action; (2) nonparty control over the prior action; [and] (3) adequate representation of the nonparty by the party to the judgment in the prior action."[64] Many of the objectors to the *House* settlement argue that the interests of athletes are *not* adequately

62. For a general discussion of the doctrine of collateral estoppel and class action lawsuits, see generally David Rosenberg, *Avoiding Duplicative Litigation of Similar Claims: The Superiority of Class Action vs. Collateral Estoppel vs. Standard Claims Market*, (Harv. L. Sch., Pub. L. Res. Paper No. 43, Harv. L. & Econ. Discussion Paper No. 395, Nov. 14, 2002). https://papers.ssrn.com/abstract=354100 [https://perma.cc/33F4-HR55].

63. The claims in *Fontenot*, which targets NCAA Bylaw 12, and more specifically television-revenue sharing, plausibly overlap with injunctive relief potentially included in the *House* settlement.

64. Cannon v. Armstrong Containers, Inc., 92 F.4d 688, 708 (7th Cir. 2024) (citing *Taylor*, 553 U.S. 880, 893–95).

represented by plaintiff's counsel in *House*,[65] which weighs against applying the doctrine of collateral estoppel to claims from these objectors.

There are no simple answers to questions of collateral estoppel, particularly in the context of antitrust litigation against the NCAA, where the potentially unlawful conduct spans decades,[66] impacts generations of athletes, and covers conduct ranging from television broadcast agreements[67] to restrictions on academic awards.[68] However, leaders in college athletics have recognized one potential path to near-universal claim preclusion: "the existence of a special statutory scheme providing for nonparty issue preclusion."[69] NCAA President Charlie Baker has indicated if a settlement is reached in *House*, the NCAA would pursue a statutory scheme that may preclude future antitrust claims.[70] Some have expressed skepticism about the feasibility of such a bill, particularly if that bill delegates responsibility for regulating college sports to the NCAA or another entity.[71] Aside from these concerns, a federal bill aimed at regulating college sports may preclude plaintiffs from litigating issues related to amateurism in the future under the sixth criteria in *Taylor*.

65. *See supra* notes 23-30 and accompanying text.

66. For a general discussion of the history of amateurism restraints, see Marc Edelman et. al, *The Collegiate Employee-Athlete*, 2024 ILL L. REV. 1, 5–14 (2024).

67. *See, e.g.,* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 88 (1984).

68. *See, e.g.,* NCAA v. Alston, 594 U.S. 69, 73–74 (2021).

69. *Cannon*, 92 F.4d at 708 (citing *Taylor*, 553 U.S. at 893-95, 898).

70. Dan Murphy, *College Athlete Employment Bill Moves Forward*, ESPN (June 13, 2024), https://www.espn.com/college-sports/story/_/id/40344931/house-committee-moves-college-athlete-employment-bill-forward [https://perma.cc/VM49-Z35R] (quoting NCAA President Charlie Baker: "If the court blesses [the antitrust settlement], then it puts us in a position where we can go to Congress and say one of the three branches of the federal government blessed this as a model to create compensation without triggering employment.").

71. *See, e.g.,* Sam C. Ehrlich, *The Constitutional Problems with Delegating Legislative Power to College Sports*, 98 ST. JOHN'S L. REV. 211 (2024).

Conclusion

The stakes surrounding the application of collateral estoppel in college athletics are real and significant. The NCAA is already arguing that plaintiffs' claims may be precluded by the doctrine of collateral estoppel,[72] and the preclusive effect of a potential settlement in the *House* case has been questioned by both objectors and the judge presiding over the case.[73]

These questions are indicative of a broader tension surrounding the future of college athletics. On one hand, anticompetitive conduct involving the NCAA affects a wide range of potential plaintiffs, and, in *Taylor*, the Supreme Court discussed the foundational principle that "a litigant is not bound by a judgement to which she was not a party."[74] On the other hand, a constant threat of litigation without estoppel may position courts to become the "day-to-day enforcer" of legal decrees involving the NCAA, which would likely be an ineffective and inefficient use of judicial resources.[75]

Going forward, the application of collateral estoppel in litigation involving the NCAA will depend on the issues alleged by plaintiffs and the status of the plaintiffs in regard to class

---

72. *See* Answer to Complaint at 40, Brantmeier v. Nat'l Collegiate Athletic Ass'n, No. 24-CV-00238 (M.D.N.C. June 26, 2024); Statement of Interest of United States of America at 10, House v. NCAA, 545 F.Supp.3d 804 (N.D. Cal. Jan. 17, 2025) (No. 20-CV-03919).

73. Michael McCann, *NCAA House Settlement Not Approved, Faces Fire in Hearing*, SPORTICO (Sep. 5, 2024), https://www.sportico.com/law/analysis/2024/ncaa-house-settlement-not-approved-1234796270/ [https://perma.cc/CHN4-9S28]. While the settlement was granted preliminary approval on October 7, 2024, see *supra* note 2, because Judge Claudia Wilken did not provide a written order explaining her reasoning it is impossible to say now whether her concerns have been sated by the relatively minor changes made by the parties in advance of preliminary approval or whether such issues will arise again in the face of likely new objectors in advance of the final approval hearing scheduled for April 7, 2025.

74. Taylor v. Sturgell, 553 U.S. 880, 898 (2008).

75. *See* NCAA v. Alston, 594 U.S. 69, 102–103 (2021) (rejecting the NCAA's assertion that the district court's injunction constituted micromanagement of college athletics).

membership in the *House* case. It is possible that future plaintiffs may be foreclosed from suing the NCAA for conduct addressed in the *House* case, particularly if Congress passes a statutory scheme that precludes future plaintiffs from challenging NCAA rules after the *House* settlement. Absent a statutory scheme, questions related to collateral estoppel will be considered by judges, plaintiffs, and stakeholders in college athletics for years to come.