Collegiate Athlete Compensation in the 21st Century in the United States

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Introduction

Following years of debate and advocacy about whether college athletes should receive compensation beyond tuition, room, board and books, two antitrust cases against the National Collegiate Athletic Association (NCAA) opened the door for what is now called by some the wild west of college athletics. The two cases, *O'Bannon v. NCAA*[1] and *NCAA v. Alston*[2], focused on the NCAA's limitations on compensation for athletes. *O'Bannon* opened the door for schools to supplement the athletic scholarships up to the full cost of attendance at each institution. In June, 2021, the U. S. Supreme Court in *Alston* went farther and confirmed that payments could be made to scholarship athletes of up to $5980 per year for education related performance or support.[3] Prior to that date California and Florida had enacted legislation to allow college athletes to benefit from the use of their name image and likeness (NIL), with the laws to go into effect July 1, 2021. More than two dozen states followed with similar pieces of legislation. Under pressure, the NCAA issued an interim NIL policy on June 30, 2021 that waives enforcement of the amateurism rules related to gaining benefits from NIL opportunities.[4]

This paper will assess the first year of NIL life. It will also look at two cases pending in federal district court that have the potential to further expand the compensation opportunities for college athletes. One of the cases, *House v. NCAA*, is arguing for greatly expanded rights to revenue for athletes through sharing of television revenues, among other things.[5] The other case, *Johnson v. NCAA*, seeks to have the athlete/school relationship to be defined as an employment situation under the federal Fair Labor Standards Act (FLSA).[6]

NIL

College athletes (and in some states, high school athletes) have been able to receive compensation for the use of their name, image and likeness (NIL) for nearly a year under state

[1] 802 F.3d 1049 (9th Cir. 2015), *cert. denied* 137 S. Ct. 277 (2016).
[2] 594 U.S. ___ (2021)
[3] As this is written, fewer than 30 Division I schools have made public announcements confirming they will be making the Alston payments.
[4] NIL_InterimPolicy.pdf (ncaaorg.s3.amazonaws.com)
[5] House v. NCAA, No. 4:20-cv-03919, June 15, 2020, (N.D. Cal.)
[6] Johnson v. NCAA, No. 2:19-cv-05230 (E.D. Pa.)

laws and NCAA policy. Much has been written about it since athletes got the green light and took off negotiating deals for the use of their NIL. Many have predicted the end of collegiate athletics as we know it. Many have expressed consternation and confusion over exactly what is allowed and what is not. It is, as one Power 5 athletics director described, a "beautiful mess". It is appropriate at this time to ask what do we know about NIL today? What don't we know? Where are we headed?

What do we Know?

It is safe to say that today hundreds, if not thousands, of athletes are benefiting from contractual arrangements for the use of their NIL. While there are not many details for reasons noted below, it is also safe to say that the vast majority of deals are relatively small and one time in nature. Of course, it is the large deals that are garnering the attention and causing chaos, primarily in football and men's basketball. Recruitment, both initial and transfer, appears to be significantly impacted by NIL deals. The NCAA interim policy clearly states that NIL compensation cannot be contingent upon enrollment at a specific school. But, it seems apparent that schools, collectives and individual benefactors are acting as if this prohibition is nonexistent. There have been countless reports simultaneously reporting athletes transferring and indicating the details of their newfound NIL deals at the new school. Coincidence? Maybe, but only if you believe in the Tooth Fairy and Santa. At the back end, there have been announcements of high-profile men's basketball players at Kentucky, Michigan and North Carolina who have elected to stay in school for one more year in order to improve their draft status.[7] All will likely benefit from lucrative NIL deals for the coming year.

What do these deals look like? Most involve local appearances, meet and greets, autograph signings and advertising vehicles endorsing local businesses. There a few that involve five-six figure cash payments in exchange for appearances, etc. and may even include use of a car for a set period of time. A number of athletes have put together signature apparel lines and are marketing them locally and online. (One such entrepreneur sold his apparel recently at his school's spring football game.) Athletes in individual and Olympic sports will likely benefit most from the ability to do summer clinics and private coaching.

Amidst all of the opportunities for athletes, there are some precautions and considerations that they and their advisors and parents must contemplate. One key thing for many is how to find deals. An answer to the question, at least at the Power 5 schools, seems to be through a "Collective." Simply put a Collective is a fundraising organization, which typically reaches out to boosters and business supporters of athletic programs for NIL deals for athletes. Since the first of the year, literally dozens of Collectives have been created. Some are non-profit in structure, and some are incorporated as LLCs. Athletes working with Collectives may end up signing contracts for deals with the Collective or they may be done directly with the vendor or sponsor.

[7] Conversely, a University of Miami basketball player who had declared for the NBA draft said if he did not get enough NIL money at Miami he would either enter the transfer portal or stay in the draft. This statement was issued through his NIL agent on April 29, 2022. NIL agent says Miami hoops star Isaiah Wong will enter transfer portal if NIL compensation isn't increased (espn.com) While he later backed off this position, it nonetheless represents a new aggressiveness on the part of college athletes.

In either case the athlete is advised not to sign deals that are exclusive. It is to their advantage to keep as many doors open as possible. The athlete must be aware of types of deals that are prohibited, by the NCAA, the school or a state law. The athlete must comply with the disclosure rules put in place by the school or state law. It would not be surprising to see deals contain some sort of subtle "poison pill" provision intended to discourage transfers. In the wake of several athletes encountering legal issues subsequent to entering into NIL deals, the athlete should expect that contracts will contain conduct or morals clauses. The athlete must be cognizant of the tax obligations associated with most deals. Finally, immigration laws currently make it very difficult for international athletes to enter into NIL deals. While there are a few high profile instances of international athletes striking deals, the situation seems ripe for action either by immigration officials or the White House via an executive order.

What we don't know

The answers to this question are almost too numerous to even contemplate. The question on most minds is what can be done to put some guard rails on the sector and which organization, or entity, can create and enforce them. What exactly is pay for play in the NIL world? What exactly constitutes an inducement to attend or stay at a particular school? What ultimately will boosters be allowed to do under either state laws or NCAA policies? Can the schools be directly involved in deal making for the athletes? In some states, direct participation by the school is prohibited. In others it is allowed, and, in some instances, this has produced group licensing deals and other opportunities across entire athletic programs.

While the NCAA has sent "Letters of Inquiry" to a small number of schools concerning NIL matters, it is very clear at present that the NCAA does not have the desire, intention or stomach to step in with something more definitive than its interim policy and a set of 18 FAQ's.[8] In fact, the NCAA is taking the lead, along with various AD's and coaches, in urging Congress to do something. Given the current economic challenges and the war in Ukraine, it seems unlikely that Congress has any collective interest in acting at this time.

Another unknown at this date is a realistic estimate of the number of deals in place overall and at individual schools. This is because, despite the disclosure requirements in place at most schools, estimates are that fewer than 25% of the deals have been formally disclosed to athletic compliance officials. In some cases, it is because of misguided beliefs that no disclosure means no tax liability. The rise of the Collective may operate to fix this issue as many of them are partnered with companies that provide disclosure software and processes.

Where the h#%@ are we going?

Anyone who has *the answer* to this question should be first in line to succeed Mark Emmert—and installed immediately. But, absent a clear answer, there are several factors that will continue to drive the NIL world. The Collective environment is likely to grow and create a wider range of

[8] NIL_QandA.pdf (ncaaorg.s3.amazonaws.com)

opportunities at some campuses. A burning question is how the IRS is going to view the so-called nonprofit versions.

Another question is whether states will continue to enact legislation aimed at giving the schools in their states competitive advantages over those in other states. Indeed, several states have already either repealed their NIL law (Alabama) or amended them in such a way as to provide an explicit right for the schools to become directly involved in doing NIL deals for their athletes (Tennessee and Mississippi). Schools taking such action must be very cognizant of Title IX implications with any deals facilitated.

How soon will we see wide-spread legislative or regulatory support for high school athletes' ability to enter into NIL deals? At present, there are at least a half dozen states allowing high school athletes to enter into deals, with many more state legislatures and high school athletic associations considering proposals to open the door to such opportunities.

Revenue Sharing

As we look ahead there are a few certainties. First, there is an ever growing gap between the Haves and Have Nots in collegiate sports. This is especially evident when looking at NIL opportunities. There is even a growing gap within the Power 5 as we see the SEC and Big 10 continuing to outpace the other three conferences in so many ways.

Second, it seems clear that the search for a new NCAA president, coupled with the work of the Transformation Committee, must produce guidance and guard rails for the NIL world.

And, oh, by the way, the *Alston* money is finally rolling out to sweeten the pot for scholarship athletes at more than 20 of the Power 5 schools—and, perhaps a few of the others as budgets allow.

Perhaps more ominous for the NCAA is the *House* case, filed in the summer of 2020. This is a class action antitrust suit zeroing in on the pre-2021 prohibition on benefits from use of NIL. The complaint argues that the prohibition had anticompetitive effects that far outweigh any alleged procompetitive impacts. The plaintiffs seek actual damages for all Division I collegiate athletes for the four years prior to the filing of the case to the date of any judgement entered, equal to the NIL compensation the class would have received if allowed. There is also a sub-class of athletes competing in women's basketball, men's basketball and football at Power 5 schools, who assert a claim for their share of the game telecast group licensing for the same period. The court denied the NCAA's motion to dismiss in June, 2021. The case is likely to take several years to work its way to a final resolution, absent a settlement. Query, what is the impact of the NCAA interim NIL policy on the organization's position in *House* that limits on athlete compensation are necessary to sustaining consumer demand for collegiate sports.

Collegiate Athletes as Employees

Johnson was filed in 2019 in federal district court in Pennsylvania. The plaintiffs contend that collegiate athletes should be found to be employees under the FSLA in that they put in long

hours practicing and competing. They are closely supervised and subject to "workplace" rules just like any other employees. The defendants are several Division I member institutions and the NCAA. The NCAA is alleged to be a joint employer of the athletes and thus subject to liability. The plaintiffs seek a judgement that entitles them to at least minimum wages for the hours of their practice and competition. The District Court denied NCAA's motion to dismiss, but did certify the case for interlocutory appeal to the Third Circuit. The Third Circuit accepted the case in February, 2022. There is a Ninth Circuit case that holds that athletes are not employees.[9] The court in *Johnson* noted Ninth Circuit decisions are not binding on it and that there were distinctions between the two cases. If successful, the case would place yet another burden on budgets of all NCAA member institutions and add complex considerations to the world of collegiate sports.

Conclusion

One year after the *Alston* decision and the launching of legal NIL activities collegiate sports is squarely in a chaotic state. Despite the apparent prohibition on pay for play in state laws and the NCAA interim policy, it appears that NIL is a significant piece of athlete recruitment and retention. It is both the Wild West and a "beautiful mess." More and more coaches, athletic administrators and university presidents are calling for some sort of order. One conference commissioner is even wondering out loud whether the NCAA, as a trade organization representing many schools with differing business models, can remain intact. What a new NCAA structure and vision might look like is far from clear. Perhaps the appointment of a new NCAA president and the work of the Transformation Committee will provide the answer. Neither is likely to occur fast enough.

ABOUT THE AUTHOR

Peter Goplerud is Of Counsel to Spencer Fane with a focus on sports law and higher education law. He has spent much of his career in legal education, with service as dean of four different law schools. He has also maintained a law practice presence during much of his career, handling coaching contracts, NCAA compliance matters, Title IX issues, accreditation and regulatory cases. He served for over 20 years on the board of directors of the Sports Lawyers Association and is co-author of one the leading sports law texts.

[9] Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019)