NATIONAL SPORTS LAW NEGOTIATION COMPETITION 2020

ROUND TWO

"In Name (Image, and Likeness) Only"

GENERAL FACTS FOR BOTH TEAMS

On October 29, 2019, the National Collegiate Athletic Association (NCAA) announced that it would take steps towards allowing student-athletes the opportunity to profit from their names, images, and likenesses (NILs). The NCAA made this announcement after decades of significant pressure to do so by various stakeholders and advocates in college sports. For example, in the mid-2010s, litigation against the NCAA over the uncompensated use of popular *NCAA Football* and *NCAA Basketball* video game franchises compelled the NCAA to stop licensing these games. The issue of fair compensation rights for NCAA athletes, however, has been within the public zeitgeist since before the early 2000s, when University of Colorado football player Jeremy Bloom made headlines by suing the NCAA over his inability to both play college sports and receive sponsorship deals—even though his reputation was built from a pre-college career as a professional skier and model.

For many, the NCAA's loosening of NIL restrictions is too little, too late. Indeed, the NCAA's announcement came less than one month after California passed SB 206 (the Fair Pay to Play Act), which will forbid California colleges and universities from revoking the athletic eligibility of student-athletes who receive endorsements and sponsorships while in college, even if those endorsement and sponsorships come as a result of their careers as college athletes. While the NCAA has threatened legal action against California—claiming that the new law violates the dormant commerce clause[1]—the law has since been replicated (with occasional modification) in pending legislation in several other states, including Florida, Oregon, Illinois, Minnesota, Pennsylvania, and Iowa.

[1] *See* NCAA v. Miller, 10 F. 3d 633 (9th Cir. 1993).

In addition to this state legislative action to force the NCAA to allow for NIL payments, in March 2019, U.S. Representatives Mark Walker (R-NC) and Cedric Richmond (D-La.) introduced the Student-Athlete Equity Act, a federal bill that would amend the definition of a qualified amateur sports organization in the tax code to remove the restriction on student-athletes using or being compensated for use of their NIL. This bill, if passed, would effectively force the NCAA to allow athletes to receive endorsement income relating to the sport that they play in college or be subject to significant tax penalties. Similarly, in October 2019, U.S. Representative (and former Indianapolis Colts wide receiver) Anthony Gonzalez announced that he planned to introduce similar legislation.

Other members of Congress have also threatened to seek federal legislation to force the NCAA to allow student-athletes to profit off of their NILs. Most notably, in December 2019 Senators Chris Murphy (D-Conn.) and Mitt Romney (R-Utah) formed a working group on student-athlete compensation and related issues intended to provide an informal setting for lawmakers, college sports stakeholders, athletes, and other experts to engage on potential NIL-related federal legislation. This working group also includes Senators Marco Rubio (R-FL), David Perdue (R-GA), and Cory Booker (D-NJ).

While these federal bills have yet to pass the committee stage, in February 2020, discussions about them came to a head when the Senate Commerce Subcommittee on Manufacturing, Trade, and Consumer Protection held a hearing to address the NCAA's inaction on NIL compensation legalization. At this hearing, NCAA president Mark Emmert was pressed by senators on both sides of the aisle as to why the NCAA has taken so long to allow student-athletes the ability to share in the exploding revenues of college sports. Emmert firmly stated that the NCAA was pursuing quick and decisive action. He also asked Congress to block the threat of a patchwork of state legislation through preemptive federal legislation.

The NCAA has much to fear from federal legislation, but also much to gain. On one hand, federal legislation would take away the NCAA's control over the NIL-payment issue and its ability to deliberatively craft policy that serves the NCAA's interests and those of its member schools. On the other hand, the NCAA would benefit if federal legislation preempted the ever-growing labyrinth of proposed differing state laws. Moreover, the NCAA could use federal legislation to attain something that has been a long-sought-after goal for Emmert: an exemption from the antitrust laws.

The NCAA's desire for an antitrust exemption has been an open but obvious secret for many years. In recent years, it has become a top lobbying priority thanks in large part to devastating antitrust litigation losses in the Ninth Circuit Court of Appeals and associated district courts. While the NCAA is no stranger to being forced into action by litigation—rule changes on agent representation and transfer bylaws came to fruition suspiciously close in time to *Oliver v. NCAA* and *Agnew v. NCAA*—the NCAA suffered perhaps its greatest court defeat in 2015 when the Ninth Circuit in *O'Bannon v. NCAA* ruled on antitrust challenges to the rules restricting an athlete's ability to profit from his NIL.

In *O'Bannon*, the Ninth Circuit rejected the NCAA's argument that its rules comported with Justice Stevens's plea in *NCAA v. Board of Regents* for courts to give "ample latitude" to the NCAA's amateurism operations[2] and found that its limits on student-athlete compensation violated the Sherman Antitrust Act. Although the Ninth Circuit struck down the district court's injunction that would have forced the NCAA to allow schools to pay student-athletes a stipend of up to $5,000 per year, the Circuit court decision nonetheless forced the NCAA to permit more athlete compensation. And in March 2019, Judge Claudia Wilken of the Northern District of California found in *In re NCAA Grant-in-Aid Antitrust Litigation* (*Alston v. NCAA*) that the NCAA's rule changes following *O'Bannon* were insufficient to meet its burden. The court then enjoined the NCAA from enforcing *any* limits on compensation that is "related to education"[3]—an injunction that the NCAA criticized as overbroad, indefinable, and impossible to enforce. That decision is currently under appeal at the Ninth Circuit, with oral arguments scheduled for March 9, 2020.

With these goals in mind, the NCAA reached out to staffers for Senators Romney and Murphy, engaging with the working group on potential federal legislation governing student-athlete compensation. While Senators Romney and Murphy are unable to meet with the NCAA directly at this time, they have agreed to send representatives to meet with the NCAA to form the outline of this potential federal legislation, which, if agreed upon by the two sides, will be shared

[2] *See* NCAA v. Board of Regents, 468 U.S. 85, 117, 120A (1984).
[3] Permanent Injunction at 1, In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation, 375 F.Supp.3d 1058 (N.D. Cal. Mar. 8, 2019) (No. 14-md-02541), ECF No. 1163. *See also* Alexis Mansanarez, *Federal Judge Ends NCAA Cap on Athlete Compensation 'Related to Education,' But Leaves Other Limits Unchanged*, SPORTING NEWS (Mar. 8, 2019), https://www.sportingnews.com/us/ncaa-football/news/federal-judge-ends-ncaa-cap-on-athlete-compensation-related-to-education-but-leaves-other-limits-unchanged/icflsw3g11fx1jr2prse0mzso.

with both the working group and the NCAA Board of Governors for review and ratification. In this regard, both the NCAA and Senators Romney and Murphy have authorized their representatives to craft mutually beneficial legislation that will advance each side's interests.

CONFIDENTIAL FACTS FOR THE NCAA

The NCAA is not used to not being in control. While the NCAA's amateurism rules have been under attack for some time now, the battlefield has been in an arena that the NCAA feels that it can control: the courtroom. Legislators—both members of Congress and especially state legislators—are substantially more unpredictable and more difficult for the NCAA to control, especially as the swing of public opinion has gone against the NCAA's governance over intercollegiate amateur sports. In the opinion of Mark Emmert and other high-profile members of the NCAA governance apparatus, the use by state and federal legislators of the NCAA as a punching bag to score political points and distract from other issues is tremendously unfair and substantially detracts from the NCAA's core educational mission. But it is nonetheless the reality that the Association now faces.

The NCAA is certainly willing to allow student-athletes more freedom in profiting off of their NIL, but it wants to maintain competitive balance among its sports and divisions. If athletes can profit off their NILs without restriction, the NCAA fears that the "haves" in college sports would completely overrun the "have-nots"; the lower-revenue schools would never be able to compete with the cream of the crop for the best players on the recruiting market. The income-generating power of the major schools would pose too much of an incentive for athletes to attend those schools. While this aspect of competitive balance is already strongly in favor of the top schools and top conferences, the NCAA fears that allowing full and unrestricted NIL rights will make things substantially worse.

Moreover, the NCAA wants to ensure that college sports are still *amateur*. The NCAA freely acknowledges that the meaning of amateur has changed over time. But it still means that student-athletes are not paid cash money to play. As such, the NCAA has three main goals in any NIL legislation—whether it be internal NCAA legislation, state legislation, or legislation by Congress.

First and foremost, the NCAA wants to ensure that if student-athletes are profiting off of their NILs, they are not profiting off of their athletic performance as gained through their prominence as student-athletes and instead are mainly profiting off of individual skill, reputation, or prior-existing endorsement relationships. To ensure that this fundamental goal is met, the

NCAA wants to require student-athletes to submit all NIL-related contracts to the NCAA for approval. The NCAA sees three categories of potential NIL deals:

1. Student-athlete work product, that would be based on non-athletic-related skills and accomplishments like writing a book or being part of a family business;
2. Individual licensing, that would involve student-athletes individually selling their athletic prominence; and,
3. Group licensing, that would involve deals with the university itself, or the NCAA as a whole.

The NCAA has no issue with allowing the first category, but the second and third categories are problematic. In particular, the NCAA worries that group licensing would transform student-athletes into paid employees of their institutions. If the NCAA is going to allow individual and group licensing, it wants schools and the NCAA to act as a regulator of those deals, not as brokers. The NCAA is concerned that if the schools are too closely aligned with these deals—especially if they are directly involved with providing cash compensation to their student-athletes for athletic-related sponsorships and endorsements—a court may see them as employing their student-athletes. This would run the risk of opening college athletics to a litany of federal and state employment statutes.

As a second goal, the NCAA wants to institute a yearly cap on the amount that each student-athlete can receive through NIL deals. The NCAA wants to ensure that the primary focus for student-athletes is education, not engaging in endorsement deals and making a job out of their participation in college sports. The current plan being considered by the NCAA governors would cap yearly NIL earnings at $15,000 per student-athlete. But if Congress objects to that limit (which the NCAA would admit is fairly low), the Board of Governors will go up to $30,000 per year per student-athlete. A best-case scenario would allow for the NCAA to accept up to $50,000 per student-athletes participating in the so-called ‘revenue sports’ (football and basketball) while keeping caps lower for the more “pure” non-revenue sports. Such a structure, the NCAA recognizes, could violate Title IX. As such, unless Congress is prepared to write in an exemption to Title IX for NIL payments, the NCAA is unwilling to accept higher payments for revenue-sports athletes.

Finally, the NCAA would strongly prefer NIL legislation that requires student-athletes to wait until after they have exhausted their NCAA eligibility (either through graduation, entering a professional draft, or dropping out) to collect any and all NIL payments. After all, college sports are *amateur* sports, and it makes sense for student-athletes to not be able to profit off of their athletic performance while they are in college, and the NCAA is greatly concerned about the on-campus division between student-athletes and the rest of the student body that would result from student-athletes receiving sponsorship funds while in college. The NCAA can ensure Congress that student-athlete earnings will be held in an interest-earning trust fund that no one could touch except the student-athletes themselves. If necessary, the NCAA will even permit the student-athletes (rather than the school) to collect on that interest themselves, though this allowance should be avoided if possible since such an understanding would violate the tenants of amateurism. While the NCAA understands that Congress may be opposed to such an arrangement, this is a high priority for the NCAA in order to preserve amateurism in college sports.

While those three goals are of the NCAA's primary concern, it also wants to retain flexibility moving forward. It does not want federal legislation to lock it into any particular rules moving forward. Under ideal circumstances, the NCAA would be given relatively free reign to regulate NIL payments within general Congressional guidelines; the more power the federal bill gives to the NCAA to create its own rules, the better. If given this freedom, the NCAA can guarantee that it can draft, pass, and promulgate new policy by the start of the 2023 school year. An inability to come to terms on federal legislation may delay that start date further, as the NCAA will have to battle and deal with various state laws, each with differing requirements.

If the NCAA is going to allow NIL payments, it needs to ensure that any action it takes to regulate those payments will be free from antitrust attack. For the past thirty-five years, the NCAA has very much enjoyed the benefits of the Supreme Court's decision in *NCAA v. Board of Regents*. While the Court's actual decision striking down the NCAA's restriction on the proliferation of television agreements was a major loss for the NCAA's ability to control its member institutions and control the spread of money into college sports, the added language by

Justice John Paul Stevens granting "ample latitude" to the NCAA to maintain amateurism in college sports[4] has led to many favorable decisions.

Recently, however, that protection has crumbled significantly. Losses by the NCAA—particularly at the Ninth Circuit—have called into question the extent of the latitude that Justice Stevens deemed necessary in *Board of Regents*. NCAA leadership is tremendously concerned about the potential effects of the pending *Alston v. NCAA* case now on appeal to the Ninth Circuit; if the far-too-broad (in the NCAA's opinion) injunction issued by Judge Claudia Wilken at the district court is upheld or even expanded, the result would be chaos among NCAA institutions as they attempted to differentiate benefits "related to education" from the benefits that Judge Wilken deemed as still controllable by the NCAA. Further, the presence of the California bill within the Ninth Circuit's jurisdiction concerns NCAA leadership; while the NCAA legal team is confident that the bill is unconstitutional under the dormant commerce clause, they would be much more comfortable if the lawsuit was going to be heard in a friendly circuit more historically receptive to the NCAA's goals and interests.

Uncertainty about how the Ninth Circuit will rule is the main factor driving the NCAA to the table. The NCAA is confident that it can secure the votes to defeat Representative Walker and Richmond's overbroad bill in its current form and defeat the individual state bills on interstate commerce grounds.[5] But the NCAA sees appropriate federal legislation as an opportunity to end the legal battles over amateurism once and for all. California's new law and its copycats in other states have the potential of wreaking havoc on the NCAA's mission in large part due to the Ninth Circuit's decision in *O'Bannon*, and the NCAA needs to find a way to cut off that portended chaos before it comes to fruition.

In *O'Bannon*, the Ninth Circuit wrote that "[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap" but "[o]nce that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point."[6] The NCAA's legal team feels that language—written to justify overturning the district court's inanely instituted $5,000 per year stipend—could be interpreted as something of a line in the sand, where as soon as college

[4] *See* NCAA v. Board of Regents, 468 U.S. 85, 120A (1984).
[5] *See, e.g.,* NCAA v. Miller, 10 F. 3d 633 (9th Cir. 1993).
[6] *See* O'Bannon v. NCAA, 802 F. 3d 1049, 1078 (9th Cir. 2015).

athletes are compensated for their athletic performance beyond education-related benefits the Ninth Circuit will strike down amateurism altogether under antitrust law. Allowing individual and group licensing—as California's bill would—may do just that. While nothing is certain—the *O'Bannon* decision still gave significant deference to the NCAA to retain amateurism—the risk that the Ninth Circuit will go rogue (and the Supreme Court will refuse to overturn it) motivates the NCAA to get a deal done with Congress.

The NCAA still feels (as other circuits have held) that amateurism restrictions—which are implemented to take money *out* of college sports—are non-commercial in nature and therefore beyond the scope of the Sherman Act. The Ninth Circuit's ruling in *O'Bannon*—especially if *Alston* is affirmed—could easily spread throughout the country As such, the NCAA feels that Congress taking action to require the NCAA to allow NIL payments—as unwelcome a prospect as it may be—may be the best opportunity for the NCAA to get away from the mess that has become their prospects in the antitrust courts. So long as the new law exempts the NCAA from Sherman Act liability for its activities protecting amateurism and competitive balance in college sports, the NCAA would consider it to be a major win.

The NCAA would prefer as broad of an exemption from the antitrust laws as possible. The Big-4 professional sports have one for television contracts (through the Sports Broadcasting Act), and Major League Baseball has had an even broader exemption since the early 1900s. But the NCAA would accept any exemption that protects its decisions on eligibility rules—a category that should explicitly include the allocation and administration of athletic scholarships, player compensation (including NILs), and the "year-in-residence" transfer rule—such freedom would allow the NCAA to retain amateurism in college sports and permit only the changes it sees as necessary moving forward.

CONFIDENTIAL FACTS FOR SENATORS ROMNEY AND MURPHY

In the view of many members of Congress, the idea that NCAA sports are *amateur* has become something of a bad joke. At the point in time that negotiations between Congressional representatives and the NCAA is set to take place, the NCAA will be in the midst of the annual NCAA men's basketball tournament that involves a 22-year, $19.6 billion contract between the NCAA and broadcasters CBS and Turner Sports. Furthermore, college coaches are too often the highest-paid officials in their respective states, earning millions of dollars per year largely buoyed by the taxpayers. To most members of Congress, it appears that the only thing *amateur* about college sports is how the players are treated.

In this regard, the bill offered last March by Representatives Mark Walker (R-NC) and Cedric Richmond (D-La.) is bipartisan, with broad approval across House coalitions. The bill has support from both free-market advocates like Representative Walker and Senator Romney, who feel that denying college athletes the ability to sell themselves to advertisers is an affront to the ideals of the American capitalist system, and athlete fairness advocates like Representative Richmond and Senator Murphy, who feel that the NCAA has too-long been able to profit off the backs of the young men and women who play college sports.

Getting a bill to become law remains difficult—especially in today's political climate—and the existing bills have gained little traction. Given that lack of movement, Senators Romney and Murphy decided to form a bipartisan working group to take more deliberate and comprehensive action, with the aim of proposing federal legislation on the issue within the next few months. With this in mind, Senators Romney and Murphy were pleased—and also suspicious—when the NCAA reached out to them to discuss a potential bill.

At the moment, Senators Romney and Murphy remain optimistic that their working group will lead to meaningful legislative activity. But they understand that other members of Congress want the NCAA to sign off on a bill before moving it forward. Many members of Congress—and, more importantly, their constituents—love major college sports. Congressional members are thus fearful of angering the NCAA and potentially causing issues for schools within their constituencies. If the NCAA is involved and supportive of the legislation, however,

Senators Romney and Murphy feel that they can pass a bill that meaningfully reforms college sports.

Based on the NCAA's public statements on the NIL issue, Senators Romney and Murphy know that the NCAA wants to pass NIL legislation "in a manner consistent with the collegiate model," whatever that means. Based on their research and interviews with various stakeholders, Senators Romney and Murphy are aware that the NCAA sees NIL deals as within three categories, each with their own challenges:

1. Student-athlete work product, that would be based on non-athletic-related skills and accomplishments like writing a book or being part of a family business;
2. Individual licensing, that would involve student-athletes individually selling their athletic prominence; and,
3. Group licensing, that would involve deals with the college or university itself, or the NCAA as a whole.

Senators Romney and Murphy—based on their interests in unlocking free market rights for college athletes—are much more concerned with the first two categories than the third category. Both senators feel strongly that college athletes should have the freedom to come to deals on their own without NCAA interference. But the senators are concerned that direct payment from schools in the form of group licensing deals will ultimately be the death of amateurism in college sports. Legislation that forces group licensing may be difficult to pass, even on the slim chance that the NCAA would support it.

Above all, Senators Romney and Murphy are concerned about giving the NCAA too much freedom in passing their own NIL legislation for reasons based both on timing and substance. While Senators Romney and Murphy have little interest in writing a bill that sets forth point-by-point the mechanics of a new NIL enforcement system, they want the NCAA to promise that it will take prompt meaningful action without trying to stall for additional time under the current system. As such, Senators Romney and Murphy will only agree to put forth a bill that gives the NCAA freedom to come up with its own regulations if the NCAA commits to a deadline of the start of the 2023 school year.

Additionally, Senators Romney and Murphy are concerned that the NCAA will work to restrict student-athlete freedoms in order to keep "consistent with the collegiate model." A

rumor is circulating that the NCAA is looking to both cap the amount of NIL money that each student-athlete can receive per year and force athletes to wait until after graduation to receive their NIL money. Senators Romney and Murphy are united in their belief that amateur sports should stay amateur. But they feel that it is hypocritical of the NCAA to cap outside payments made to college athletes citing *amateurism* while the universities receive billions in television revenue and allow coaches to take endorsement deals without restrictions.

If the NCAA is willing to allow NIL payments within the individual licensing category, Senators Romney and Murphy will forgive a cap on NIL payments, so long as that cap is no less than $25,000 per year per athlete. Preferably, Senators Romney and Murphy would like to see athletes in revenue sports (football and basketball) receive a higher cap, given that they are bringing in much more revenue to their schools. Senators Romney and Murphy are aware of arguments that such an arrangement could violate Title IX. While they think those concerns are overblown, they understand if the NCAA and their member schools would rather not take that risk. An amendment to Title IX to quell these concerns would be extremely unlikely and risk inflaming various currently-uninvolved coalitions and advocacy groups. The Senators would thus not agree to it.

Senators Romney and Murphy are completely unwilling to entertain an NCAA restriction that would require athletes to wait until after they graduate to receive their NIL payments. Such a restriction ignores societal issues involved with college athlete graduation and would find little support among members of Congress. A broader restriction that allows athletes to collect their money whenever they voluntarily give up their NCAA eligibility would be more satiable but is still problematic. Such terms would incentivize dropping out of college and require athletes to place their trust in the hands of the NCAA and/or their schools to ethically hold onto their money until it is time for them to collect it. Furthermore, given the labyrinth of NCAA restrictions that exists on basically all other issues, Senators Romney and Murphy do not want to see what restrictions the NCAA would conjure up if they agree to broadly allow it to limit NIL payments. For example, the Senators are concerned that the NCAA and member schools would use trust funds containing student-athlete NIL money as an additional way to profit off of these student-athletes by forbidding student-athletes from collecting on the interest earned and instead collect those interest payments themselves. Such an arrangement, even in the interest of amateurism, would be unconscionable.

The NCAA's willingness to engage on the NIL issue at the negotiating table is a good sign for the passage of a bill, as Representatives Walker, Richmond, and Gonzalez feel that with the NCAA's support, a bill would absolutely pass. Indeed, the NCAA has much to gain in having Congress pass a nationwide, preemptive bill that cuts off state measures at their source (and avoids costly and unpredictable dormant commerce clause challenges by the NCAA[7]), and Senators Romney and Murphy feel that they can use that to provide meaningful change for college athletes.

Senators Romney and Murphy know that an antitrust exemption is a top priority for the NCAA, mostly because all of the actions that they wish to take—namely the per-year caps on NIL payments and the requirement that athletes must wait until after graduation to receive the money—could certainly be seen as clear violations of antitrust law, especially within the Ninth Circuit, which has been historically unfriendly to the NCAA. While most courts—led by the Supreme Court's call for "ample latitude" to be given to the NCAA in maintaining amateurism in college sports in *Board of Regents*[8]—have deferred to the NCAA, the Ninth Circuit has recently threatened to change all of that, starting with 2015's *O'Bannon v. NCAA* and potentially continuing with the ongoing *Alston v. NCAA*.

In *O'Bannon*, the Ninth Circuit wrote that "[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap" but "[o]nce that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point."[9] Senators Romney and Murphy have heard arguments that this language could be interpreted as something of a line in the sand, where as soon as college athletes are compensated for their athletic performance beyond education-related benefits, the Ninth Circuit would strike down amateurism altogether under the antitrust laws. If the NCAA is concerned that allowing NIL payments to college athletes—either through federal, state, or NCAA-level legislation—would cross that "line," they will likely seek to absolve themselves of the risk of Ninth Circuit blowback by stalling as long as possible or restricting NIL payments as much as possible.

[7] *See, e.g.,* NCAA v. Miller, 10 F. 3d 633 (9th Cir. 1993).
[8] *See* 468 U.S. 85, 120A (1984).
[9] *See* O'Bannon v. NCAA, 802 F. 3d 1049, 1078 (9th Cir. 2015).

As such, Senators Romney and Murphy are willing to grant the NCAA a partial antitrust exemption as part of the deal. The Senators also know that granting the NCAA—a deeply unpopular institution—such special treatment would risk angering constituents, and as such it may be difficult to get members of Congress on board with a bill that exempts the NCAA from antitrust for all or most of its activity. Such an exemption must be limited only to the preservation of amateurism while subjecting the NCAA to antitrust regulation for all of its other business dealings. As such, the exemption can, if necessary, exempt the NCAA from antitrust scrutiny for all compensation limits (with the NIL restrictions discussed above as firm minimums), the "year-in-residence" transfer rules, and any similar athlete eligibility rules related to amateurism and the protection of competitive balance in college sports. The Senators want to be clear, however, that they are strongly opposed to granting the NCAA a blanket exemption that includes all other NCAA business activity.