



# The State of the NCAA's Name, Image, and Likeness Rules in Colorado

BY TIM SHANNON

In early 2014, the University of Oklahoma ordered three members of its football team to make a financial contribution to a charity of their choosing as punishment for violating the National Intercollegiate Athletic Association's (NCAA) amateurism rules. The punishment stemmed from the players' acceptance of an improper benefit at a graduation celebration—a free bowl of pasta—that threatened their amateur status and eligibility to compete at the NCAA level. To ensure that accepting free pasta would not render the players ineligible for the upcoming football season, the University of Oklahoma required each to make

a charitable contribution to offset the value of the pasta, or \$3.83.<sup>1</sup>

The infamous story of the illicit pasta is just one example of how the NCAA operated before the dawn of the name, image, and likeness (NIL) era. Student-athletes were prohibited from receiving anything of value in recognition of their notoriety as athletes, and the NCAA scrupulously enforced its rules and amateurism model. Even the smallest infraction could jeopardize an athlete's eligibility.

The NCAA's decades-old practice of strictly enforcing its amateurism model was flipped on its head when the NCAA officially adopted its

interim NIL rules on July 1, 2021.<sup>2</sup> Based on these rules, and less than a decade after the Oklahoma pasta incident, NCAA student-athletes have cashed in handsomely on the use of their NILs. For example, Louisiana State University gymnast Livvy Dunne and former Alabama quarterback Bryce Young<sup>3</sup> have each reportedly earned more than \$1 million through NIL endorsements.<sup>4</sup>

As the NIL economy continues to grow in both size and scope, so do opportunities for Colorado attorneys. Individual athletes, NIL "collectives," collegiate institutions, and businesses hoping to expand their marketing reach need guidance from attorneys who specialize in antitrust, employment, business, tax, NCAA compliance, and intellectual property law to successfully navigate the NIL marketplace. This article provides an overview of the history and current state of the NIL rules in the hopes of encouraging Colorado attorneys, including those who have never worked with athletes, to get involved in this exciting new space.

## Development of the NCAA's NIL Rules

In less than a decade, the NCAA evolved from an organization that punished those who took \$3.83 worth of free pasta into an organization that allows student-athletes to make millions of dollars from the use of their NILs. However, this massive shift was not driven by the NCAA. Instead, the organization was compelled to make a series of ever-growing concessions to student-athletes in response to public criticism of its strict amateurism model and subsequent litigation questioning the fairness of that model.

## Public Outcry Expands Student-Athlete Benefits

The NCAA's strict amateurism model first began to erode after "pasta-gate" came to light in early 2014. In the midst of widespread backlash against the NCAA over the ridiculousness of forcing college students to offset the value of pasta worth \$3.83, in April of 2014, Shabazz Napier, a basketball star from the University of Connecticut, made headlines when he said that he sometimes went to bed hungry because he could not afford to pay for food.<sup>5</sup> In an attempt to quell the public outcry generated by these

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two incidents, the NCAA, an organization that reported total revenues of just under \$1 billion and an annual budget surplus of \$80.5 million in 2014,<sup>6</sup> amended its bylaws to allow student-athletes to receive unlimited meals and snacks from their respective schools.<sup>7</sup>

While providing student-athletes who generate \$1 billion worth of revenue with access to adequate nutrition should seemingly be a minimum requirement rather than a fringe benefit, at the time, this rule change was seen as a significant concession from the NCAA. As the NCAA's harsh rules and strict model of amateurism continued to be publicly scrutinized, the organization faced rising pressure to further increase benefits for student-athletes. Once the NCAA began to capitulate in response to mounting public pressure, it became clear that a new, athlete-centric era of intercollegiate athletics was underway.

### ***O'Bannon v. NCAA Recognizes Student-Athlete NIL Rights***

While the NCAA was expanding benefits for student-athletes in response to rising public pressure, it was simultaneously facing legal challenges to its strict amateurism model in the courtroom. One of the most notable cases during this period was *O'Bannon v. NCAA*,<sup>8</sup> an antitrust class action lawsuit brought by former college football and men's basketball players against the NCAA after the NCAA entered into a licensing agreement with video game maker EA Sports. As part of its licensing agreement with the NCAA, EA Sports produced basketball and football video games featuring avatars that strongly resembled real student-athletes, complete with accurate uniforms and numbers.

Upon review of the NCAA's actions that culminated in the EA Sports licensing agreement, the *O'Bannon* court held that the NCAA restrained trade and violated the Sherman Act by illegally controlling the market for the student-athletes' NILs. According to the court, prohibiting student-athletes from profiting from their own NILs while simultaneously benefiting from such prohibition by negotiating a competition-free licensing agreement with EA Sports amounted to anticompetitive behavior by the NCAA. By recognizing that student-athletes have

rights to their NILs, that there is an economic market for those rights, and that the NCAA is subject to the Sherman Act when restricting those rights, the *O'Bannon* decision laid the groundwork for the current NIL landscape. Even so, in the wake of *O'Bannon*, the NCAA opted to end its agreement with EA Sports rather than allowing current student-athletes to be paid for the use of their NILs in video games.<sup>9</sup>

### ***California Forces the Issue***

The next major blow to the NCAA's strict amateurism model came from the California legislature. Emboldened by the *O'Bannon* decision, California Governor Gavin Newsom signed the Fair Pay to Play Act into law on September 30, 2019, with an effective date of January 1, 2023.<sup>10</sup> Among other key provisions, the act prohibits "California postsecondary educational institutions" from "preventing a student participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness."<sup>11</sup> Further, the act establishes that any "group or organization with authority over intercollegiate athletics" is prohibited from preventing a California postsecondary educational institution "from participating in intercollegiate athletics as a result of the compensation of a student athlete for the use of the student's" NIL.

In other words, the Fair Pay to Play Act directly contradicted the NCAA's strict amateurism rules and gave California intercollegiate student-athletes the right to profit from the use of their NILs without fear of retribution from the NCAA. Predictably, panic ensued. Schools across the country feared that they would be unable to compete when recruiting top athletes, as most student-athletes would go to California schools to take advantage of the state's new NIL law. In turn, the NCAA worried that other states would pass similar laws to remain competitive and the strict amateurism model that it had relied upon for decades would be lost.

### ***The Landmark NCAA v. Alston Opinion***

In short order, the concerns generated by the Fair Pay to Play Act became moot, as the current NIL era was officially ushered in by the Supreme Court's 2021 decision in *NCAA v. Alston*.<sup>12</sup> On its

face, *Alston* was another class action antitrust lawsuit brought by student-athletes against the NCAA, this time challenging NCAA rules that placed limits on educational benefits available to student-athletes. In the unanimous opinion, the Supreme Court held that NCAA member institutions must be allowed to offer enhanced education-related benefits to student-athletes, such as laptops, tutoring, and internships, without affecting the student-athletes' athletic eligibility. The holding was explicitly limited to education-related benefits and did not impact any of the NCAA's other "compensation restrictions," including the rules that prohibited student-athletes from profiting from their NILs.<sup>13</sup>

While the majority opinion in *Alston* solidified a limited win for student-athletes, it was the concurring opinion by Justice Kavanaugh that sent shock waves through the NCAA and led to the rapid adoption of the NCAA's interim NIL rules. In that opinion, Justice Kavanaugh began by declaring that the "NCAA's business model," which relies on free labor from student-athletes to generate billions of dollars of revenue, "would be flatly illegal in almost any other industry in America."<sup>14</sup> From there, Justice Kavanaugh commented that, under the NCAA's current rules, "enormous sums of money flow to seemingly everyone except the student athletes," a fact that he attributed to "the NCAA and its member colleges . . . suppressing the pay of student athletes."<sup>15</sup> Next, after acknowledging the importance of college sports in America's history and culture, Justice Kavanaugh argued that "traditions alone cannot justify" the NCAA's longtime practice of generating huge revenues "on the backs of student athletes who are not fairly compensated." Justice Kavanaugh ended the opinion by flatly stating that the "NCAA is not above the law."<sup>16</sup>

Although the *Alston* decision was technically a limited victory for student-athletes on the narrow issue of education-related benefits, Justice Kavanaugh's concurring opinion left little doubt about the likely result of any future litigation challenging the NCAA's strict amateurism model. Accordingly, just days after the *Alston* opinion was handed down, the NCAA adopted its current interim NIL policy, which allows student-athletes to profit from the use

of their NILs without jeopardizing their athletic eligibility.<sup>17</sup>

### The Dawn of the NIL Era: A Patchwork of NCAA Rules and State Laws

The interim NIL rules went into effect on July 1, 2021, and since that time, the NCAA has issued additional guidance in an attempt to clarify its rules. Nevertheless, the NCAA has yet to issue a final, more robust set of NIL rules. Instead, fearing additional litigation, the NCAA has largely deferred to the various states to issue more detailed NIL rules while simultaneously working “with Congress to adopt federal legislation” in the hopes of creating a uniform set of NIL rules for all member institutions across the country.<sup>18</sup> Until those rules become a reality, Colorado attorneys working within the NIL marketplace will need to familiarize themselves with the NCAA’s interim NIL rules, its additional guidance, and Colorado’s NIL statute.

#### The NCAA’s Interim NIL Rules

This new era of intercollegiate athletics began with the NCAA’s interim NIL rules. Despite the significance of this change, the actual contents of the interim rules are incredibly sparse and leave more questions open than answered.<sup>19</sup> Accordingly, under the NCAA’s interim NIL rules, student-athletes, collegiate institutions, and advisors have been left to navigate the new NIL marketplace based on little more than the following general guidelines:

- If an institution is located in a state that does not have an NIL law and “an individual elects to engage in an NIL activity, the individual’s eligibility for intercollegiate athletics will not be impacted by application of” the NCAA bylaws.<sup>20</sup>
- If an institution is located in a state that does have an NIL law and “an individual or member institution elects to engage in an NIL activity that is protected by law or executive order, the individual’s eligibility for and/or the membership institution’s full participation in NCAA athletics will not be impacted” by the NCAA bylaws, unless the state NIL law is “invalidated or rendered unenforceable by operation of law.”<sup>21</sup>

- Student-athletes may utilize a “professional services provider,” such as an attorney, to provide guidance on NIL activities unless “otherwise provided by a state law.”<sup>22</sup>

Predictably, these minimal, vague guidelines quickly led to confusion and vastly different interpretations about the permissibility of various NIL activities.

#### Clarifications to the NCAA’s Interim Rules

To clarify the many grey areas left by its sparse interim rules, the NCAA issued further guidance. While this guidance is useful on a narrow range of issues, overall, it has done little to create certainty or uniformity in the NIL marketplace. Further, the guidance is expressly subject to all applicable state laws, which vary greatly and can lead to disparate results in different states. With these caveats in mind, the following is a summary of the key takeaways from the NCAA’s guidance on its interim NIL rules:

- Both current NCAA student-athletes and prospective NCAA student-athletes, including those who are still in high school, may engage in NIL activities “without impacting their NCAA eligibility.”<sup>23</sup>
- NCAA institutions “should not dictate how student-athletes use their [NIL] compensation,” and should not “require student-athletes to use [NIL] compensation for financial aid” or as a replacement for traditional athletic scholarships.<sup>24</sup>
- NIL deals must involve a quid pro quo. In other words, student-athletes should only be compensated “for work actually performed,” and may not be given NIL money without giving something of value in return.<sup>25</sup>
- NIL compensation cannot be “contingent upon enrollment at a particular school,” and cannot be given in exchange for achieving a certain level of athletic performance. While athletic performance “may enhance a student-athlete’s NIL value, [it] may not be the ‘consideration’ for NIL compensation.”<sup>26</sup>
- Student-athletes may not be represented by any athletics department staff members when “marketing their athletics ability or

reputation,” and institutions “may not compensate a student-athlete” for use of their NIL.<sup>27</sup> These rules are in line with the NCAA’s general goal to keep athletics department staff at an arm’s length from NIL deals to avoid any improper recruiting practices or inducements.<sup>28</sup>

- Athletics department staff may not communicate with an NIL entity about specific student-athlete requests for compensation, encourage an NIL entity to fulfill a student-athlete’s compensation requests, “[p]roactively assist in the development/creation, execution or implementation” of a student-athlete’s NIL activity, or provide services to support a student-athlete’s NIL activity.<sup>29</sup>

Further clarification on the interim NIL rules, and the NCAA’s plan to enforce those rules, came in early 2023 when an internal NCAA memorandum was leaked to the public.<sup>30</sup> In that memorandum, the NCAA informed all Division I institutions that when “available information supports that the behaviors leading up to, surrounding, and/or related to an NIL agreement or activity” are contrary to the NCAA’s bylaws or the interim NIL rules, the NCAA will “presume a violation occurred.”<sup>31</sup> Once this presumption comes into effect, the burden shifts to the applicable institution to “clearly demonstrate that all behaviors complied with” the NCAA’s bylaws and interim NIL rules.<sup>32</sup>

While circulating the internal memorandum is rumored to have been an effort by the NCAA to scare institutions into a more conservative approach on NIL activities, as of the writing of this article, the NCAA has only issued one penalty for an NIL violation.<sup>33</sup> On February 24, 2023, the NCAA suspended the University of Miami’s head women’s basketball coach for three games, issued a fine against the Miami women’s basketball team, and issued various recruiting restrictions against the program for the remainder of the 2023 school year.<sup>34</sup> These punishments stemmed from Miami’s improper conduct when recruiting Haley and Hanna Cavinder, twin sisters and social media stars, including connecting the Cavinder twins with a well-known booster of Miami athletics during their recruiting visits. Despite this

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isolated enforcement action, until the NCAA issues a final set of NIL rules or significantly increases its enforcement efforts, institutions and student-athletes will be forced to navigate the NIL marketplace with limited information about the permissibility of many NIL activities and the consequences that can result from various NIL violations.

### **The Colorado NIL Statute**

In addition to NCAA rules, institutions and student-athletes wishing to participate in the NIL marketplace must be aware of state NIL laws, which vary greatly throughout the country. In Colorado, the current NIL law was enacted on March 20, 2020, and took effect on January 1, 2023.<sup>35</sup> In many ways, the Colorado NIL law mirrors the NCAA's interim NIL rules, as the key provisions establish that every intercollegiate student-athlete in the state has the right to (1) be paid for the use of their NIL and (2) hire a professional, such as an attorney, to represent their interests without fear of losing their athletic eligibility.<sup>36</sup>

The Colorado NIL law also provides in-state institutions with various protections. First, student-athletes are required to report any NIL deals to their applicable athletics department within the earlier of (1) 72 hours of entering into an NIL contract or (2) before the student-athlete's next athletic event. Further, student-athletes are prohibited from entering an NIL contract that conflicts with a "team contract," which is defined as a contract between the institution and another party that "relates to the activities of an athletic team of the institution."<sup>37</sup> These protections are designed to give Colorado institutions the opportunity to vet out improper NIL deals and to avoid alienating athletic department sponsors who may have exclusive deals with an institution that could be violated by a student-athlete's individual NIL contract. For example, if an institution has a team contract for on-field apparel with Nike, the institution may be able to prevent a student-athlete from wearing Adidas apparel when competing in an intercollegiate athletic event.

Even though the Colorado NIL law just took effect earlier this year, an amended version was signed into law by Governor Polis on June 6, 2023,

and is set to take effect 90 days after the final adjournment of the Colorado general assembly's current session.<sup>38</sup> As amended, Colorado's NIL law explicitly allows institutions in the state to "identify, create, solicit, facilitate, and otherwise enable opportunities" for student-athletes to earn compensation from the use of their NILs, "so long as the institution first acquires the consent" of the applicable student-athletes.<sup>39</sup> Additionally, the amended law explicitly allows tax-exempt charitable organizations, including NIL collectives, to enter into NIL deals with Colorado student-athletes.

Astute readers will observe that the provisions of the proposed bill directly conflict with the NCAA's guidance on its interim NIL rules. While the NCAA's guidance prohibits athletics department staff from communicating with NIL entities regarding a specific student-athlete's requests for NIL compensation, the proposed bill would allow Colorado institutions to "create" and "solicit" opportunities for individual student-athletes to earn NIL compensation. Nevertheless, the amended Colorado NIL law is modeled after NIL laws already adopted in other states. The states' willingness to ignore the NCAA's interim NIL rules stems from the consensus belief that, after *Alston*, the NCAA does not have the legal authority to control the NIL marketplace. This reality has led the NCAA to increase its efforts in lobbying for the enactment of a federal NIL law that would preempt all state NIL laws and create a uniform standard throughout the country. In fact, just this spring, at least two such federal bills have been introduced,<sup>40</sup> but neither is expected to gain much traction in the current political climate. Until federal NIL legislation is adopted, the disparate state laws will continue to control.

### **Other Developments in College Sports to Keep an Eye On**

In addition to the emerging NIL marketplace, the NCAA is facing an unprecedented number of challenges to its amateurism model. While many of these issues do not technically involve the NCAA's NIL rules or any state NIL laws, practitioners in the NIL space should, at the very least, be aware of the ongoing developments described below.

### **The California College Athlete Protection Act**

In January 2023, a California lawmaker introduced the College Athlete Protection Act to the state legislature.<sup>41</sup> If passed, the law would require athletic departments at California institutions to share as much as "half of the revenue generated by each college team" with the student-athletes on each team through either scholarship awards or "revenue-sharing payments."<sup>42</sup> Much like the Fair Pay to Play Act, this California law could quickly lead other states to pass similar laws to remain competitive, and could provide a revenue stream for student-athletes, including those who do not receive any NIL compensation.

### **Employment Status for College Athletes?**

In February 2023, a three-judge panel from the Third Circuit Court of Appeals heard oral arguments in *Johnson v. NCAA*. In *Johnson*, former student-athletes argue that the NCAA and its member institutions control their time, class schedules, majors, equipment, and other key aspects of their educational experience to such an extent that the student-athletes should be classified as employees under the Fair Labor Standards Act.<sup>43</sup> The push to treat student-athletes as employees was further aided in May 2023 when the National Labor Relations Board (NLRB) issued a complaint against the NCAA, the Pac-12 Conference, and the University of Southern California alleging that the three parties acted as joint employers of NCAA football and men's and women's basketball student-athletes, and had committed unfair labor practices against those student-athletes.<sup>44</sup> A hearing on the matter is scheduled for November 7, 2023. Through the NLRB complaint and the *Johnson* case, there is a real possibility that student-athletes could be reclassified as employees of the NCAA and/or its member institutions, a result that would shake the NCAA's model to its core.

### **Opportunities for Colorado Lawyers to Get Involved**

Even in its infancy, the NIL marketplace has blossomed into a huge economy. In the first year following the NCAA's adoption of its interim NIL rules, NCAA student-athletes collectively earned \$917 million of NIL payments.<sup>45</sup> In the second

year of the NIL era, that number is expected to reach \$1.14 billion, and most industry experts predict further growth in future years.<sup>46</sup> As the NIL economy continues to grow, so too do the opportunities for Colorado attorneys to get involved.

Overall, it's easy, and often justified, to criticize the NCAA's business model and practices. However, the dawn of the NIL era has created a sea change for intercollegiate athletics, and Colorado attorneys with expertise in a variety of practice areas now have an opportunity to advise student-athletes, collegiate institutions, NIL collectives, and businesses hoping to leverage NIL marketing. Better yet, because the rules and laws governing the NIL marketplace are still being written, Colorado attorneys have a chance to help create a new, more equitable system that can benefit all stakeholders in the NIL economy.

While the NIL marketplace may be new, the areas of legal expertise that it relies upon are not.

Accordingly, Colorado attorneys from a wide range of practice areas have an opportunity to get involved in this exciting new space. Student-athletes need help from experienced business and tax attorneys to negotiate NIL contracts, manage risks, and minimize tax liabilities. NCAA institutions need to leverage NIL deals to recruit and retain top athletes and coaches without alienating sponsors, alumni, and boosters. NIL collectives, many of which operate as 501(c)(3) organizations, need advice on how to vigorously pursue their missions without impacting their tax-exempt status. The NCAA needs to optimize its business model without running afoul of state and federal antitrust and NIL laws. Businesses need help licensing student-athlete NILs and negotiating marketing deals.

In sum, Colorado attorneys, including those who have not previously worked in sports law, should be aware of the emerging NIL economy and eager to take advantage of the opportunities that it has created. **CL**



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