

“ethical and moral standards” and what would constitute violations thereof. This language would give the postsecondary education institution a basis for challenging an NIL contract and confer standing to litigate a contract if necessary.

A likely point of litigation will be what constitutes “commensurate market value” for NIL compensation. The Act, as written, defines “compensation” very broadly. With all the different forms of acceptable compensation, it could be challenging to evaluate whether the proposed compensation is of “commensurate market value.” For example, suppose an athlete and car dealership agree that the athlete will receive a percentage of sales proceeds for a television advertisement. Can the school object that the compensation is not “commensurate market value” when that deal could earn the player more than the university generates revenue from the sport the athlete plays? Also, what about athletes at smaller schools? A well-known basketball player at a high-profile program will demand higher compensation than a Division-II water polo player. How wide a discrepancy will the Illinois courts permit in determining fair value? Will the auto dealership from the earlier hypothetical be justified in paying a percentage of sales to one athlete while perhaps only offering “social media compensation” to the other?

The Act also fails to address royalties. While the Act states that all NIL contracts must terminate when the student-athlete stops participating in intercollegiate athletics, that could be challenging under a contract that provides for royalties for a product that the sponsor continues to sell. For example, suppose a video game company places a picture of a well-known freshman basketball player on the cover of its video game. However, the following year the player makes the jump to the professional ranks. Is the video game company obligated to pull the game from store shelves? Can the company continue to sell the game but not pay the athlete? Must the company re-negotiate the NIL contract now that the player is a professional athlete instead of a student-athlete? Attorneys for the interested parties will need to think ahead and account for these issues in negotiating the terms of any NIL contract that provides for royalties.

Illinois lawmakers hail the Act as a significant step in ushering in a new era of college athletics in the state. However, the Act leaves open enough questions that

litigation on compensation and compliance with the Act is inevitable. Athletes, schools, and sponsors will need to work closely with their counsel to ensure compliance with the Act and anticipate potential conflict areas. As more states continue to enact NIL legislation and the NCAA’s own rules on NIL go into effect, perhaps some of these issues will be resolved, but perhaps just as likely, conflicting language will lead to even more confusion and litigation.

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Businesses Can Cautiously Proceed with Student-Athlete Sponsorship Deals

By J’Naia L. Boyd, of RivkinRadler

Businesses have been champing at the bit for a chance to collaborate more with college athletes for years. Until recently, however, those collaborations were not possible because college athletes were prohibited from profiting off their name and likeness and entering into sponsorship deals under the rules of the National Collegiate Athletic Association (NCAA).

Over the past couple of years, the NCAA had been considering a change to its name, image, and likeness (NIL) rules as state legislation across the country was taking shape to address NIL-based compensation for student-athletes.¹ Then on June 21, 2021, the United States Supreme Court made a landmark ruling in *Nat’l Collegiate Athletic Ass’n v. Alston*, where it held that the NCAA violated federal antitrust law by imposing rules restricting the education-related benefits that student-athletes may receive, such as post-eligibility scholarships at graduate or vocational schools.² Nine days later, the NCAA went a step further and adopted the Interim NIL Policy, allowing college athletes to receive NIL-based compensation.³ This new policy and

1 See *Taking Action, Name, Image, and Likeness*, NCAA, <https://www.ncaa.org/about/taking-action> (last visited July 14, 2021); Alan Blinder, *College Athletes May Earn Money From Their Fame, N.C.A.A. Rules*, New York Times (June 30, 2021), <https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html> (last visited July 14, 2021).

2 See *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141 (2021) (Kavanaugh, J., concurring in result).

3 See *Taking Action, Name, Image, and Likeness*, NCAA, <https://www.ncaa.org/about/taking-action> (last visited July 14, 2021).

a raft of new NIL state laws have now made it possible for companies to engage some college athletes into sponsorship agreements.

Already, several notable athletes have announced endorsement deals. Twin sisters Haley and Hanna Cavinder, star guards on the California State University, Fresno women's basketball team, have endorsement deals with Boost Mobile and Gopuff.⁴ Hercy Miller, incoming basketball player with Tennessee State University and son of mogul and rapper Master P, signed a four-year, \$2 million endorsement deal with tech company Web Apps America.⁵ According to reports from ESPN, local partnerships are also heating up in robust sports cities and towns.⁶ Many college athletes are already social media stars and are now looking for ways to monetize their accounts, which creates a perfect avenue for businesses, large or small, to work with athletes who have a following and fanbase.

Although this new landscape provides a treasure trove of opportunities for businesses, it is important to be aware that new state laws are in the works or on the books concerning NIL. In some instances, there may be a state law roadblock to what otherwise looks to be a great business opportunity.

Supreme Court's NIL Decision Spurs Rule Changes

Notably, the Supreme Court in *Alston* did not rule on the NCAA's remaining compensation rules, including those that restrict student-athletes from receiving compensation from endorsement deals, because the plaintiffs in the case did not seek review of their "across-the-board challenge" to the NCAA's compensation rules.⁷ Justice Kavanaugh, in a concurring opinion,

4 See Robert Kuwada, *Fresno State Twins with Huge Tik Tok Following Sign Another Endorsement Deal*, The Fresno Bee (July 2, 2021), <https://www.fresnobee.com/sports/college/mountain-west/fresno-state/article252541708.html> (last visited July 13, 2021).

5 See Mike Organ, *How Tennessee State's Hercy Miller, Son Of Rapper Master P, Will Spend His \$2 Million NIL Deal*, Nashville Tennessean (July 6, 2021), <https://www.tennessean.com/story/sports/2021/07/06/master-p-son-hercy-plans-spend-2-million-endorsement-deal-tennessee-state-ncaa/7873411002/> (last visited July 13, 2021).

6 See Dan Murphy, *Let's Make A Deal: NCAA Athletes Cashing in on Name, Image and Likeness*, ESPN (July 1, 2021), https://www.espn.com/college-sports/story/_/id/31738893/ncaa-athletes-cashing-name-image-likeness (last visited July 13, 2021).

7 141 S.Ct. at 2154.

questioned whether any of the NCAA's compensation rules could pass antitrust scrutiny.⁸ Those serious questions may not ever be answered by the Court as the NCAA's Interim NIL Policy suspended NIL-compensation rules for all incoming and current college athletes in all sports.⁹

The NCAA's Interim NIL Policy specifically provides:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.
- Individuals can use a professional services provider for NIL activities.
- College athletes who attend a school in a state without an NIL law can engage in NIL activity without violating NCAA rules related to name, image and likeness.
- State law and schools/conferences may impose reporting requirements.¹⁰

NCAA rules concerning pay-for-play and improper inducement for enrollment into schools are still in effect.¹¹ As noted by the policy, college athletes must abide by the NIL laws of their state.¹² Indeed, the state legislative response to allow college athletes to exploit their name and likeness has been swift and widespread.

Alabama, Colorado, Florida, Georgia, Illinois, Kentucky, Mississippi, New Mexico, Ohio, Oregon, and Texas have NIL legislation that went into effect on July 1, 2021.¹³ NIL laws in Nebraska, Ohio, and Pennsylvania went into effect immediately.¹⁴ Eleven other states have NIL laws going into effect between this

8 See *id.* at 2167.

9 See *Taking Action, Name, Image, and Likeness*, NCAA, <https://www.ncaa.org/about/taking-action> (last visited July 14, 2021).

10 *Id.*

11 See *Name, Image, and Likeness Policy, Question and Answer*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_Qa-ndA.pdf (last visited July 14, 2021).

12 See *Taking Action, Name, Image, and Likeness*, NCAA, <https://www.ncaa.org/about/taking-action> (last visited July 14, 2021).

13 See *Tracker: Name, Image and Likeness Legislation by State*, Business of College Sports (July 2, 2021), <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> (last visited July 14, 2021).

14 See *id.*

year and 2025.¹⁵ Several other states have NIL bills on the floor, and legislators in Wisconsin have not yet proposed a bill but are currently considering it.¹⁶ The new state laws are not as open-ended as the NCAA's Interim NIL Policy, and many specifically ban college athletes from endorsing alcohol, tobacco, and adult entertainment.¹⁷ Other states, like Florida, prohibit student-athletes from entering into a contract where a term of the contract conflicts with a term of their team contract.¹⁸ While the NCAA has not yet imposed reporting requirements, some of the new state laws require athletes to report any NIL-related contracts to their respective schools.¹⁹

Also, keep in mind that the NCAA's Interim NIL Policy does not, generally speaking, apply to high school athletes. For instance, some states with large college sports programs, like Texas, Florida, Georgia, and Ohio, have rules on the books that restrict high school athletes from profiting from their name and likeness;²⁰ however, these same states have newly enacted NIL laws favoring college athletes. High school athletes in New York are similarly barred from “[c]apitalizing on athletic fame by receiving money or gifts of monetary value.”²¹ The Executive Director of the National Fed-

eration of State High School Associations (NFSHA), Dr. Karissa L. Niehoff, emphasized this point about high school athletics by releasing a column on the NFSHA's website, which explains that “[c]urrent high school student-athletes CANNOT earn money as a result of their connection to their high school team” and that “state associations have rules in place that prohibit student-athletes from receiving money in any form that is connected to wearing their school uniform.”²² On the other hand, the California Interscholastic Federation allows high school athletes to profit from their name and likeness, with certain restrictions relating to use of their high school's name or marks.²³

Prospective college athletes appear to fall under the auspices of the new NCAA policy,²⁴ but they are still technically high school athletes, and it is unclear how a violation of a state high school association's bylaws on NIL will affect eligibility at the collegiate level.

Stay Tuned to Evolving Laws

The new NCAA NIL rules may be fluid until federal legislation or new NCAA rules are adopted.²⁵ Couple that with the myriad of new state laws and NIL rules that may be adopted by individual schools and conferences, there may be challenges to navigate before moving forward with inking a deal.

If you are looking to engage college athletes for endorsement and sponsorship opportunities, consider reaching out to an attorney who can help your business navigate this new opportunity.

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¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See, e.g. S.B. No. 381. 205th Gen. Assem., 2021 Sess. (P.A. 2021) (Pennsylvania law prohibiting NIL compensation for college athletes in connection with “adult entertainment products and services,” “alcohol products” and “tobacco and electronic smoking products and devices”).

¹⁸ See Intercollegiate Athlete Compensation and Rights, C.S.C.S.S.B. 646. 26th Leg., 2nd Sess. Ch. 2020-28 (F.L. 2020).

¹⁹ See *id.* (mandating disclosure of NIL-based contracts to “to the post-secondary educational institution at which she or he is enrolled, in a manner designated by the institution.”); S.B. 1385. 87th Leg., (T.X. 2021) (same).

²⁰ See S.B. 1385; *Constitution, Subchapter M. Eligibility*, University Interscholastic League, <https://www.uiltexas.org/policy/constitution/general/eligibility> (last visited July 14, 2021); *Amateur Bylaw Resource Center*, Ohio High School Athletic Association <https://www.ohsaa.org/Eligibility/Amateur> (last visited July 14, 2021); *Name, Image and Likeness Update for Florida High School Student-Athletes*, Florida High School Athletic Association (July 8, 2021), <https://fhsaa.com/news/2021/7/8/name-image-and-likeness-update-for-florida-high-school-student-athletes.aspx> (last visited July 14, 2021); *Constitution and Bylaws 2021-2022*, Georgia High School Association, <https://www.ghsa.net/sites/default/files/documents/Constitution/Constitution21-22completecx1.pdf> (last visited July 14, 2021).

²¹ *NYSPHSAA Handbook*, New York State Public High School Athletic Association, <http://www.nysphsaa.org/Portals/0/PDF/Hand->

[book/2020-21/NYSPHSAA%20Handbook%20002.pdf](#) (last visited July 14, 2021).

²² Dr. Karissa L. Niehoff, *NIL Rulings Do Not Change for High School Student-Athletes*, National Federation of State High School Associations, July 7, 2021 <https://www.nfhs.org/articles/nil-rulings-do-not-change-for-high-school-student-athletes/> (last visited July 12, 2021).

²³ See 2021-2022 CIF Constitution and Bylaws, California Interscholastic Federation, <https://www.cifstate.org/governance/constitution/index> (last visited July 14, 2021).

²⁴ See *Name, Image, and Likeness Policy, Question and Answer*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_Qa-ndA.pdf (last visited July 14, 2021).

²⁵ See *id.*