LEAD1 ASSOCIATION

NAME, IMAGE, AND LIKENESS ("NIL") INSTITUTIONAL REPORT

OCTOBER-NOVEMBER 2022

"With NIL comes many new opportunities and challenges for college sports. The LEAD1 NIL Institutional Report helps our members navigate through these changes."

—Tom McMillen, President and Chief Executive Officer of LEAD1 Association

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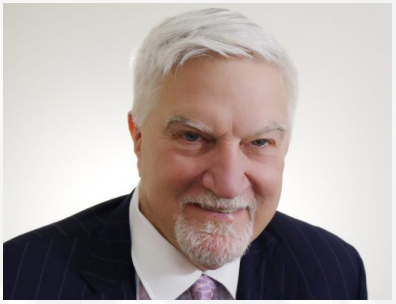
The NIL Institutional Report

NIL

The Tom McMillen Federal NIL Scoop

By Tom McMillen, President, and Chief Executive Officer of LEAD1. McMillen is a former Congressman, college basketball All-American, Rhodes Scholar, and NBA player, who took over LEAD1 in 2015.



Tom McMillen

Thank you for reading the eighth issue of the LEAD1 NIL Institutional Report. In this issue we continue to bring some of the best and brightest legal minds in college sports to provide our athletics departments with the most cutting-edge NIL legal content in the enterprise.

Since our last issue, there has been much activity, from a productive LEAD1 Annual Fall Meeting to some high-profile Senators proposing new NIL legislation.

At our recent LEAD1 Fall meeting held here in Washington DC, we discussed how college athletics is going through an unprecedented period of reform and change, and these times call for dynamic leadership and unity across our enterprise. One key topic was FBS football governance and whether, or not, our membership should explore alternative models outside of the current status-quo. We explored the financial reality that the NCAA provides $50m+ of resources annually, for a vast array of services, to support the current governance structure of FBS football. The NCAA's unique funding model relies heavily on March Madness to cover football governance related expenses. So, we ask the question, if not the NCAA, then who? This was a constant topic of conversation, and it is my goal to keep these issues at the top of the agenda. In that vein, based upon our meeting, we are developing a letter on this subject to send to college sports leaders in the next 30-days.

On the NIL front, our eyes are set on the November midterms and potential changes to the Senate and House, and how it will impact proposed NIL related legislation. It appears today that the Democrats have a slight edge in the Senate, but it can change overnight. Many political observers throughout our membership believe that if the Republicans take control, an NIL bill is much more likely to get done. But if the Congress is divided, we still have the problem of bills that reach outside of NIL (such as student-athlete employment and welfare provisions), which have a drastically lower chance of bipartisan. Additionally, I continue to implore the NCAA to encourage states to harmonize their laws so that all institutions can be involved with NIL transactions. As I mention in a recent Sportico piece, more states should consider modifying their existing NIL laws to lift facilitation restrictions for athletics departments to be more involved.

No strangers to college football, Senator's Tommy Tuberville (R-AL) and Joe Manchin (D-WV) are working together to try hard to find a middle-ground NIL bill that might stand more of a chance than what has already been proposed. Manchin's reputation is that he can reach across the aisle and get deals done, so it will be interesting to see what happens. We won't see any real movement, however, until after the mid-terms.

U.S. Senators Ben Cardin (D-MD) and John Thune (R-SD) also recently introduced the Athlete Opportunity and Taxpayer Integrity Act, which seeks to deny charitable deductions for any contributions used by donees to compensate college athletes for use of their NIL by reason of their status as athletes. Given that the bill is bipartisan, it is possible that such a provision could get wrapped into an overall NIL bill.

However these issues play out, we will continue to keep you educated on the intersection between the Congress and college sports in future issues of the LEAD1 NIL Institutional Report. Enjoy the reading!

IN THIS ISSUE

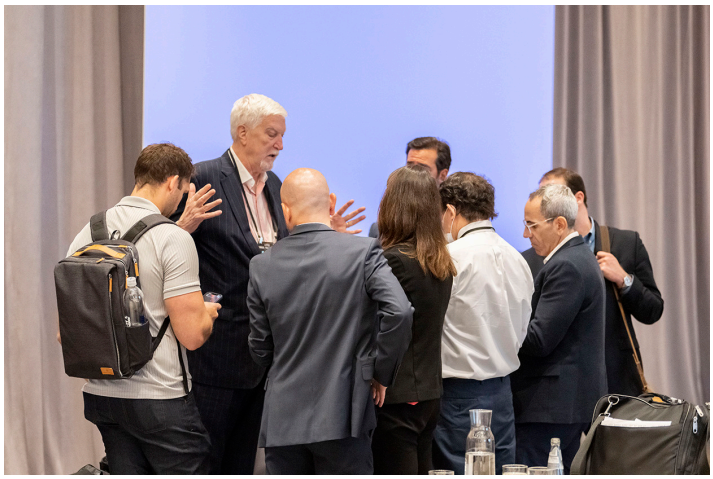
The Tom McMillen Federal NIL Scoop 2

Amend It or End It: Should Institutions Favor, Repeal or Amendment State NIL Laws? 4

Assessing the Insurance Coverage Issues in Concussion Lawsuits Filed Against NCAA 6

Are 501(c)(3) NIL Collectives In Danger of Extinction? An Analysis of The Athletic Opportunity and Taxpayer Integrity Act 8

Of Course There Are Guardrails—NIL and Civil Rights Laws 10



Disclosing Athletes' NIL Activity and FERPA 12

Group Licensing NIL Deals and the Transfer Portal 14

NIL: Institution's Duty to Monitor and Educate 16

Giving Title IX Its Props in the NIL Era of College Sports 17

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Amend It or End It: Should Institutions Favor, Repeal or Amendment State NIL Laws?

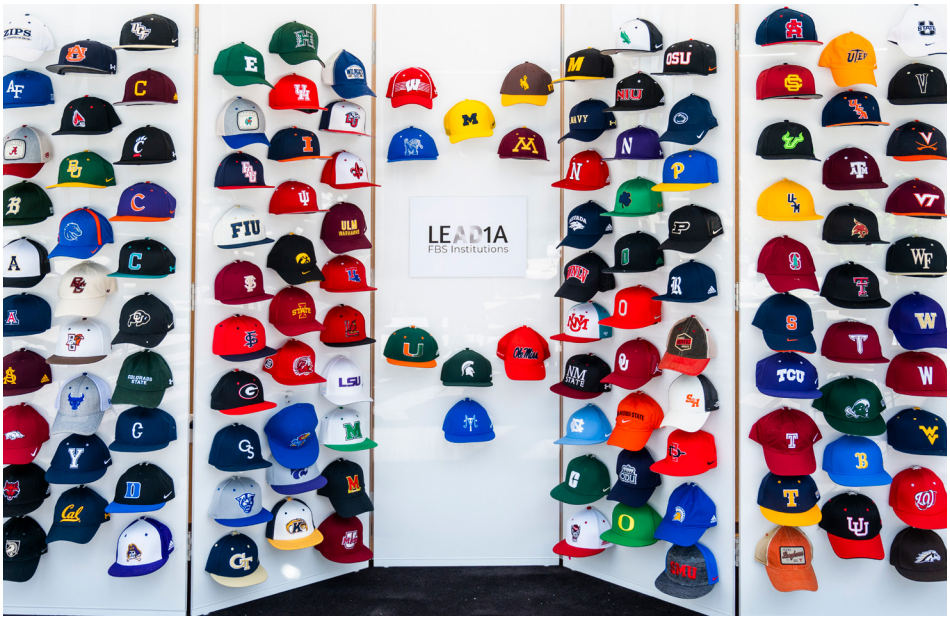
By Bennett Speyer is a Partner and Hospitality, Leisure and Sports Co-chair at Shumaker, Loop & Kendrick, LLP; Robert Boland is Of Counsel at Shumaker, Loop & Kendrick, LLP and an Assistant Professor at Seton Hall Law School; Alan Suskey is the Executive Vice Principal and Principal State Practice at Shumaker Advisors Florida, LLC.

There are approximately 30 states that have enacted NIL laws or recognized NIL rights for collegiate athletes. Others have legislation in debate or about to go into effect. While the ink is still wet on some state NIL laws, there is a movement that advocates for the repeal of, or has already been successful in repealing, these recently enacted NIL laws.

Is it more advantageous to repeal a recently enacted law, as Alabama and South Carolina have done, or otherwise mooting via sunset provisions, as Georgia has done? Or is it more effective to amend these laws based on the changes observed in the first 16 months of NIL practices?

As a firm with a Hospitality, Leisure, and Sports Business Sector and a Public Policy and Governmental Affairs Service Line, as well as offices in states where collegiate sports are not just a popular diversion, but are also economic drivers, we at Shumaker have been asking this same question with answers tilting toward amending, and not ending, NIL laws. However, legislative cycles and perceptions may not make this universally true or easy to do.

The principal reason behind the drive to repeal is the NCAA's relaxed historical amateurism rules, allowing athletes across the Association's membership to participate in NIL. In July 2021, when the NCAA pulled back some of its rules on amateurism, it no longer required a state law that specifically authorized NIL activity for athletes to participate in NIL, as was believed to be the case before the NCAA took its action. When states rushed to emulate California's passage of the Fair Pay to Play Act in 2019 and began recognizing athletes' NIL rights in July 2021 from the 2023 date in the California Bill, it was not due to a deep philosophical commitment to the principle of athletes being compensated for their rights of publicity. Rather, it was because they feared that as the nation's most populous state, home to four Power 5 schools and a total of 24 Division I institutions, California would have a significant recruiting advantage. So, states raced one another to pass NIL laws.



With the majority of state laws' mirroring California's in preventing institutions from directly compensating student-athletes for the use of their NIL—which ironically was at the core of the initial O'Bannon decision that first recognized NIL rights—and keeping the institution at arm's length from being involved in student-athletes' NIL activity, the perception that states without NIL laws had a strategic advantage when the NCAA relaxation occurred fueled this trend toward repealing. There is speculation that states without an NIL law have fewer limitations on what alumni, boosters, and institutions could do to advance NIL opportunities.

There is a false perception that states lacking NIL laws have significant advantages over states that do. Federal law places significant limitation on institutions, most notably complying with Title IX and Title VII of the Civil Rights Act of 1964, that prohibit gender or racial discrimination by educational institutions. Other federal laws on student financial aid are implicated by some NIL activities, especially the actions of potential alter egos like collectives. With institutions likely responsible for significant levels of NIL compliance, amending quickly written state NIL laws may provide a better course of action.

States amending NIL laws include Mississippi, that has already amended its

NIL law permitting institutions' greater involvement in NIL with a unique, but possibly over-broad provision that immunizes institutions from suit over NIL decisions; Louisiana, with two amendments pending; and Florida, where the amendment process is ongoing. Even states sharing the same geography see this question differently.

From an institutional perspective, we believe there are distinct advantages to amending and maintaining a state NIL law. There are practical reasons for this, despite credible commentators suggesting that only institutional policies governing NIL are necessary. Given that the authorization for NIL was based on both the pullback in NCAA policy and enforcement and state law structure, removing state law structure because of perceived limitations in recruitment or the timing of legislative sessions could cloud an already murky space. It would also place student-athletes and institutions in opposition regarding institutional decisions asserting conflicted or prohibited NIL opportunities. In states with an NIL law, a student-athlete might raise a challenge to the institution's interpretation of the law, without having to hold the institution liable. It would also place the NCAA, which recently announced it would ramp up enforcement, as the sole voice on NIL.

Regarding the "vice categories" found in state laws—alcohol, smoking, vaping, cannabis, gambling and sports betting, controlled substances, performance enhancing substances, and adult entertainment—state universities that comprise the majority of Power 5 members might be at a disadvantage in restricting athletes from pursuing NIL opportunities or enforcing prohibitions in these areas in the absence of a state law. Most of these products can be legally advertised, and the institution and its opposing policies could be viewed as impermissible state action. Again, state NIL law may provide shelter for institutions in the NIL space.

Federal law places significant limitations on institutions, most notably complying with Title IX and Title VII of the Civil Rights Act of 1964, that prohibit gender or racial discrimination by educational institutions.

The chief areas for amendment now focus on institutional roles in facilitating NIL opportunities for student-athletes. The California Fair Pay to Play Act, which established artificial and perhaps convenient barriers to institutional involvement in NIL, served as the model for all subsequent NIL laws. In 2021, those barriers may have appealed to everyone from university counsels, who are risk adverse by nature, to athletic directors and coaches, who may view NIL as hard-to-understand and chaotic. However, those barriers on institutional involvement potentially made several positive NIL processes more difficult, including: the implementation of meaningful educational initiatives, the ability to assist student athletes in the contracting process, and supporting a robust disclosure process, all of which benefit athletes and institutions alike. Collectives have filled some of these gaps doing what universities might be prohibited to do, but collectives are attracting even greater scrutiny that often points back to the institutions. State NIL laws are imperfect, but NIL is here to stay—improving the imperfect seems a reasoned course.

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Assessing the Insurance Coverage Issues in the Concussion Lawsuits Filed Against the NCAA

By Richard C. Giller, of Greenspoon Marder

Over ten years ago, the New York Post correctly predicted that concussion lawsuits would be the "next big U.S. litigation."[1] Fast forward a decade and we find ourselves immersed in dozens of concussion lawsuits filed against the National Collegiate Athletic Association (NCAA) including a potentially ground breaking individual concussion case filed by Alana Gee, the widow of former University of Southern California (USC) linebacker Matthew Gee, who died in his sleep at the age of 49.[2] The Gee case started the first few days of trial last week in Los Angeles Superior Court,[3] and the significance of a jury verdict in that case—one way or another—could have far-reaching financial repercussions as well as impacting the future of college sports.

Sports concussion lawsuits trigger a number of important and well-documented cultural, medical, and legal issues, from the personal and social toll of the athlete and his family dealing with a lifetime of degenerative brain diseases and symptoms—like migraine headaches, paranoia, anxiety, Amyotrophic Lateral Sclerosis (ALS), Chronic Traumatic Encephalopathy (CTE), Alzheimer's, Parkinson's, many of which lead to premature death—to who, as between the NCAA on the one hand and individual schools and conferences on the other, is legally culpable for failing to protect athletes from concussions or advise athletes about the long term effects of brain injuries.[4] Many of those issues have been analyzed by others but the focus of this article, while touching on some of the heartbreaking facts in the individual cases, will be on whether insurance coverage is available to the NCAA to help offset the millions or billions of dollars at stake in defending and resolving these concussion cases.

Concussion Cases Involving the NCAA

In September 2011, Adrian Arrington, a former Eastern Illinois University football player, filed a class action lawsuit against the NCAA seeking damages arising out of concussions sustained by hundreds of student-athletes. That case alleged, among other things, that the NCAA knew about, but disregarded, information concerning the long-term effects that concussions could have on the future lives of student-athletes, and that the Association ignored studies linking the frequency and severity of concussions with certain sports.

Dozens of other lawsuits against the NCAA followed and, in December 2013, all of pending the actions were consolidated into a single multi-district litigation (MDL), which is currently pending in Chicago. The parties to the NCAA concussion class action case ultimately settled the lawsuit with the Association agreeing to establish a $70 million fund for concussion testing and diagnosis for student-athletes and committing an additional $5 million to research in addition to the testing and diagnosis funding.

In addition to defending against the class action lawsuit, the NCAA has also been named as a defendant in over two dozen individual concussion lawsuits, like the Gee case. The thrust of the individual actions is that the NCAA (1) had a duty to protect athletes from concussive and sub-concussive head injuries; (2) was negligent in the performance of that duty; (3) athletes suffered brain injuries as a result; and (4) such injuries took place between 1998 and 2005. Of the twenty-nine individual lawsuits twelve involve student-athletes who are now deceased; fourteen athletes were diagnosed with CTE or CTE-like symptoms;[5] five were diagnosed with early-onset Alzheimer's; three with ALS; and one with Parkinson's disease.

The list of common post-concussion symptoms experienced by individual athletes include, severe headaches, dizziness, hearing loss, memory loss, vision problems, depression, dementia, impulsivity to anger, delirium, psychotic episodes, speech impediment, loss of inhibition and impulse control, panic, anxiety, irritability, paranoia, disorientation, hallucinations, social isolation, suicidal thoughts, and cognitive dysfunction, among a host of other symptoms. As alleged in a heartbreaking lawsuit filed by the wife of Cullen Finnerty, the winningest quarterback in NCAA history with a 51-4 record

1 https://nypost.com/2012/06/30/concussion-lawsuits-are-next-big-u-s-litigation/

2 According to a 2020 Sports Illustrated article entitled "In 1989, USC Had a Depth Chart of a Dozen Linebackers. Five Have Died, Each Before Age 50" (https://www.si.com/college/2020/10/07/usc-and-its-dying-linebackers), Gee was the fifth of 12 USC linebackers from the 1989 team to die after protracted mental health-related issues.

3 The *Gee* trial began on October 10, 2022. It appears that the first four days have consisted of rulings on multiple pre-trial motions, objections to proposed jury instructions, and motions in *limine* (MILs) with the court granting, in whole or in part, several MILs, while denying most of the others. On Friday, October 14 alone, the parties filed nine pleadings, totaling over 830 pages of documents, including five MILs filed by Plaintiff, a trial brief and declaration regarding alleged spoliation of evidence filed by the NCAA, and an opposition to a jury instruction along with a response to certain deposition designations and counter-designations filed by Plaintiff.

4 The NCAA has argued in some of the individual concussion cases that it does not owe a legal duty to the student athletes who play sports at is member schools because, according to the Association, it has very little control over how its member schools educate, train, and care for student athletes.

5 It is generally accepted that CTE cannot be definitively diagnosed until after death.

at Grand Valley State, Cullen suffered from paranoia, fatigue, and forgetfulness, because of head trauma sustained in college, all of which eventually led to his death. During a fishing trip in Michigan in 2013, Cullen became so confused and anxious that he apparently wandered into and got lost in the woods where, three days later, he was found dead at the age of 30. An autopsy revealed that he died of pneumonia brought on by inhalation of vomit after he became disoriented, possibly because of a combination CTE and painkillers.

Twenty of the individual concussion lawsuits are still pending.[6] As one might imagine, with millions—and possibly billions—of dollars in defense costs and indemnity payments at stake, sports concussion lawsuits have spawned their own insurance coverage lawsuits pitting the NCAA against the insurers that had issued policies covering the time frames at issue. This article will focus on the NCAA coverage case that remains pending.

The NCAA Insurance Coverage Case Seeking Coverage for the Concussion Lawsuits

In June 2012, TIG Insurance Company filed a declaratory judgment action against the NCAA in Kansas federal court disputing that it had a duty to either defend or indemnify the Association in the concussion MDL. The Kansas coverage litigation between the NCAA and its insurers was voluntarily dismissed by TIG in August 2013.

In December 2012, the NCAA filed its own declaratory judgment action in Indiana state court against twenty-three insurance companies that had issued primary and excess liability policies to the Association.[7] In May 2021, the NCAA filed a summary judgment motion against one of its insurers—USF&G—asserting that the carrier had a duty to provide the Association with a defense in the individual lawsuits and claiming that, as of January 17, 2020, the NCAA had paid nearly $12.5 million in unreimbursed defense costs in connection with the concussion cases.

By joint motion filed on November 30, 2020, the summary judgment hearing was taken off calendar because, according to the motion, the NCAA and USF&G "agreed in principle to a settlement regarding payment of defense costs." The NCAA v. TIG insurance coverage case is currently stayed indefinitely "pursuant to defense costs sharing agreements … negotiated between the NCAA and the defendants," with respect to all of the underlying actions. The defenses asserted by the insurers in both the Kansas and Indiana insurance coverage cases are discussed below.

Assessing the Carrier's Coverage Defenses

The insurance companies assert four primary defenses against being required to defend or indemnify the NCAA in the concussion lawsuits: (1) coverage is precluded because some policies contain an "Athletics Participants Exclusion (APE);" (2) the "Employer's Liability Exclusion" (ELE) in some policies bar coverage for "bodily injury" to an "employee" of the insured "arising out of and in the course of employment by the insured;" (4) medical monitoring costs do not constitute "damages because of bodily injury"; and (4) the damages sought do not constitute an "accident" because they were "expected or intended from the standpoint of the insured," and, therefore excluded. Each of these arguments is well-worn and well-litigated.

The APE exclusion appears to only exist in a handful of policies and, in those policies, the exclusion only precludes coverage for "bodily injury" sustained while practicing or participating in a sport. Because the quoted phase is an undefined term, it may not extend to the resulting mental illnesses, sicknesses, or diseases, diagnosed in concussed players. Additionally, the claims asserted against the NCAA often include claims of negligence in the assessment and treatment of the head injuries. These claims also likely fall outside of the APE. As several cases have concluded, the failure to provide adequate medical care following a sporting accident and claims of negligent emergency treatment on-site do not fall within an Athletic Participants exclusion.

The ELE also does not appear to apply to the concussion claims filed against the NCAA because student-athletes at individual member institutions do not qualify as "employees" of the NCAA. Despite prior rulings by administrative bodies that scholarship football players were "employees" for purposes of forming a union, there is no authority for the proposition that student-athletes are employees of the individual member institutions or the NCAA while playing their sport and, therefore, the ELE does not apply.

As a preliminary matter, nearly every individual concussion cases seeks compensatory damages so this coverage defense has no bearing on the insurance issues in those cases. As for cases seeking medical monitoring costs, a majority of jurisdictions (including California, Illinois, New Jersey, New York, Pennsylvania, Washington, and West Virginia). These courts agree that medical monitoring claims trigger, at the very least, a duty to defend the policyholder against such claims.

See NCAA on Page 19

6 Seven of the individual cases have been voluntarily dismissed, which could mean that a settlement was reached between the NCAA and the plaintiffs in those cases. The NCAA successfully defeated two of the individual cases, one on summary judgment and the other after trial, the latter is currently on appeal.

7 The docket in the Indiana coverage case is 92-pages long and consists of over 830 separate entries with one insurer being dismissed without prejudice (Fireman's Fund) and a second insurer dismissed with prejudice (Zurich/Maryland Casualty).

Are 501(c)(3) NIL Collectives In Danger of Extinction? An Analysis of The Athletic Opportunity and Taxpayer Integrity Act

By Mit Winter and Ben Tompkins, of Kernnyhertz Perry

Last issue we wrote about how many NIL collectives are choosing to organize as nonprofit organizations, generally as 501(c)(3) organizations. Doing so could allow taxpayers who give money to one of these collectives to claim a deduction on their tax return for the amount donated, which reduces the donor's taxable income. This in turn makes it easier for a collective to raise money, because many donors are used to receiving a tax deduction when they donate to a university's athletics program, and are similarly demanding a tax deduction before they will donate to an NIL collective.

Almost as if on cue, late last month we had a development that squarely takes aim at these tax deductions donors may receive for their donations to 501(c)(3) collectives. On September 28, U.S. Senators John Thune (R-S.D.) and Ben Cardin (D-Md.) introduced a bill known as the Athlete Opportunity and Taxpayer Integrity Act. Thune is the ranking member of the Senate's Subcommittee on Taxation and IRS Oversight and Cardin is a member of the same subcommittee. The press release announcing the bill said it "would prohibit individuals and organizations from using the charitable tax deduction for specific contributions that compensate college or incoming college athletes for the use of their name, image, and likeness (NIL)."

On its face, the bill sounds as if it would put an end to the practice of NIL collectives organizing as 501(c)(3)s. After all, if donors would no longer be able to obtain tax deductions for donations made to the collective, what is the point of spending the additional time and effort to organize and operate as a 501(c)(3) instead of a for-profit business?

However, despite the strong language in the press release, the actual text of the bill is not as straightforward as it sounds. Instead, it creates a number of questions and does not altogether prohibit NIL collectives from organizing as 501(c)(3)s.

The bill itself, which proposes to amend the Internal Revenue Code, is short. If enacted, it would add a section to the code which states that "[n]o deduction shall be allowed for any contribution any portion of which is used by the donee to compensate one or more secondary or post-secondary school athlete for the use of their name, image, or likeness by reason of their status as athletes."

As noted above, this language creates a number of questions.

Despite the many open questions relating to this bill, it definitely warrants universities and collectives keeping an eye on whether it garners further support in the Senate and, potentially, the House.

First, does the bill completely put an end to collectives organizing and operating as 501(c)(3)s? No. The bill does not prohibit an NIL collective that compensates college athletes for the use of their NILs from organizing or even from operating as a 501(c)(3). It would only prevent a donor to the collective from claiming a tax deduction on his or her own tax return. The collective itself would still receive the tax benefits that come along with being organized and operated as a 501(c)(3). And while the bill would presumably make it more difficult for a collective that is focused on using athletes NILs to operate, collectives may be able to avoid the law being applied to them if they work with individuals other than just college athletes or come up with other creative ways to avoid falling under the bill's language.

Second, the bill's language disallowing a tax deduction for portions of donations that are used to compensate athletes for the use of their NILs is ambiguous. Does it mean that if any portion of the donation is used to compensate an athlete for the use of his or her NIL then the entire contribution is not tax deductible? Or is only the portion that is paid to an athlete for the use of his or her NIL (as opposed to allowing a deduction for the portion that is used to cover other expenses incurred by the 501(c)(3))? The answer to this question is important in determining whether collectives may choose to continue operating as 501(c)(3)s.

Third, will the bill make it harder for future collectives to gain approval to operate as a 501(c)(3)? If a portion of the deductions received by a collective are not eligible for tax deductions, then will the IRS take a second look at any collective to determine whether the collective has a valid exempt purpose. While the bill does not contain any such language, it remains to be seen if the IRS will take a closer look at collectives and their tax-exempt status under 501(c)(3).

In addition to these questions, the bill contains other provisions that are important to take note of.

One, the bill is not retroactive. This means that, unless the bill is passed this year and assuming the IRS takes no further action against the collective related to the collective's 501(c)(3) approval, those who donate to a 501(c)(3) collective this year should be able to claim a tax deduction on amounts of the donation used to compensate athletes for the use of their NILs.

Two, the bill contains an exception for donations made directly to educational institutions. So, portions of donations made to a university or its athletic department that are then used to compensate athletes for the use of their NILs would still be tax deductible. Although universities are currently prohibited by NCAA rules from providing NIL compensation to their own athletes, it is interesting that this exception was included. Was it included in anticipation of a day when universities are providing NIL compensation to their athletes?

Despite the many open questions relating to this bill, it definitely warrants universities and collectives keeping an eye on whether it garners further support in the Senate and, potentially, the House. If passed, it would cause 501(c)(3) collectives and their donors to assess whether to continue operating as nonprofits or to just shift to the for-profit model that many other collectives operate under.

About Kennyhertz Perry's Collegiate Sports Practice Group

Kennyhertz Perry's collegiate sports attorneys have represented and advised clients on a wide variety of collegiate sports matters. These matters have included, among others, challenges to the legality of NCAA bylaws, assistance with conference realignment matters, litigation relating to coaching changes and buyouts, negotiation and litigation relating to conference broadcast agreements, resolution of intellectual property issues, drafting and negotiating name, image, and likeness and sponsorship contracts and license agreements, assisting with objections to open records requests, Title IX analysis, and concussion litigation.

The firm's lawyers also have experience working as government attorneys and compliance officers for highly regulated industries. As a result of this experience, Kennyhertz Perry's college sports lawyers have a rare combination of extensive experience working on collegiate sports law matters and the investigatory, compliance, and advocacy skills that are currently necessary for the successful representation of the organizations involved in college sports today.

Kennyhertz Perry's collegiate sports practice is led by Mit Winter, a former Division I basketball player. Mit played basketball at The College of William & Mary and has represented universities, conferences, the NCAA, businesses, and athletes in numerous collegiate sports law matters. Mit is regarded as an expert in collegiate sports law and NIL law and frequently writes on legal issues that apply to college sports.

To learn more about Kennyhertz Perry, LLC, please visit kennyhertzperry.com.

Mit Winter

Ben Tompkins

Of Course There Are Guardrails—NIL and Civil Rights Laws

By Dan Cohen and Lexi Trumble, of Nelson Mullins

"It's the wild west!" "I wish we had any guidance or rules about how to implement NIL on our campus."

That commentary reflects legitimate concerns by those within collegiate athletics related to the country's patchwork approach to regulating and legislating permissible NIL activities. But, legally, the NIL era is not the free-for-all that many people perceive. In particular, Title IX provides critical guardrails that, if not respected, could create significant legal risk to colleges and universities.

Ultimately, it is crucial that each institution be able to proactively demonstrate that market-based payment differences cannot be attributed to differences in the institution's social media or other efforts that favor male student-athletes.

While Title IX only applies to education institutions that receive federal funding, not private third parties, there are circumstances under which universities could become liable for third parties' "discriminatory" NIL behavior that disproportionately benefits male student-athletes (e.g., football and basketball players). Moreover, as universities contemplate increasing their institutional involvement with NIL activities for the benefit of their student-athletes, universities should be especially cognizant of Title IX requirements that likely apply in the NIL space.

To the extent (1) universities may choose to have institutional involvement with NIL activities for their student-athletes, directly or by providing significant assistance to third parties, and (2) those NIL activities may not be entirely market-based, federal civil rights law may control. This may include university-supported group licensing approaches to NIL monetization or other approaches where each student-athlete is not paid based on their own fair market value.

Any diversion away from market-based NIL opportunities towards any form of "pay-for-play" structure, if imputed to the school, may require equitable payments in the aggregate to male and female student-athletes. Athletics directors and their staff should be cognizant of potentially-costly Title IX liability and should engage legal counsel to mitigate such risks, whether they arise internally or externally.

This article, the first in a Title IX-focused series, examines potential mechanisms by which athletics departments and education institutions may be liable for institutional NIL efforts under Title IX. The series will proceed to provide tangible, practical suggestions and recommendations for avoiding liability and promoting gender equity in the NIL space.

Title IX Gender Equity

Title IX of the Education Amendments of 1972 is a federal law that prohibits sex discrimination in any federally funded education program or activity. 20 U.S.C. § 1681(a). It requires schools that receive federal funding to ensure gender equity in thirteen different athletics program areas, including equity in the provision of financial aid and equitable treatment of male and female student-athletes. 34 C.F.R. §§ 106.37, 106.41. NIL payments, and university efforts or initiatives surrounding them, may implicate at least two Title IX program areas—athletic financial assistance and publicity.

Equitable Financial Assistance

University administrators already know that athletic scholarships or grants-in-aid must be provided proportionally to male and female student-athletes. 34 C.F.R. § 106.37(c)(1). Each year's EADA submission creates public exposure by publishing institutions' scholarship allocations.

Beyond that requirement, the Title IX regulations also require: "When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes." 1979 Policy Interpretation, 44 Fed. Reg. 71,413, at 71,415 (Dec. 11, 1979) (emphasis added).

OCR has declared that "Athletic financial assistance includes any financial assistance expenditures through the institution's athletics program ***and any other aid that is connected to a student's athletic participation***." (Emphasis added.)

When student-athletes receive NIL payments that are not fully market-based, such as potentially in a group licensing setting and under many collectives' approaches, they arguably may be paid because they are on a given team – because of the student's athletic participation. In other words, if NIL payments are made without due consideration for each student-athlete's differing market value and/or quid pro quo marketing efforts, there is a realistic concern that such payments could be considered "financial assistance . . . that is connected to a student's athletic participation."

In that circumstance, if the payments can be imputed to the university (which will be the topic of next month's article), then Title IX may require the school to make equivalent benefits proportionately available to male and female athletes.

Universities should be wary of institutional efforts that may enable student-athletes to receive such participation-based NIL payments directly or by providing significant assistance to NIL collectives or other support organizations that may take disparate actions that favor certain men's revenue sports. If those arguably pay-for-play payments can be imputed to the school, then the school itself potentially may get saddled with Title IX liability.

To mitigate such liability, schools should endeavor to keep NIL activities off-campus, market-driven, and distinctly separate from recruiting activities. Otherwise, Title IX may require institutions to equitably compensate male and female student-athletes with respect to NIL payments.

Publicity

Even if NIL agreements and payments take place entirely off-campus, Title IX still governs institutions' internal practices. Schools are required to treat male and female student-athletes equitably, including in the provision of publicity. 34 C.F.R. § 106.41(c)(10). Compliance with this aspect of Title IX's equitable treatment requirement is assessed by examining, among other factors, the equivalence for men and women of access to publicity resources and the quantity and quality of promotional devices featuring men's and women's programs. 1979 Policy Interpretation, at 71,417.

Title IX compliance involves an aggregated analysis across **all** teams and **all** program areas, and there is an expectation that schools will provide equitable efforts to publicize their male and female student-athletes. Schools cannot control fan or media behavior, and market forces beyond a university's control may dictate that student-athletes are met with different levels of financial success in the NIL marketplace. But schools, as recipients of federal funds subject to Title IX, remain obligated to try to promote men's and women's teams equitably through press releases, promotional materials, and social media attention, among other efforts. To that end, we recommend exercising diligence and oversight with respect to the quality and quantity of such content being generated for male and female student-athletes in the aggregate.

Especially in today's NIL environment which requires student-athletes to engage in personal branding and marketing to attract endorsement deals or other monetization opportunities, **university-generated publicity and social media attention help raise student-athletes' profiles and external visibility. That visibility translates directly to market influence and may significantly impact student-athletes' potential for NIL earnings. Under Title IX, schools should equitably promote male and female student-athletes to help them monetize their own names, images, and likenesses.**

Conclusion

Regardless of a school's involvement with (or distance from) NIL activities and payments, the fact remains that each institution—as a recipient of federal funds—is subject to Title IX's gender equity requirements, especially in the context of institutional efforts to promote and publicize male and female student-athletes. There is a legitimate distinction between market-driven valuation of NIL agreements, which may result in higher compensation for male student-athletes, and institutional efforts to provide equitable publicity, promotion, and financial assistance for male and female student-athletes. Ultimately, it is crucial that each institution be able to proactively demonstrate that market-based payment differences cannot be attributed to differences in the institution's social media or other efforts that favor male student-athletes.

Don't let Twitter commentary fool you; there is at least one massive guardrail in place to govern NIL activities: Title IX.

For more information on the Nelson Mullins Collegiate Athletics Team's guidance on NIL topics, please visit our website or contact a member of the team.

Dan Cohen

Lexi Trumble

Disclosing Athletes' NIL Activity and FERPA

By Kasey Nielsen and Kylie Stryffeler, of Bricker & Eckler

When a request comes in for your athlete's NIL contracts or other information related to NIL activity, what goes into making the choice whether to release certain information? In the short time since athletes were permitted to engage in NIL activity, the public and news media have been naturally curious about as much and has made various calls for transparency. Athletes have also called for transparency related to NIL deals, ostensibly in an effort to better understand how their own deals stack-up or how the "fair market value" of certain activities is taking shape. As is typically the case when information requests bump into areas involving student privacy, requesters – and open-access advocates – are beginning to express frustration with the limited amount of information that institutions are releasing.

While the decision to release information often leads to debates (and litigation) over the public's right to know and the student's right to privacy, the factors that lead to these decisions are relatively uncomplicated. A behind-the-scenes look at how an institution might resolve particularly tricky requests would likely only yield what you already know: FERPA is a 1970's-era law that is becoming increasingly difficult to apply to today's information-laden campuses. Nevertheless, while each institution will have its own processes in place to evaluate a request, the first step is almost always tied to FERPA. Because of that, this piece focuses on some of the critical, if basic, decisions that an institution must consider before releasing athlete NIL information to a requester.

What NIL Records does your Institution Maintain?

Before discussing how FERPA may impact your institution's decision whether to release records in response to a request, it may be helpful to understand what types of NIL related records your institution might maintain. First, there might be records your institution is required to maintain. Depending on your state, your institution may be required to obtain records of NIL activity engaged in by your athletes. For example, in Ohio, athletes are required to disclose proposed NIL contracts to their institution.[1] Similarly, in Arkansas, athletes are required to disclose contract terms, conditions, parties, and compensation to designated school officials.[2] Several other states require some form of disclosure of NIL activity or contract terms to the institution including, but not limited to, Oklahoma, Michigan, Pennsylvania, New Jersey, Nevada, Nebraska, Montana, Mississippi, and Colorado.

Nevertheless, while each institution will have its own processes in place to evaluate a request, the first step is almost always tied to FERPA.

In the context of contract term disclosures, your institution may maintain proposed contracts, executed contracts, or correspondence between the athlete and institutional officials regarding deal terms or potential conflicts. To stay organized, your athletic department may also may maintain a master database or spreadsheet with details of every athlete's NIL activity.

Beyond what is required by state law, your institution may also maintain, and perhaps generate, additional NIL records. This might include results of conflict checks, disciplinary-related records if an athlete fails to follow the institution's NIL policy, athlete's requests for facilities and intellectual property use, and other internal communications about an athlete's NIL activities. Since you never know what an outside entity may request, it is important to have a discussion about potential NIL records your institution maintains.

Where does FERPA fit in?

Having identified some of the records that may be in the institution's possession, the office who manages public records requests will next have to decide whether your institution is permitted to release those records without the written consent of the students to whom the records relate.[3]

FERPA is a two faceted federal privacy law. First, it grants students the right to inspect their own education records. Second, it generally prevents educational institutions that receive federal funding from disclosing personally identifiable information from such education records. Education records, for purposes of FERPA, consistent of virtually all records directly related to a student and maintained by the educational institution, or a party acting for that institution. 34 C.F.R. 99.3. Institutions may release personally identifiable information with either the written consent of the postsecondary student, or if certain exceptions are met. 34 C.F.R. 99.31. Releasing information outside those restrictions may result in a loss of federal funding for the institution. 20 U.S.C. 1232g(b)(1).

How does this apply to NIL infor-

1 Executive Order 2021-10D, signed June 28, 2021.

2 Ark. Code Ann. § 4-75-1301 (West).

3 20 U.S.C. §1232g; 34 C.F.R Part 99

mation? If your institution maintains documents related to student athlete NIL activity—like proposed contracts, executed contracts, correspondence between athletes and the institution, etc.—and those documents are directly related to a particular student or multiple students, that information will be considered an educational record of the student or students about which the record directly relates. Thus, the disclosure of the document may be prohibited without written consent of the athlete.

What about records held by a third-party platform, like INFLCR or Opendorse, where athletes submit their NIL activity? The third parties are often utilized as a more efficient way to collect that information, but would likely be considered a party acting for the institution. Therefore, FERPA applies to protect the information they hold on your behalf.

Can Records Be Redacted and Released?

It may be possible under the FERPA regulations to redact NIL records sufficiently to permit their release without written consent of the student. Specifically, the regulations allow for records to be released where the removal of all personally identifiable information makes it to where a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information. 34 C.F.R. 99.31(b)(1). Notably, "personally identifiable information" (PII) is defined to include "information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 C.F.R. 99.3. This means that the devil is in the details when redactions are made.

Going back to the spreadsheet example, let's say your institution maintains an NIL contract list that contains the following details:

Name	*Sport*	*Position*	*Number of NIL contracts*	*Total NIL compensation*	*Parties to the contract*
Student-Athlete	Football	Quarterback	2	$122,000	Star Car Dealership, Apparel Store

The office on your campus who handles these requests would likely not release the spreadsheet "as is" because it contains PII. Specifically, "Mike Thomas" must be redacted because it is a student's name, along with any information that would allow someone to identify the student with reasonable certainty. For example, it is likely that not redacting the athlete's position will make it fairly easy to determine who the athlete is. Similarly, to the extent that the NIL deal involves the use of the person's name, image, and likeness (all of which is personally identifiable!), it may be easy to identify the athlete by observing which commercials they are in or which brands they associate with on social media. Although it depends on what the request seeks, the most a school could likely release is the sport, the number of NIL contracts, and the total NIL compensation. Details such as the athlete's position and the parties to their contract would almost certainly be withheld as a reasonable person would be able to identify the athlete with reasonable certainty. As you can see, your institution can likely redact enough information about an athlete to release the record.

Transparency vs. Privacy

Coaches, athletic departments, and members of your institution's community may want to appear transparent and provide the requested data.

To this end, institutions might consider publishing aggregated dashboards showing NIL activity according to preset categories that protect individual students. However, the decision to release NIL records that contain personally identifiable information cannot be, and should not be, taken lightly because of your institution's obligations under FERPA. Transparency is important, but so is student privacy—and maintaining your institution's federal funding.

Kasey Nielsen

Kylie E. Stryffeler

Group Licensing NIL Deals and the Transfer Portal

By LaKeisha Marsh and Jamel Greer, of Akerman

The state of college sports has been in a frenzy as of late due to ongoing legal challenges and changes to NCAA legislation on NIL. Concerns regarding the regulation of NIL have only been exacerbated by the changes to the student-athlete transfer portal, which has in some instances, devolved into a glorified recruitment tool for athletic programs to lure student-athletes away from their current institution. Given the current landscape of college sports, the lack of regulation in the area of Group Licensing NIL deals ("GL-NIL") creates a vacuum for known and unknown consequences that stem from the decision of one or more student-athletes to transfer away from their institution after their institution has executed a GL-NIL deal.

How Did We Get Here?

In April of 2021, the NCAA's "one-time transfer exception" took effect, allowing Division I student-athletes to transfer to a new institution and play immediately without the need to sit out one year (and lose one year of eligibility). The concerns brought about by the transfer portal were compounded in July of 2021, when the NCAA instituted the NIL interim rule on the heels of the Alston decision. Now more than ever, student-athletes are considering the extent to which a transfer to a new institution will boost their ability to sign lucrative NIL deals. A prime example is the transfer of star quarterback, Caleb Williams, who signed a new NIL deal with "Beats By Dre" shortly after transferring to USC from the University of Oklahoma. Williams had no previous NIL deal, so new school, new deal. Pretty cut and dry. But what if, instead, Williams had entered the transfer portal shortly after headlining a new GL-NIL deal with his previous institution? The consequences of such a scenario remain incredibly unclear under the current rules and guidance.

How Do GL-NIL Deals Come Into Play?

While the GL-NIL deal is fairly new to the college sports scene, it has long been a major conduit for business engagements in the entertainment and professional sports industries (e.g. NBA 2K video game, MLB trading cards and the manufacture and sale of WNBA jerseys). Currently in college sports, GL-NIL deals are gaining momentum. From sponsorship deals for specific teams to conference-wide opportunities, GL-NIL deals come in all shapes and sizes.

Now more than ever, student-athletes are considering the extent to which a transfer to a new institution will boost their ability to sign lucrative NIL deals.

Notably, in the course of developing NIL guidance, the NCAA has remained silent on the potential use and regulation of GL-NIL deals. Likewise, the NCAA stopped short of applying additional permissions or restrictions on the transfer portal. In the absence of such authority and guidance, (including the anticipation of federal congressional authority), all interested parties are left in a contractual "gray area" to the extent that states, athletic conferences and institutions do not provide rules or guidance on handling issues that may arise through the intersection of a GL-NIL deal and the transfer portal.

It follows that in the context of executing GL-NIL deals today utilizing the collective leverage of multiple athletes (that may include the use of intuitional marks and/or logos), the current legislative landscape presents a set of unique problems in the event that one or more student-athletes decide to exercise their rights under the transfer portal. Those problems include but are not limited to:

- What happens to a team-wide GL-NIL deal when the star player(s) for that team transfers mid-contract to another institution? Does the departure of the student-athletes with the biggest draw decrease the overall value of the deal/put the deal in jeopardy?
- Can a third-party brand terminate a GL-NIL if one or more star student-athletes transfer to a different institution?
- Can GL-NIL agreements continue to use the NIL of student-athletes who no longer attend the institution?
- Can student-athletes who enter the transfer portal continue to receive payment if their NIL is still being monetized as part of the GL-NIL deal?
- How can GL-NIL deals in colleges sports incentivize student-athletes to remain at their current institutions while not running afoul of NCAA bylaws?

Most, if not all of the questions above could (and should) be addressed through federal coordinated legislation that brings the NCAA, student-athletes and institutions to the table. However, in the interim, all parties looking to engage in GL-NIL deals will do so without a clear understanding of how GL-NIL deals or the transfer portal will be regulated in the future.

What Can Be Done Now?

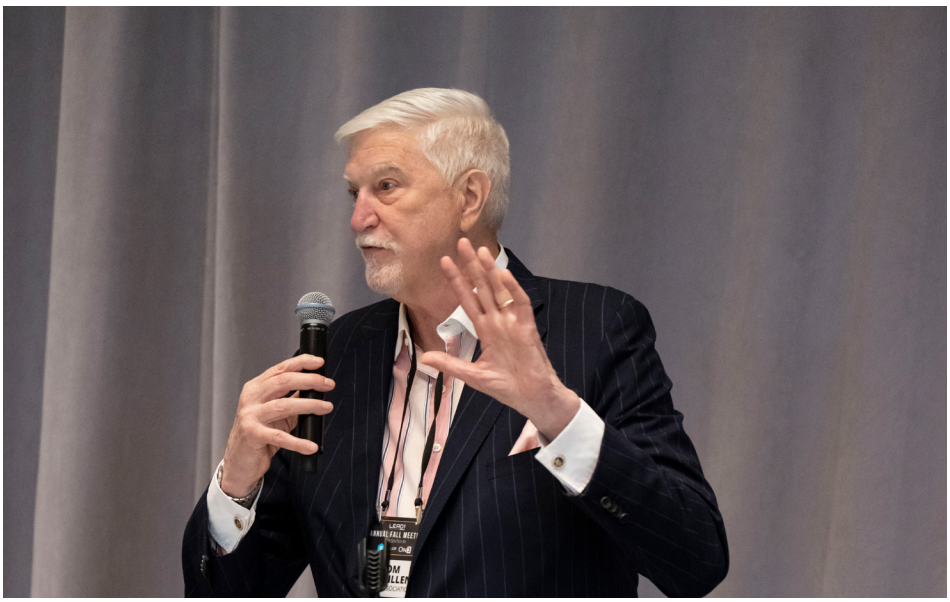
Currently, marketing, branding and licensing companies are executing GL-NIL deals at institutions across the country. In March, Syracuse executed a GL-NIL deal with Brandr using the institution's official trademarks and logos. In June, LSU also signed onto a similar GL-NIL deal with Brandr, but included a caveat that student-athletes cannot use the institution's marks or logos unless it's through a GL-NIL deal.

However, given the gray area surrounding both GL-NIL and the transfer portal, if a student-athlete transferring (while a GL-NIL deal is still in progress) significantly undermines the value of a GL-NIL deal, institutions and third parties are limited to remedies stemming from breach of contractual obligations.

Prior to negotiating the next GL-NIL deal, interested parties should consider the following contractual provision considerations:

- Structure contracts such that student-athletes are compensated purely for their performance in the GL-NIL and not conditioned on continued enrollment at a specific institution.
- Be specific regarding what conduct meets the threshold for substantial performance for all involved parties as well as conduct that amounts to a breach.
- Memorialize the process by which individual student-athletes can be added and/or removed from the class of individuals participating in the GL-NIL deal.
- Create tiers of student-athlete participation in GL-NIL deals such that former student-athletes can maintain passive participation in an ongoing GL-NIL deal to the extent feasible.
- Set an institutional "cooling off" period where a student-athlete is prohibited from entering into a GL-NIL deal that is in direct competition with a current or recent deal that expired for a least six months.

Paying special attention to these contractual provisions will aide in mitigating the potential impact of student-athletes' premature departure from an institution while a GL-NIL is active and ongoing. Notwithstanding, institutions should keep in close contact with legal counsel regarding new developments in the regulation of GL-NIL deals and the transfer portal.



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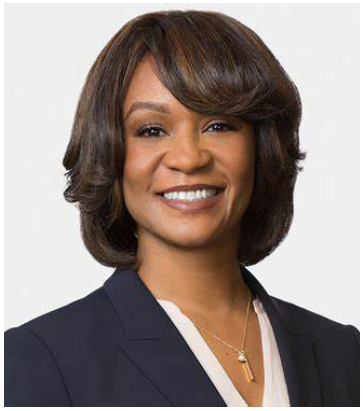

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NIL: Institution's Duty to Monitor and Educate

By Kyle Ritchie and Meghan Gulvas, of Bond, Shoeneck & King

In our last article dealing with NIL, we addressed collectives and other third parties being deemed "representatives of an institution's athletics interests" (Booster) under NCAA Bylaws 8.4.2 and 13.02.15. The article examined the potential effects of Booster activity on both prospective student-athletes (PSA) and current student-athletes (SA) at an institution. This article will address duties imposed on an NCAA member institution as a result of this designation; specifically, the duty to monitor and the duty to educate.

Duty to Monitor SAs, Coaches and Boosters

NCAA Article 8 imposes several specific duties on member institutions. One of these duties is the obligation to monitor its athletics teams and to report potential violations of NCAA legislation. With any NIL state law, an institution must be aware of whether this also imposes a legal obligation. For example, Florida Statute 1006.74(2)(i) mandates that SAs disclose to their institution any NIL agreement to which they are a party. An institution must review and evaluate whether there are violations of its institutional NIL policy, NCAA NIL guidelines or the state law. Further, under NCAA bylaws, an institution remains responsible for the actions of its Boosters, including those which are a party to an NIL agreement with a SA. In the NIL space, this includes a duty to monitor the NIL transactions between SAs and Boosters to ensure the prohibitions on pay-for-play and improper inducements are followed.

To satisfy the duty to monitor, it is recommended that at a minimum an institution: (1) reviews the contract details for each SA's NIL agreement; (2) assesses the NIL arrangement based upon institutional knowledge and publicly available information (including social media); and (3) provides basic follow-up with both the SA and the Booster to ensure the NIL arrangement is being followed and quid pro quo is occurring.

Duty to Educate SAs, Coaches and Boosters

Along with the duty to monitor comes an institution's duty to educate. Boosters and coaches are treated similarly in the NIL space when it comes to institutional responsibilities. Simply put, the institution must provide regular education to Boosters and its coaches regarding all aspects of NIL activities.

As was the case prior to NIL legislation, prohibitions on contacts between PSAs and Boosters remain in place. A Booster is not allowed to engage in recruiting activities on behalf of a member institution. This includes prohibition on contacts between the Booster and a PSA if any recruiting communication takes place. The May 2022 NCAA Q&A document made clear that contacts between a Booster and a PSA will be analyzed under NCAA Article 13 rules. The institution is responsible for the activities of its coaches and Boosters. Accordingly, the institution must educate its coaches and Boosters on these rules or be susceptible to potential NCAA violations.

As this is an emerging topic, routine education and updates should be provided in both written form and in-person meetings. It is recommended that an institution consider sending quarterly mailings to known NIL third parties (regardless of Booster status) and offer to those same groups opportunities to engage in live education sessions via Zoom, Microsoft Teams, etc. Finally, in addition to educating coaches on NIL developments, institutions should remind coaches that they play an integral part in ensuring NIL compliance through their interactions with PSAs, SAs and Boosters. By providing educational opportunities and ensuring a consistent message regarding NIL, the institution can satisfy its duty to educate.

Summary

NIL has certainly expanded the responsibilities of institutions to ensure compliance with NCAA rules. The NCAA continues to provide updates and modifications regarding the NIL policy, indicating its continued review of NIL situations. Institutions should continue to be proactive in their compliance efforts. As mentioned in our previous article, the institution and its compliance staff should gather and maintain a list of persons and entities it knows or suspects would be considered Boosters (including collectives or similar persons or entities by way of NIL administration). Utilizing this list, the institution can develop its NIL monitoring and education policy as a result of NCAA guidance, rather than as a response to an NCAA inquiry.

Kyle Ritchie

Meghan Gulvas

Giving Title IX Its Props in the NIL Era of College Sports

By Jon Israel and Nicole Marschean, of Foley

In the beginning of the name, image, and likeness ("NIL") era in college sports, state laws, NCAA regulations, boosters, and collectives have been the prime focus for both observers and NIL stakeholders, with seven-figure NIL deals making sensationalistic headlines. During that time, the country celebrated the 50th anniversary of Title IX of the Education Amendments of 1972 ("Title IX"), which, among other things, paved the way to increased participation of women in college sports. So far, it seems Title IX has been sitting on the metaphorical sidelines of NIL. However, that does not mean that Title IX has no role to play in the NIL game, and NCAA schools should be actively considering Title IX as part of their NIL game plan.

Title IX provides, in relevant part, "[n] o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to the discrimination under any education program or activity receiving Federal financial assistance." Title IX mainly governs the activity of only one NIL stakeholder – NCAA schools, and as a federal law, it is enforceable without regard to any state law or other regulation relating to NIL. In other words, an NCAA school's compliance with state and NCAA NIL regulations does not preclude or mitigate a Title IX violation. The NCAA spotted this issue in its July 2021 Question and Answer Guidance to its NIL Policy and recommended that NCAA schools consult their general counsel about the issue and "be aware of and comply with all applicable state and federal laws, including gender equity requirements." The NCAA's observation was not made in a vacuum, and decisions and actions an NCAA school takes as it sets NIL policy and monitors NIL activity could have unintended Title IX consequences. As policies and strategies are tweaked in Year 2 of NIL, NCAA schools are encouraged to consider Title IX while doing so.

As a threshold matter, it is folly for an NCAA school to think that it might avoid Title IX concerns simply by being and staying uninvolved in NIL activities, i.e., leaving such activities to its student-athletes and third parties (as most NIL laws and rules generally contemplate). This simplistic approach may limit the risk of a potential NIL-related Title IX violation, but it does not eliminate the risk. It ignores the ways NIL can still touch a school even if it is not involved in facilitating or approving NIL deals for its student-athletes. In any event, such NIL abstinence is more theoretical than actual, as most schools are generally wading, if not swimming, in NIL waters in hopes (and fears) of keeping their athletic programs competitive in the NIL environment.

As a threshold matter, it is folly for an NCAA school to think that it might avoid Title IX concerns simply by being and staying uninvolved in NIL activities.

In evaluating NIL policy and activity, NCAA schools need to be cognizant of two types of Title IX violations: first, any disparate treatment or impact that any institutional policy has on the opportunities and benefits for women athletes; and second, any liability that can be imposed on a school for conduct of third parties, including boosters, collective, or brands.

It is rare for NCAA schools to create and sustain policies that explicitly discriminate against women athletes. However, even with many decades of Title IX compliance experience, schools are still susceptible to sex discrimination claims under the statute, including disparate treatment claims (i.e., inequitable conduct where discriminatory intent is outright or can be inferred, e.g., inequitably eliminating women's sports teams or not providing women athletes the same access to athletic facilities or equipment) and disparate impact claims (i.e., facially neutral policies that disparately impact women athletes, e.g., policies that when administered result in unequal resources or outcomes between men and women student-athletes, including fundraising, coaching, discipline). Title IX claims and sanctions can have a significant impact on a school's financial and other resources. NIL activity – and a school's knowledge of and involvement in it – would appear to create a new platform for potential Title IX claims.

The advent of NIL has pushed NCAA schools to amend and create policies and programs in response to new and ever-increasing NIL activity of student athletes (e.g., student-athlete NIL education programs, processes to approve NIL transactions, and NIL marketplaces to facilitate third-party and student-athlete NIL engagement). In this reactionary environment, NCAA schools should be mindful of their involvement in the procurement or approval of NIL transactions and the assistance given to their student-athletes in the process, specifically whether such involvement or assistance is equitably afforded to both men and women athletes.

To stay ahead of these issues, NCAA

schools should evaluate the following aspects of their athletic programs in relation to NIL:

Employee Title IX Education and Monitoring: A school's Title IX compliance is only as good as the conduct of its staff. An employee violation equates to a school violation. For example, if a staff member provides NIL education or advice only to the school's football players or assists those players in procuring NIL deals, then the school may be susceptible to a Title IX claim, even if this staff support or assistance was not authorized by the school. Accordingly, schools subject to Title IX should institute, or review existing, professional development and monitoring systems for athlete-facing employees, specifically in regard to Title IX and NIL.

Administration of Policies: NIL likely impacts a number of pre-existing school policies, including student-athlete use of a school's intellectual property (e.g., marks and logos). In the context of NIL, a student-athlete's access and right to use their school's intellectual property would seem a lucrative benefit for the student-athlete and impact the value of an NIL deal involving that student-athlete. Accordingly, in offering student-athletes access to or use of its marks, logos or other intellectual property in an NIL deal, schools should carefully consider the reasoning for and impact of doing so (or not doing so). Any limits to student-athlete use of intellectual property or other license that impacts the access of women student-athletes to the NIL market could potentially run afoul of Title IX and expose the school to liability. Specifically, NCAA schools should scrutinize any restrictions on the endorsement of products and services that are customarily associated with women and/or other limitations that would make women student-athletes or teams less likely than their male counterparts to receive approval for their NIL deal and corresponding use of the school's intellectual property.

NIL Involvement with Third Parties: Schools subject to Title IX also should assess and review policies and arrangements related to co-branding opportunities and/or other interactions with an NIL sponsor or an NIL collective. Title IX is potentially implicated if a school inequitably provides co-branding opportunities to men's teams or male student-athletes in relation to women's teams or women student-athletes. Likewise, schools could also face scrutiny by endorsing or providing support to collectives that are focused only on men's sports or male student-athletes (e.g., football, men's basketball, or wrestling). Accordingly, a school's interactions with, and any facilitation or enhancement of NIL opportunities through, third parties, such as sponsors or collectives, should be viewed through a gender-equity lens and scrutinized for sex-based discrimination.

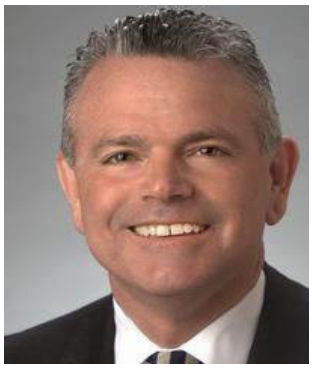
TITLE IX IS POTENTIALLY IMPLICATED IF A SCHOOL INEQUITABLY PROVIDES CO-BRANDING OPPORTUNITIES TO MEN'S TEAMS OR MALE STUDENT-ATHLETES IN RELATION TO WOMEN'S TEAMS OR WOMEN STUDENT-ATHLETES.

It is this last point – potential Title IX liability for the conduct of third-parties engaging in NIL activity – that may deserve some extra attention at this juncture in the NIL era. While such Title IX liability for third-party conduct seems both remote and extreme, it is not unprecedented in certain circumstances, including third-party activity of boosters. In theory and practice, when acting as independent third parties entering into NIL deals with student-athletes, booster organizations or collectives would not seem to create Title IX concerns for the respective schools of those student-athletes. However, there is case law in the context of high school athletics that suggests that colleges and universities should be careful (to the extent they can) about how those third-party relationships are structured and function in practice. In Daniels v. Sch. Bd. of Brevard Cnty., Fla., 985 F. Supp. 1458, 1462 (M.D. Fla. 1997), the court held that a school could not escape Title IX responsibility, even when the school provided equal funding to its baseball and softball teams, when it "acquiesced" to a system where each team had its own booster organization and funding disparities existed when the boys' baseball booster organization was more successful in fundraising than the girls' softball booster organization.

Even though NIL opportunities are categorically different than the straight fundraising disparities in Daniels, the case and its holdings could be analogized to the context of NIL booster activity. The NCAA defines a "booster" as an individual or entity "who is known (or who should have been known) by a member of the institution's executive or athletics administration to have participated in or to be a member of an agency or organization promoting the institution's intercollegiate athletics program or to assist or to have assisted in providing benefits to enrolled student-athletes or their family members." In other words, if the NIL activities of a booster organization or collective (i) promotes a school's athletic program or assists in providing benefits to enrolled student athletes, and (ii) such activities are known to the school, then the school could potentially be responsible for any activity of the booster organization or collective that violates NCAA rules.

Of course, it may be quite different for the NCAA to tag a school vicariously for a rules violation by a booster or collective than to have Title IX liability imposed on a school for such third-party conduct. Nevertheless, much like in Daniels, Title IX could be implicated if the school has knowledge of and "acquiesces" to boosters or collectives supporting student-athlete NIL activity in a way that discriminates based on sex (e.g., a collective providing only NIL deals to football players). Liability could potentially turn on the level of interaction, association, or engagement between the school and the booster organization or collective that is engaged in NIL activity in a potentially discriminatory manner. While general consensus is that the advent NIL in college sports should provide equal opportunities and benefits for all student-athletes regardless of sex or sport, boosters or collectives targeting the more lucrative or popular sports, like football and men's basketball, could conceivably present the same sort of equity issues present in Daniels.

For these reasons, Title IX must be a primary consideration for any school that is subject to its requirements and has student-athletes engaging in NIL activity, especially with booster organizations or collectives actively supporting its student-athletes, even in circumstances where the institution is not proactively involved with such organizations or collectives or their NIL activity. To be sure, the NCAA has done little to enforce its own rules prohibiting the use of NIL as a pay-for-play scheme or as an impermissible recruiting inducement, which arguably has led many participants in NIL activity to push the envelope with respect to those rules. While that may be happening, schools cannot lose sight of Title IX and their potential liability for the third-party activity that may be going on around them (with their own varying degrees of knowledge, facilitation, and participation). Consequently, in this brave (and risk-provoking) new world of NIL, the big regulatory bomb to drop is not likely to be an NCAA compliance matter, but rather, a Title IX action brought by or for women student-athletes who see NIL as a benefit or opportunity that is being disparately delivered to male student athletes, including through third parties known to or interconnected with their school.



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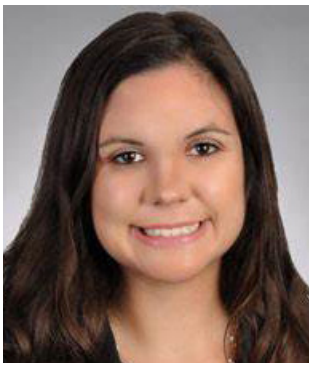

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NCAA

Continued from page 6

Most liability policies require the carrier to defend and indemnify the policyholder against bodily injury claims as defined in the policy (including sickness and disease) that are caused by an "occurrence" which is defined as an "accident." Accident is not defined in most policies but, regardless of how one defines occurrence or accident, most liability policies exclude bodily injury that is "expected or intended from the standpoint of the insured."

This exclusion fails to resolve a very fundamental question as to its application; i.e., what is it that must be fortuitous? For example, does the exclusion only apply where the injury causing act itself is intentional or is it limited to those situations where the policyholder intended the resulting damage, or injury, or are both required? The answer to these questions could be critically important in concussion insurance litigation because most of the underlying lawsuits allege that the NCAA was aware of and withheld certain information from players regarding concussions but not necessarily that the NCAA expected or intended that the failure to share concussion information would result in a lifetime of chronic, progressive, and degenerative brain diseases for concussed student-athletes.

One court summed up application of the "expected or intended" exclusion this way: "Insurance is purchased … to indemnify the insured for damages caused by accidents, that is, for conduct not meant to cause harm but which goes awry. The insured may be negligent, indeed, in failing to take precautions or to foresee the possibility of harm, yet insurance coverage protects the insured

from his own lack of due care. If the policyholder were to be told that the words of the 'occurrence' definition excluding coverage for 'expected or intended' damages actually mean that coverage is also lost for damage which a prudent person 'should have' foreseen, there would be no point to purchasing a policy of liability insurance."[8] As a result, this coverage defense may not succeed.

Conclusion

Resolving the sports concussion lawsuits in such a way that provides for the wellbeing of the players involved and protects future student-athletes from similar trauma is of paramount importance. The ability of the NCAA to call upon the resources of the numerous insurance companies that had insured the Association over the years could go a long way towards achieving this goal. As this article explained, the primary bases upon which insurers are attempting to avoid paying for the defense or indemnity of the concussion cases are well-worn and well-litigated. In this author's opinion, the NCAA appears to have solid grounds upon which to secure defense and indemnity payments for the underlying concussion lawsuits and defeat the coverage defenses being proffered by the carriers.

Richard C. Giller

8 *I.T. Baker; Inc. v. Aetna Casualty & Surety, Co., Cook v. Rockwell 1nt.l Corp.*, 778 F. Supp. 512 (D. Colo. 1991). The Kentucky Supreme Court described this position as the "majority rule," refusing to apply the "expected or intended" exclusion unless the insured "specifically and subjectively intend[ed] the injury giving rise to the claim, ... we agree that if injury was not actually and subjectively intended or expected by the insured, coverage is provided even though the action giving rise to the injury itself was intentional and the injury foreseeable." *Brown Found. v. St. Paul Ins. Co.*, 814 S.W.2d 273, 278 (1991) (citation omitted).