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GAME CHANGERS: REWRITING THE PLAYBOOK A SPORTS AND ENTERTAINMENT LAW SYMPOSIUM

Luke Fedlam *

Attorney Luke Fedlam gave these remarks as part of the Akron Law Review 2023 Symposium at The University of Akron School of Law in April 2023.

I. OPENING REMARKS

Well, first and foremost, thank you, Demetria, so much for having me. Tyler, Jennifer, thank you. To all of the members of the Akron Law Review, congratulations and thank you for allowing me to be a part of the Akron Law Review 2023 Symposium.

When I looked at the title and was asked about participating and [thought] about “Game Changers” and “Rewriting the Playbook” in the sports law world, there is so much happening. As I get the opportunity to speak with law students, it is really such an exciting time at all levels of sports when we think about the significant changes that are coming to sports across the board. And [it is exciting] to be able to have this opportunity just to focus today very briefly on Name, Image, and Likeness (NIL), what I would describe as one of the most significant changes in college sports history [and] the fact that student athletes can earn compensation from the licensing of their Name, Image, and Likeness.

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II. DEFINING NAME, IMAGE, AND LIKENESS

The first place to start that makes the most sense would be just defining what we are talking about when we talk about Name, Image, and Likeness. As law students, you most likely have a good understanding, but most fans don't fully understand what Name, Image, and Likeness is. They think that it is simply just the ability for college student athletes to earn compensation, to be able to get paid. That is maybe part of the story when we think about the history of [being a] student athlete.

Student athletes have been able to earn compensation, historically, if they were able to find time during their offseason or maybe even during the season to work a part time job, and they could be able to earn compensation just as any other student on campus could potentially earn. But this idea of Name, Image, and Likeness is really centered on the fact that student athletes have not been able to earn compensation from the licensing or lending for a fee of their name, their image, and their likeness. When I have the opportunity, through Anomaly [Sports Group] and some of the speaking that I do, to be able to go around and talk to student athletes across the country, (I believe at this point we have visited with nearly 40,000 student athletes at the college level), what is fascinating to me is that most people do not fully understand what name, what image, and what likeness actually mean.

I think we all most commonly know what "Name" is, right? "Name" is simply that it's our name. It could also be a nickname if you think about Michael Jordan as an example. The idea of Air Jordan most certainly is a nickname that is ascribed to Michael Jordan that he has rights in.

If we think about "Image", about half or 60% of student athletes that we talk with think that "Image" is simply what your general image in the community is—how people view you, what people think about you, what your reputation is. In actuality, when we are talking about Name, Image, and Likeness, "Image" is simply a photo or a video of an individual and the fact that you have rights, we all have our persona rights to our name, to our image, and to our likeness. And so that is "Image". You would not want to drive down the street and see an image of you on a billboard that you did not authorize or allow someone to use with your permission.

Finally, "Likeness." Most student athletes, and when I say most, I mean really almost all student athletes that we talk to, think that likeness is really just based on your likability, the number of followers you have on social media, what your social presence looks like—and that is most certainly not the case. "Likeness" is a graphic representation of an individual. So if we were to think about that same Michael Jordan

example, the Jumpman logo. We know exactly who that is. That is Michael Jordan. We do not have to see his face, we do not have to see a jersey, a number on the jersey, a name on the jersey. We know that is Michael Jordan. So I tell student athletes all the time, if you were ever at a State Fair or some street kind of designer did a caricature or a cartoon of you, that is a likeness of you and you have rights to that likeness as well. Student athletes have those rights. But up until July 1, 2021, student athletes were not able to license those persona rights, those Name, Image, and Likeness rights for compensation.

III. HISTORY OF NAME, IMAGE, AND LIKENESS

If we had a few hours, I could talk about the history and how we actually got here. But I am going to try to do it over the next maybe 120 seconds or so to just give you a quick snapshot of how we got to where we are at today. I will not go back to *O'Bannon*, but I think the *O'Bannon* cases against the NCAA and EA Sports give us a great foundational understanding.¹ But let's just go ahead and fast forward to more recent history in 2019 when the state legislature in the state of California ultimately came out with their Name, Image, and Likeness legislation.² They passed this legislation that said college student athletes or rather student athletes of institutions of higher education in the state of California would be able to earn compensation from the licensing of their Name, Image, and Likeness. They wanted to work with the NCAA so they set their law to go into effect in 2023, four years later. Ultimately [this was] to give the NCAA four years to kind of get a plan in place for student athletes across the NCAA.

The NCAA puts together a legislative working group that was studying the issue and coming up with some potential regulations around NIL. Well, fast forward to 2020, the state of Florida said we see you California, but we are going to raise you, we are going to pass NIL legislation and we are going to do it in a way that it goes into effect July 1, 2021. This caused that legislative working group to start to work overtime to come up with legislation. In January of 2021, really the week before the various NCAA Councils—the D1, D2, D3 Councils—were set to vote on the proposed Name, Image, and Likeness regulations, the Department of Justice came out and said we think there might be an antitrust issue

1. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F.Supp. 3d 955 (N.D. Cal. 2014); *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015); *O'Bannon v. NCAA*, 137 S. Ct. 277 (2016).

2. Fair Pay to Play Act, S.B. 206, (Cal. 2019).

here, we would recommend that you don't actually take that vote and implement NIL regulations at this point.

When that happened, the NCAA was kind of put on pause for passing legislation. Other states said, well, we cannot just let Florida be the only state that has this legislation. So multiple states started passing, very quickly, NIL legislation for their various student athletes at institutions of higher education to be able to engage in Name, Image, and Likeness and be compensated as of July 1, 2021.

Simultaneously, we had the *NCAA v. Alston* case in front of the Supreme Court, where oral arguments were heard in March of 2021.³ During that time, just to be clear, the question before the Court had nothing to do directly with Name, Image, and Likeness. The question before the court really was [whether] it [was] an antitrust violation for the NCAA to put a cap on education related benefits for student athletes—education related benefits being things like study abroad programs, stipends or computers, laptops, iPads, those things that are tied to education. And so, at this point, now we're in this interesting place where oral arguments were heard in March. And we were expecting, in June, the Court to come out with this decision, knowing that July 1st was when NIL was set to go into effect.

Most state legislatures that took up the issue really did not have an issue passing it because, if you could imagine Republicans and Democrats, while they may be pretty far apart on a lot of political issues, when it comes to sports, most people don't want to lose out on recruits going to other states instead of [only] going to school within their States. So they can agree that they could come up with some very simple, very basic NIL legislation. So that was occurring state by state. In fact, here in the state of Ohio, it was not done by legislation, it was actually done by executive order, due to something that was thrown into the proposed legislation at the last minute that kind of derailed things. But when we look then at what happened when the Court came out with their decision, it was unanimous. Unanimously, the Court held that it was an antitrust violation for the NCAA to put a cap on education related benefits to student athletes.

In the concurring opinion, Justice Kavanaugh very directly and very specifically talked about how, while the only question before the Court was on this issue of education related benefits, if the NCAA were to put any other restrictions on the benefits to student athletes, they could

3. *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

imagine the same type of analysis by the Court and could imagine the same type of outcome.

So in that moment, what the NCAA did is something that a lot of people kind of somewhat overlook. The NCAA did not pass NIL legislation or regulation based on their bylaws. What they did the last week of June 2021 was suspend their current regulations as it related to benefits to student athletes to allow schools to come up with their own policy on Name, Image, and Likeness. What they said was, if you are a school that is in a state that has legislation already around Name, Image, and Likeness, then you will need to make sure that your policy follows state law. If you are a school that's in a state that does not have that legislation in place, then ultimately you can come up with your own policy.

IV. CURRENT LANDSCAPE OF NAME, IMAGE, AND LIKENESS

Obviously, that now has led us to this place where we are today, where there are a lot of different policies. There are different state laws in effect. In fact, some states have actually repealed their laws that they just put into place in 2021 because they maybe had some restrictions that were listed in them that somewhat followed the proposed legislation that the NCAA working group was coming up with that ended up being more restrictive to schools and their ability to engage in this idea of helping to get money in the hands of student athletes. Therefore, they rescinded some of those laws.

So where we are today is that every school has its own policy as it relates to NIL. When we think about that, the impact on the various stakeholder groups within this space is varied and diverse. I have the opportunity to talk to a lot of different head coaches, in particular football and basketball head coaches, and schools across the country and Name, Image, and Likeness is most certainly a challenge as they think about how do we recruit talent but also how do we retain the talent that we have.

As you can imagine in 2020 when the NCAA came out with their rule changes around the transfer portal, they did not expect that NIL was going to become a reality. When you combine NIL the way it is today along with the transfer portal, allowing college student athletes to transfer without having to sit out for a year, you have now created kind of a quasi-free agency. And I say quasi-free agency because it is not real free agency that we see in professional sports where we have collectively bargained for agreement between the unions and the leagues themselves, it has a series of rules, of timelines, of tampering, regulations, etc. Those are not

in place at the college level because there is no true free agency and obviously as we know, which I think will probably be discussed in future symposia, student athletes currently are not viewed as employees. Therefore, we don't have this collective bargained for free agency. So coaches are trying to figure this out, student athletes are trying to figure out what exactly does this mean for me and how can I earn compensation.

So since we're just having the conversation today, when we think about Name, Image, and Likeness, there [are] really kind of two types of NIL. There is the true Name, Image, and Likeness and then there is probably what most people read about when it comes to NIL. In that latter, I do not want to say that it is bad NIL, but it is what people were afraid of and that is this idea of "pay-for-play." We see third parties entering this space like collectives, donors, boosters and others who want to see their institution be successful at the recruiting and retention of top talent to try to win football games in particular, to try to win championships. So what we see are some very big deals that are presented to some student athletes.

That is most certainly the minority when it comes to kind of overall Name, Image, and Likeness. But we have read about it, we have seen about it, [such as] that Jaden Rashada situation in Florida, a top quarterback (I think he was ranked around number 50, 55, 54 by ESPN in terms of overall student football players in high school coming out) first said that he was going to go to Miami and was allegedly signing an \$8.5 million dollar deal with [the] University of Miami, then decided to de-commit from Miami and commit to [the] University of Florida where it was alleged he was signing a \$13.8 million contract. Ultimately that deal kind of fell apart and there was nothing really contractually that could hold the group that put it together accountable, and so ultimately, Jaden Rashada decided to go to school [at] Arizona State. And so now there's really no significant NIL deal for him. Those are some of the types of deals that people read about, these big numbers that are truly just to try to recruit a particular athlete or retain a particular athlete at an institution. That is not the norm.

When we think about the 500,000 plus college student athletes across the country. There are so many student athletes that are doing deals that look more like this: they go to a restaurant that they eat at frequently and end up doing a social media deal promoting that restaurant in return for their meals being taken care of for them or their meals being their form of compensation. Or we see smaller deals where there is a brand that a student athlete wants to engage with, that they reach out to and they come up with a deal that's either a merchandise deal or a smaller dollar deal. These types of deals are happening more and more and more.

Then we see situations, and I think it was Tyler at the very beginning with his opening remarks [who] talked about everything that is been happening in sports. I had the fortune and opportunity to be at the men's and women's Final Four. I will tell you the women's Final Four and then the Women's Championship game when you look—first of all, they were phenomenal—but second of all, you look at the impact of the viewership and understanding now the true value that that is from a media perspective and all that can potentially offer as the media deal that included women's basketball with ESPN is coming to a conclusion at the end of the 23-24 season. So, a lot of exciting opportunity there and from that we've seen a lot of personalities come out, from Angel Reese, Caitlin Clark, and others who have opportunities now to make significant dollars representing brands in this Name, Image, and Likeness space.

V. FUTURE OF NAME, IMAGE, AND LIKENESS

So [] I want to at least touch on where we going. One of the questions that I get frequently is where does this all go? Where are we going? Congress has been kind of looking at this issue for a while. The current Congress just held hearings. The House subcommittee that was looking into NIL held a hearing a couple weeks ago, right before the Final Four, and then the Senate Commerce Committee. I have had conversations with some of their legal staff as they look at legislation, and they are looking at potentially having hearings over the next month or two.

The idea is, is there a possible way to come with some very basic Name, Image, and Likeness legislation? And I say very basic, because if it gets too into the weeds on some of the other issues, some of these other issues are very partisan and when we look at where our federal kind of government is right now and Congress and how divided it is, it would be hard to get some of those other issues resolved. But to at least focus on the high level of Name, Image, and Likeness being under federal law and allowing for enforcement to either be delegated by Congress and by the federal government or actually handled by a government agency, would help us to have a more national standard when it comes to Name, Image, and Likeness and what that looks like and what that experience is. If you could imagine, conference commissioners, they don't like the fact that, if they have 15 schools in their conference, there may be 15 different policies as it relates to Name, Image, and Likeness. There is discussion around whether that makes it an unfair competitive landscape.

Obviously, the NCAA, one of the things that they most precious are looking for, is the idea of a safe harbor to ensure that they are going to

be protected from any lawsuits of past student athletes who did not have the opportunity to earn compensation through Name, Image, and Likeness, and therefore they want to make sure that they are not subjects of lawsuits of other student athletes. So there are a lot of different stakeholders that are involved, a lot of different issues that are at play. But there is a possibility, if we don't see it happen this summer, then there's a high likelihood we will not see it until after the next upcoming presidential election. So that's kind of where we are going, but that is from an overall kind of national standard perspective.

VI. CLOSING REMARKS

In the meantime, Name, Image, and Likeness is most certainly not going anywhere. The horse is out of the barn as they may say, so the right that the student athlete has to earn compensation that will continue to be here, and so we can expect that we are going to continue to see innovation, creativity, and new ways in which student athletes are engaging in Name, Image, and Likeness.

And I will tell you, and this is kind of my editorial comment here, I believe that Name, Image, and Likeness is most certainly a good thing for student athletes because at its core, it is a conduit to be able to teach real-world life skills to athletes who may be so incredibly hyper-focused on their sport that they may miss out on some of the academic education guiding them to some of these life skills. So when we think about understanding budgeting and understanding taxes and understanding contracts and understanding how I am making decisions to navigate some significant life decisions, i.e. Name, Image, and Likeness or which job offer do I want to take when I graduate? Or do I want to go to grad school or enter the working world? All of these are things that student athletes need help on making decisions for. Having a decision-making process is helpful. So Name, Image, and Likeness truly is an opportunity for us to be able to ask student athletes to learn about something now that they need to learn about and that they want to learn about now because money is involved and they have the opportunity to earn compensation with that.