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

*Brandon Posivak\**

*Law student Brandon Posivak 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

Hello everyone, thank you very much for allowing me to be here today. It's definitely an honor to be speaking in front of you.

So today, I'll be talking about the antitrust considerations that are innate in the NIL space. And I think that's actually exemplified perhaps a little bit periodically by th[is] video.<sup>1</sup> [It] exemplifies a little bit what NIL is and distills, I believe, a couple of the misconceptions of what exactly a NIL is.

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1. Keith Murphy, Facebook.com (Jul. 4, 2021), <https://nam11.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.facebook.com%2FKeithMurphySports%2Fvideoes%2Fa-reminder-nil-applies-to-all-ncaa-athletes-including-division-iii-meet-simpson-%2F204643151547403%2F&data=05%7C01%7Cdk164%40uakron.edu%7Cf061ae05dc9a4ba8078f08db39de2260%7Ce8575dedd7f94ecea4aa0b32991aeedd%7C0%7C0%7C638167398451881560%7CUnknown%7CTWFpbGZsb3d8eyJWlJoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6IkhhaWwiLCJXVCI6Mn0%3D%7C3000%7C%7C&sdata=cMbhs2ZJRPK4XAHbSQbSBitmooLp kcbGz0qmuObfZK8%3D&reserved=0>.

I hope you guys enjoy that video as much as I did. Really the point of that video is just to show that an NIL isn't just being utilized by the Bryce Youngs and the Angel Reeses and Caitlin Clarks of the world. NIL is actually able to be utilized by Division I, Division II, and Division III athletes, especially in smaller rural communities. It's not just the Gatorades and the large brands of the world that are handing out NIL deals. It's also these brick-and-mortar, mom-and-pop, Joe's Pizza-type shops in these rural areas, such as Simpson College in a small town in Iowa. So that was a misconception that is kind of popularized, that NIL is only for the superstars of the world, and that couldn't be farther from the truth. I actually did look it up and Jake Brend did end up getting an NIL deal from that video in 2021.

## II. HISTORY OF THE NCAA

That actually leads me into the topic of essentially how the NCAA got started. The founder of the Bull Moose Party and member of the Rough Riders, Teddy Roosevelt, was the founder of the NCAA. And it's actually fairly interesting. The NCAA was founded because a lot of schools were getting ringers or players in their late 20s and early 30s to play against college players in order for them to be able to win. There were also a ton of safety concerns, especially in college football. It was fairly common for there to be on field deaths due to lack of safety protocol. Teddy Roosevelt wanted to stop this corruption and this lack of safety in the college football space, and thus he started what is now considered the NCAA.

I think it's important to note the inception of the NCAA had very true and honest intentions. It was to create a governmental body that all colleges had to follow and had to abide by in order to promote a fair and competitive athletic environment. However, as you'll see kind of throughout this talk in my argument, that vision kind of got perverted along the way in terms of some of the restrictions that the NCAA has implemented. That [led] me to my next question: [is there] any business in the world that does not have a governmental regulation and that does not have any fellow competitors in their business?

## III. NCAA ANTITRUST VIOLATION

I did some research and I couldn't find anything, but that's exactly the case with the NCAA. The NCAA has no governmental oversight. The NCAA is also not in competition with anybody. So that's the inception of what the antitrust violation actually is here. The antitrust violation, per the

Sherman Act, and the Sherman Act is to antitrust law what the 4th amendment is to Criminal Procedure. It's really at the heart of antitrust law and essentially the Sherman Act states that a business is not able to institute an unreasonable restraint on trade. Basically, we want to stop monopolization, so we want to avoid Verizon becoming a monopoly and pushing out T-Mobile and AT&T and some of these other phone carrier providers. The fact the NCAA is not in competition with anyone and has no oversight inherently causes antitrust questions to arise.

So now when we're looking at whether there's an antitrust violation here, the District Court in the *NCAA v. Alston* case used the rule of reason analysis, which is a four step analysis that I'll talk about a little bit later, that points to whether there has been an antitrust violation by a business.<sup>2</sup> It looks at the anti-competitive aspects by that business as well as its procompetitive justifications and essentially uses a balancing test to determine if there's any sort of Sherman Act per se violation.

However, in its structure by itself, the NCAA is what's called a hub-and-spoke cartel. The market players in a hub-and-spoke cartel are the spokes. They enter into an agreement to share sensitive information through a vertical common player, which is the hub that acts as a medium to facilitate the cartel. If you think about it, the NCAA is essentially, if you think about a bicycle wheel, the NCAA is the hub and all the spokes are the conferences that are the players that make up the entire wheel. The transfers of information go through the hub and get dispersed all the way to the spokes.

A hub-and-spoke cartel is possible to be legitimate and legal under the Sherman Act. However, again, without competition that causes an issue. However, the conferences themselves are in competition with each other. Thus, my law review article argues that the NCAA is in violation of antitrust law, which is exactly what the *NCAA v. Alston* Court found.<sup>3</sup> However, if the NCAA were to become defunct and the conferences were able to govern themselves, since the conferences are in competition with each other, this would dispel the antitrust violation that is caused by the NCAA.

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

3. Brandon Posivak, *The Demise of the Hub-and-Spoke Cartel and the Rise of the Student Athlete: A Significant Step Toward a New Era of Conferences in NCAA v. Alston*, 31 U. MIA BUS. L. REV. 38 (2023).

## IV. PROGENY OF CASES

Now moving to the progeny leading up to the *Alston* case that established Name, Image, and Likeness rights. There are three cases that kind of led to where we are now, and that's starting in 1984. The *NCAA v. Board of Regents of University of Oklahoma and University of Georgia* case was the first major significant win for student athletes.<sup>4</sup>

Very quickly, interesting to note, the term student athlete is not actually a term of art, or actually even common vernacular. The term student athlete was actually coined by a defense attorney for the NCAA in this 1984 case. It became popularized by this attorney in a brilliant move to show that these college athletes were student athletes, meaning they were students first, athletes second. [It was to] show that the NCAA puts such an emphasis on academics, that these were not athletes like professional athletes, they were student athletes. And this was in an attempt to show that the amateurism argument of the NCAA was valid. It ended up becoming common vernacular to call them student athletes, but prior to this defense attorney inventing that term, college athletes were simply called athletes, just as a professional athlete would be called an athlete.

Now, in the 1984 case of *Board of Regents*, the holding was a significant victory for these student athletes because it knocked down the NCAA's broadcasting regulations.<sup>5</sup> Under the NCAA's Broadcasting regulations, the NCAA decided which games got televised and controlled on which channels those got televised. So, for example, if The University of Akron was playing a football game against Bowling Green, the NCAA would have the decision as to whether that game would be on TV as opposed to when it's on the MAC Network. Now we have the SEC Network, the ACC Network, the Big 10 Network, own schools even have their own networks, such as University of Texas at Austin [with] the Longhorn Network. Notre Dame has a decades long deal with NBC to have their home games televised on NBC. That was all made possible by this 1984 *Board of Regents* decision.

Fast forward a few decades to 2006. The next big student athlete win came in *White v. NCAA*.<sup>6</sup> That case actually never fully went to trial, but actually settled. It was still a \$10 million win for student athletes. Essentially the argument in that case was that the NCAA gives athletic and schools give academic scholarships to these student athletes in order

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4. National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984).

5. *Id.*

6. *White v. NCAA*, 2006 U.S. Dist. LEXIS 101374 (C.D. Cal., Oct. 19, 2006).

for them to go to school. However, the NCAA was not covering extra expenses, such as laundry, room and board, meals. Some of these students who are coming from impoverished backgrounds, even on a full scholarship, were not able to afford the cost of living in their respective college towns. Because of this, the *White v. NCAA* case essentially established a fund for student athletes, both retroactive and proactive, to be able to get money for room and board for some of these living expenses that were not covered by their scholarships.

The third essential victory, although there is an asterisk next to this victory, was the 2015 case of *O'Bannon v. NCAA*.<sup>7</sup> This case was denied certiorari and never actually made it to the Supreme Court level. However, the 9th Circuit made an important determination, although it did not become binding precedent, [but] became persuasive precedent. Basically, the 9th Circuit struck down the NCAA amateurism argument. The NCAA had rested on their amateurism argument since its inception, and it had survived up until that point in 2015.

The amateurism argument was fully rejected in 2021 in the *NCAA v. Alston* case, but in *O'Bannon v. NCAA*, the rejection of the amateurism argument basically foreshadowed the eventual *Alston* decision and the amateurism argument is exactly what it sounds like. The NCAA argues that student athletes should not be able to be paid or profit off their Name, Image and Likeness because they're amateurs. Again, much like the term student athlete, amateur is a term entirely created by the NCAA.

The NCAA actually in [and] of itself, does not have a definition of amateur. The Olympics and the IOC does have a definition of amateur, and the NCAA has adopted something close to that definition but has never fully been able to articulate the difference between student athletes and professional athletes aside from the fact that student athletes do not get paid and student athletes go to school. Those are the only two things that the NCAA has been able to point to. The 9th Circuit struck that down in 2015.

Now leading up to the *Alston* decision, fast forwarding to 2021, at the Northern District of California District Court level, Judge Wilken used the four step rule of reason analysis to strike down the NCAA's arguments of amateurism, as well as saying that the NCAA provides scouting and preparation for student athletes to make it to the professional level. But the anti-competitive aspects ended up winning the day in that case and the balancing between the anti-competitive and procompetitive justifications. The anti-competitive aspects of the fact that these student athletes are a

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7. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

cognizable labor market, and the NCAA is creating what's called a horizontal restraint on trade.

A horizontal restraint on trade means that essentially, because the NCAA is not in competition with anyone, they are creating a restraint on a labor market by denying the student athletes any sort of compensation, aside from scholarships for their performance. The student athletes would, in any other business model, be considered employees. Now again, there is no other business in the world who is able to use a horizontal restraint on trade to ensure that their employees do not make any money.

This eventually led to the *Johnson v. NCAA* case, which went up to the Third Circuit on appeal.<sup>8</sup> But in the Eastern District of Pennsylvania, Judge [Padova] essentially said that student athletes are employees and deserve to be paid minimum wage under the Fair Labor Standards Act. Again, this went up to the Third Circuit on appeal and did not win.

However, we are seeing from *Alston* a slow transition with the NCAA's arguments failing and student athletes pushing harder and harder. Justice Gorsuch's majority opinion—and it was an unanimous decision in *NCAA v. Alston*—agreed with everything Judge Wilken had [said] at the District Court level. The 9th Circuit also agreed with everything that Judge Wilken had [said] at the District Court level. Judge Gorsuch added that the NCAA does not have antitrust immunity. The NCAA was trying to argue that [they had antitrust immunity] because they are an organization that provides essentially nonprofit services for student athletes, and essentially out of their goodness of their hearts, providing these scholarships. The Court wasn't having it. And so, the Court struck down the antitrust immunity argument as well as their procompetitive justifications, most notably the amateurism justification.

My argument in my law review article agrees with Justice Kavanaugh. In his concurrence, Justice Kavanaugh criticized Justice Gorsuch and the majority for not going far enough in the *Alston* decision since the *Alston* decision is relegated specifically to education related benefits. Meaning that athletes such as Bryce Young, Caitlin Clark, Angel Reese, and some of these major athletes in both men's and women's collegiate sports are only able to have NIL deals directly related or sometimes indirectly related to education. Justice Kavanaugh essentially said that was poking a hole in the dam, but the dam should be blown up entirely and that there should be no restriction on student athletes getting NIL benefits. Thus, it should not only be within the realm of education, it should be overall anything that student athletes do. Again, as long as it

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8. *Johnson v. NCAA*, 556 F. Supp. 3d 491 (E.D. Pa. 2021).

does not violate the school's policy regarding alcohol or anything with religion.

Moving towards the impact and the significance of *Alston*, I mentioned the *Johnson* case. However, there are also multiple other cases that have been at the District Court level that have gone up to the Court of Appeals level. On April 6, 2023, just a few weeks ago, a brand new lawsuit was filed in the Northern District of California by the same exact attorneys who argued the case in *NCAA v. Alston*. This is the *Hubbard* case. The lead plaintiffs are Chuba Hubbard, who is the current running back for the Carolina Panthers and former Oklahoma State running back, and Keira McCarrell, who is a former University of Auburn track athlete. This lawsuit, as of April 6, currently has 5,000 Division I athletes who are seeking backpay dating back to 2018. This backpay is what they would have been able to receive from the *Alston* decision had the *Alston* decision been made while they were still athletes in college.

This hops on the shoulders of the *House v. NCAA* case, which basically asked for the same exact thing, except dating back to 2016.<sup>9</sup> Of note specifically, while there are currently 5,000 Division I athletes who are part of this *Hubbard* lawsuit, the attorneys projected there will be upwards of 20,000 Division I athletes joining this class action lawsuit. They will be asking for more than \$1 billion dollars in backpay for these Division I athletes, and antitrust experts are liking their chances of winning at the District Court level.

## V. FUTURE OF THE NCAA

So, where are we now? Well, according to Justice Kavanaugh, we are one or two steps away from blowing up the NCAA's dam entirely. Now, if the *Hubbard* and *House* cases are any indication, student athletes and proponents of NIL show no signs of stopping. And essentially, we are one Supreme Court case away from the NCAA losing any teeth whatsoever. We saw the NCAA's President change from Mark Emmert to Charles Baker, who is the former Massachusetts governor.

However, my article likens the NCAA's current position to General Custard's Last Stand at the Battle of Little Bighorn. Essentially, the NCAA has no further leg they can possibly stand on and are essentially delaying the inevitable. My article argues that within the next five years, the NCAA will cease to exist in its current form; that the conferences will be able to govern themselves; and that because the conferences are

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9. *Grant House v. NCAA*, 545 F. Supp. 3d 804 (N.D. Cal. 2021).



governing themselves, there will no longer be an antitrust violation.

Going to that point in particular, the actual antitrust violation here is not the fact that the NCAA is instituting monetary restrictions. It's the fact that they're not in competition with anyone. So, the conferences themselves would be able to institute their own monetary restrictions in relation to the current NIL law amongst college athletes without running afoul of the Sherman Act and of antitrust law.

I believe that within the next year, we will see a federal NIL legislation. Right now, 94% of Division I schools are in a state that has NIL legislation already passed or in the works. The only Division I school that is in a state that has done nothing so far with NIL is the University of Wyoming. And because of that, it doesn't appear that it will affect recruiting in terms of a recruit attempting to go somewhere where NIL legislation is passed versus a state where NIL legislation has not been passed. And that charge was led by California in 2019 with [the] Fair Pay to Play Act.<sup>10</sup>

So, not only did I say that five years from now the NCAA will be defunct in its current form, but I believe in one to two years we will also see a federal NIL legislation. Thus, the last stand of the NCAA appears to be near. We appear to be moving towards a very, very, very different scope of what college sports will look like in the future.

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