



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

**MARCH-APRIL 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.*

**T**hank you for reading the fifth issue of the *LEAD1 NIL Institutional Report*.

Since our fourth issue released earlier this year, more and more NIL deals have blown up the NCAA's NIL Interim Policy brick-by-brick. While the Interim policy states that improper recruiting inducements remain in effect, it was recently reported that a five-star high school football player signed an NIL deal with a collective that could pay him \$8 million by his junior year. The NCAA has stated explicitly that institutions should not use NIL arrangements to improperly induce matriculation or guarantee a particular NIL opportunity upon enrollment. While these types of agreements border the inducement line, there are also "golden handcuff" components to these deals where athletes could be contracting away their future rights, including the right to transfer in the future.

Even if some of these NIL deals are not "direct" recruiting inducements, they could still be considered "indirect" inducements where third party collectives communicate and market high-dollar figures that their athletes make to prospective athletes. The question is whether the NCAA will, at some point, draw a line in the sand or whether they will continue to let the ball roll down the hill. One thing we know is that if the ball continues to roll down the hill, more and more NIL agreements will become even more direct or essentially recruitment and retention tools. The Interim Policy also states that athletes are forbidden from receiving com-



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

pensation where work is not actually performed. To that point, we have, however, seen some international athletes receive passive income, where compensation is received, but to comply with international visa employment requirements, work is not actually performed.

But even if the NIL market continues to become more unrestrained in the coming year or so, it will still be hard for the Congress to focus its attention on the issue given the war in Ukraine and midterm elections later in the year. It is also possible that the next Congress could look very different, perhaps under Republican control, which would change the calculus of the federal NIL conversation. While there are individual Senators who have expressed interest on college sports, it will be really hard to get anything done until possibly the next Congress.

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! ■

**The Tom McMillen Federal  
NIL Scoop ..... 2**

**TECHNOLOGY PRESENTED BY  
SPRY**

**Recent Education  
Campaign Shows that  
Technology Helps Student-  
Athletes Maximize their NIL ... 4**



**SOCIAL MEDIA AND BRAND  
BUILDING PRESENTED BY INFLCR**

**A Unified NIL System  
for Student-Athletes,  
Businesses, and Collectives ... 6**



**FINANCIAL PLANNING  
PRESENTED BY TEAMALTEMUS**

**What are Student-Athletes  
doing with their Money? ..... 7**

**TEAM ALTEMUS**



**SPORTS BETTING PRESENTED  
BY ENTAIN**

**More Colleges,  
Universities Embrace  
Education To Prevent  
Gambling Harm Among  
Student Athletes, Coaches  
and Staff ..... 8**



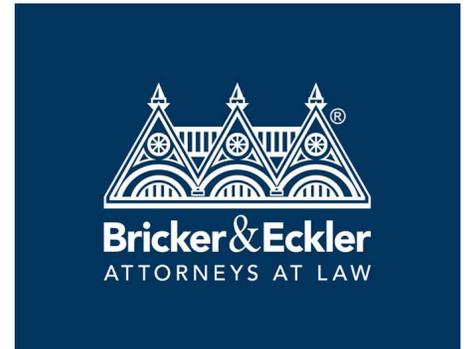
**MEDIA RELATIONS  
PRESENTED BY FINN**

**Female College Athletes  
Making Their Mark in NIL Era 9**



**LEGAL PRESENTED BY  
BRICKER & ECKLER**

**Why NCAA's (very tardy)  
NIL guidance might not  
matter to future of NIL,  
but will underscore the  
uncertain future of NCAA ..... 10**



**Alabama Repeals State  
NIL Law After Less Than  
One Year ..... 12**

**Use of School Colors  
Poses yet Another  
Potential Legal Issue on  
NIL Landscape ..... 13**

**Facilitation and NIL: Do  
Recent Moves Suggest  
Schools May Go Beyond  
Just Connecting Athletes  
with Sponsors? ..... 14**

**NIL Opportunities and  
the Impact on Student-  
Athletes Entering the  
NCAA's 'Transfer Portal' ..... 15**

**LEAD1 Interviews Oliver  
Luck on Hutton-Button NIL  
Issues ..... 16**

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## TECHNOLOGY presented by Spry

## Recent Education Campaign Shows that Technology Helps Student-Athletes Maximize their NIL

By Lyle Adams, CEO of Spry



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As the academic year nears conclusion and we approach the first anniversary of NIL, we wanted to share the results of a recent education campaign. The campaign's goal was to increase student-athlete engagement, which we hoped would increase NIL activity/participation, increase NIL earnings while increasing student-athletes' comfortability with NIL.

The campaign ran throughout the first quarter of 2022, and the results were extraordinary.

### CAMPAIGN HYPOTHESIS: WHAT WE ALL THOUGHT

- Between classes, practice, games, and now NIL opportunities, student-athletes are undeniably busy. We thought strategic communication cadence would increase their engagement.
- Increased activity on the application will yield better results for our student-athletes, starting with educating them on Rules and Regulations (NIL Legs and Regs). The targeted push notifications would lead to more completed

education tasks and more informed student-athletes.

- Helping student-athletes become more aware of NIL guidelines will influence them to disclose more opportunities on the platform – improving the lives of Compliance Administrators around the country.

### CAMPAIGN RESULTS

We analyzed the effectiveness of strategic notifications and targeted educational content with a subset of users. During the experiment window, student-athlete logins increased by 157%. Spry also saw an increase in education modules completed: up 130% since the start of the campaign. We also saw a substantial increase in NIL compensation. **The median student-athlete NIL compensation increased 2.5x in the test cohort.** We only looked at cash compensation and excluded “in-kind” deals.

The student-athletes that engaged and completed more with the education modules also saw substantially higher NIL compensation. Student-athletes that completed the NIL Basics curriculum earned more than double that of student-athletes who never completed the course.

It's clear that education is the best and easiest way to help your student-athletes learn about NIL and help them increase their earning potential. Spry's dynamic educational programming makes it easy to

distribute educational content to specific subsets of student-athletes, equipping each student-athlete with the tools and resources to succeed.

### BEST PRACTICES AND TAKEAWAYS

- Timely and consistent messaging is a great way to keep student-athletes informed and **EXCITED** about NIL policies and information.
- Every student-athlete is unique, and your educational content and programming should reflect that. Leveraging technology makes it easy to reach all your student-athletes in a scalable manner.
- Your NIL solution must be mobile-first; today's student-athletes are Gen Z. A dynamic mobile solution ensures fewer compliance heads and increased student-athlete participation.
- There is a positive correlation between education and earnings. The more you educate student-athletes, the higher the probability they will have a positive NIL experience. **In addition, student-athletes that take the time to complete the education modules in Spry tend to have higher compensation per deal and are more likely to stay within compliance with their respective institution.** ■

Contact Lyle Adams at [lyle@spry.so](mailto:lyle@spry.so)



**TECHNOLOGY HELPS STUDENT-ATHLETES MAXIMIZE THEIR NIL**



The goal of **Spry's Education Campaign** was to increase student-athlete engagement. We hoped increased engagement would increase NIL activity/participation and increase NIL earnings while increasing student-athletes' comfortability with NIL.

The campaign ran throughout the first quarter of 2022, and the results were extraordinary.

**CAMPAIGN RESULTS**

**TOTAL STUDENT-ATHLETES LOGINS**

During the experiment window, student-athlete logins **increased by 157%**



**TOTAL NIL COMPENSATION**

The median student-athlete NIL compensation increased **2.5x** in post education campaign.



**EDUCATION COMPLETION RATE**

There is an increase in education modules completed: up **130%** since the start of the campaign



**MAJOR TAKEAWAYS**

Timely and consistent messaging is a great way to keep student-athletes informed and **excited** about NIL policies and information.



Every student-athlete is **unique**, and educational content and programming should reflect that. Leveraging technology makes it easy to reach all your student-athletes in a scalable manner.

A NIL solution must be **mobile-first**; today's student-athletes are Gen Z. A dynamic mobile solution ensures fewer compliance heads and increased student-athlete participation.



There is a **positive correlation** between education and earnings. The more institutions educate student-athletes, the higher the probability they will have a positive NIL experience. In addition, student-athletes that take the time to complete the education modules in Spry tend to have **higher compensation per deal** and are more likely to stay within compliance with their respective institution.

## SOCIAL MEDIA AND BRAND BUILDING presented by INFLCR

# A Unified NIL System for Student-Athletes, Businesses, and Collectives

By Jim Cavale,  
INFLCR Founder & CEO



SPONSORED CONTENT

With Michigan as the guide, we mapped out what it looks like for your college athletics program to have a unified NIL system for student-athletes, businesses, and collectives.



Earlier this year, the University of Michigan became the 14th INFLCR client to add the INFLCR+ Local Exchange to their existing software partnership. In just the first few months of launching this new product, more than 25 of INFLCR's 206 NCAA Division I multi-year software partners have now added the INFLCR+ Local Exchange for reasons that align with UM's NIL strategy.

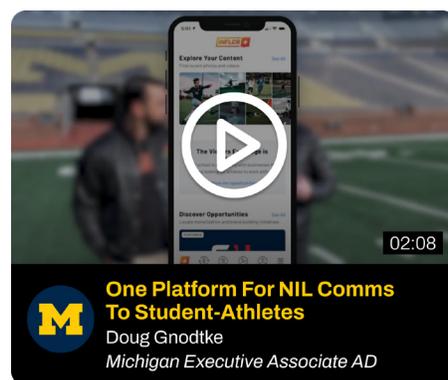
With the launch of their INFLCR+ Local Exchange, custom-branded as **The VICTORS Exchange**, UM Athletics' overarching strategy was simple – centralize all NIL activity for everyone transacting with

Contact CEO Jim Cavale [jim@inflcr.com](mailto:jim@inflcr.com)

UM student-athletes, including Valiant Management, the UM-focused collective that has consistently provided financial opportunities to UM student-athletes in a multitude of ways since NIL began in July 1, 2021.

In addition to having Valiant register for the VICTORS Exchange, UM promoted this “online NIL Storefront” in a **multimedia manner** that led to more than 60 local and national companies registering within the first week.

When building your own blueprint for an NIL strategy, centralizing into one system is where you must start. The INFLCR+ Local Exchange provides a comprehensive technology infrastructure that can be utilized by all parties, without transaction fees.



### ONE SYSTEM

*University of Michigan Athletics' Overarching NIL Strategy*

Centralize All NIL Activity For Everyone Involved In Transacting With UM Student-Athletes

- Valiant Management (UM's Collective)
- Local & National Companies Specifically Interested In Partnering With UM Student-Athletes
- Tech Marketplaces (ie. Cameo, Open-

Sponsorship, Player's Trunk, Etc.

*Meet The Student-Athletes Where They Already Are*

Some institutions have attempted to internally build their own NIL directory for businesses and student-athletes. It has been challenging to get student-athletes to sign up, let alone for the institution's athletic department to manage their own technology platform.

UM Athletics was very adamant that their VICTORS Exchange be an extension of a tech setting that UM student-athletes are already using regularly. The same app that student-athletes are using to build their personal brands, learn about NIL and disclose NIL transactions to compliance, is now the same app that Victors Exchange registrants (including Valiant Management) can use for direct communication.

It was also very important to UM Athletics that their VICTORS Exchange streamlines direct payments from registrants directly to student-athletes in exchange for their NIL services. A manual compliance disclosure process for student-athletes can lead to deals not being disclosed. All payments that flow to UM student-athletes through the VICTORS Exchange are automatically reported. This disclosure automation has exponentially increased UM Athletics' compliance oversight, while ensuring comprehensive competitive data for UM coaches to communicate success stories to their current and prospective student-athletes.

### TAKE FULL OWNERSHIP

*The University of Michigan Athletics Owns The System*

Lastly, UM Athletics was adamant

See A UNIFIED on Page 20

**FINANCIAL PLANNING presented by TeamAltemus**

**What are Student-Athletes doing with their Money?**

Public Valuation determines NIL marketability, Private Valuation of Compensation Determines Financial Health.

*By Courtney Altemus, CEO and founder of TeamAltemus*

**TEAM ALTEMUS**



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“NIL” has become as ubiquitous as ‘transfer portal’ in conversations around collegiate athletics. Both terms describe two of the most seismic shifts in NCAA rules history. However, only one refers to a rule change that affects student-athletes on a deeply personal level. Compensation from activities involving one’s “Name, Image and Likeness” is by definition, earning value from one’s persona rights. And, while one’s NIL is uniquely their own, how it is valued is determined by the public. Our goal is for student-athletes to establish good financial habits which will carry them through the rest of their lives.

Good financial habits start with a budget, or a personal financial game plan. This plan is built to achieve goals with spending decisions that are unique to the individual who creates it. Student-athletes’

reliance on social media for entertainment, news, trends, feedback, etc., makes them highly susceptible to external influence on their spending decisions. We teach them a sustainable process for managing their money and the personal decisions that come with it. This process starts first with a clear delineation of helpful public opinion (positive feedback that shapes the value of one’s NIL) vs. the unhelpful kind which heavily influences purchasing decisions. It can be counterintuitive to a student-athlete since the value of their name, image and likeness is inextricably linked to public response. Student-athletes need to be taught and to practice how to manage their money based on their own goals, needs and wants. This practice will greatly contribute to the quality of their financial health over time.

Budgeting and saving are two critical areas we teach student-athletes. Not only do we go in-depth about their meaning and significance, but how they can use them as tools for financial success. When we ask student-athletes if they have a budget they’re trying to use, generally 25% of them say they do. Many of the remain-

ing 75% don’t know where to get started. Rather than starting the instruction with math, we engage student-athletes in a design-thinking exercise to define their needs, short-term wants and long-term wants. This exercise helps establish their individualized goals and gives them the framework within budgeting and saving to achieve them.

Student-athletes will need to establish healthy financial habits at the beginning of their financial journey – doing so will enable success in both NIL and in budgeting and other spending decisions. The social media pressure influencing spending decisions is relentless and student-athletes have many voices telling them what they should or shouldn’t do with their money. Empowering student-athletes to consider their own needs and wants when starting and managing a budget helps them achieve their financial goals and minimize money-related distractions.

For many student-athletes, NIL compensation is the first time they’ve earned and managed money. As elite athletes, their brains are programmed to make

**See WHAT ARE on Page 20**



**TeamAltemus recent session with Cornell football.**

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## SPORTS BETTING presented by Entain

## More Colleges, Universities Embrace Education To Prevent Gambling Harm Among Student Athletes, Coaches and Staff

By Martin Lycka

**Entain**  
It's your game

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Sports legends, trends and even daily stories are replete with headlines, human interest and statistics that show “streaks.” We read of consecutive wins or losses, at home or away. Players go on hot streaks for three-pointers or from the free-throw line, or cold streaks from the batter’s box, or consecutive pass completions and extra points.

Coaches are revered for consecutive winning seasons or playoff and tournament appearances. Others are replaced after a string of disappointing losses.

Sometimes these streaks are easily explained by practice and conditioning, or a new recruit, opponents’ weaknesses, an injury or a slight change in some physical technique. At other times streaks are baffling, with no apparent explanation other than luck. That’s part of the enduring excitement of sports.

We also know that streaks can mean the difference between winning and losing, in a single game or for the season. Players, coaches and fans know that sometimes, it’s all about momentum.

Momentum and streaks sometimes show up in sports betting, too, and can open a downward slide that could be serious if left unchecked. And, like the sports themselves, gambling streaks often defy reason. Yes, gambling streaks might be based on savvy insights. Often, it’s just chance.

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Unlike teams and players who are only focused on the next game’s outcome, losing streaks in gambling can be devastating to players, their families, friends and coworkers. And the negative consequences can last a very long time. They can be life-changing.

It’s important for bettors to know the odds and to recognize their limits, to avoid betting beyond their means. And it’s crucial for potentially at-risk athletes, especially college athletes, coaches and staff, —who are aware of every detail of their game—likewise to be aware of the risks of gambling, how to mitigate them and how to prevent or avoid a streak that could be ruinous.

Just as last year’s NIL ruling opened new commercial opportunities for college athletes, a Supreme Court case likewise opened new opportunities for sports betting. Recent statistics show that the risk of problem gambling has continued with the 2018 legalization of sports betting, now on the way or already available in more than 30 state jurisdictions.

At the same time, the pandemic inadvertently accelerated sports betting as live sports events were cancelled or attendance limited—for two years. Those cancellations led countless sports fans to watch, and to bet, from home or from their mobile device.

Now, the resumption of more live competition, in packed arenas, coinciding with this month’s college hoops tournaments, the end of the baseball lockout, and saturation of the airwaves with sportsbook ads...well, you get the picture.

On top of that, March is the nationally designated Problem Gambling Awareness Month. Taken together, it’s a “streak” of events that underscores the need for *responsible* gambling.

Fortunately, amid this streak of circum-

stances, there’s good news: more colleges and universities across the country are stepping up to meet the challenge of problem gambling. And they have expert help.

The college group includes some of the biggest and best known, elite athletic programs in the country, as well as smaller, regional colleges. While their athletic programs may differ in scale, they share a common goal: to raise awareness of gambling risks among student athletes and organizations, to show how those risks can be safely prevented, avoided or mitigated, and to teach that help is available for those who might unwittingly find themselves in a difficult situation.

Schools participating in this Gambling Harm Education Program for Student Athletes are working with EPIC Risk Management, the world’s premier consulting group that specializes in minimizing gambling harm. EPIC provides live, in-person educational workshops and seminars, pre-recorded and on-demand virtual resources for campus communities. EPIC’s unique approach is to share their team’s lived experiences, to help athletes and organizations to minimize the risks of gambling harm.

These are first-hand accounts, presented by people, including former athletes, who have experienced gambling streaks on the downside —and found solutions. Their personal stories send a powerful message for young people who are sports experts and team leaders, and need to know how to manage today’s betting challenges and to enjoy betting responsibly on sports.

Entain Foundation U.S., the non-profit dedicated to responsible gambling, is proud to sponsor EPIC’s campus campaign. The Gambling Harm Education Program

See **SCHOOLS** on Page 18

## Female College Athletes Making Their Mark in NIL Era

By John Acunto, Senior Partner of Consumer, Lifestyle & Sports Practice at FINN Partners



SPONSORED CONTENT

The NCAA's debacle with the women's weight room facility during last year's basketball tournament—where the huge disparities between the women's and men's weight room facilities were exposed – was an unfortunate reminder that there is still much work to be done.

Even as we approach the 50-year anniversary of Title IX, the incident spotlighted inequitable treatment of women's college sports that still exists.

Now, one year later, we are almost through the first-ever NCAA Tournament in the NIL era.

And one thing is clear: NIL has demonstrated the profitability and power of women sports and female college athletes across the country.

Since July 1, 2021, female college athletes have been cashing in on NIL.

In fact, research demonstrates how popular college female hoopsters have been, as women's college basketball ranks second in overall NIL compensation to date, trailing only college football.

Here are a few of the female college athletes making their mark in today's NIL world:

- Fresno State women's basketball twins Haley and Hanna Cavinder were one

of the first athletes – male or female—to do an NIL deal, as they teamed with Boost Mobile on July 1. The twins, who recently announced they are entering the transfer portal, have secured numerous NIL partnership deals, including Six Star Nutrition.

- University of Kentucky track and field star Masai Russell has seized various NIL opportunities with companies, even signing on with the WWE. "I'm really looking for ambassadorships rather than partnerships," the four-time All-American told Entrepreneur this fall. "I want to build an empire, a brand and legacy for who Masai is."
- University of North Carolina basketball player Deja Kelly has already secured six NIL deals, including Dunkin' Donuts and others that include equity. "We can't play forever and have to have something to fall back on," Kelly told the Associated Press. "(I)t's a generational opportunity, it'll set me up for life."
- Louisiana State University gymnast Olivia Dunne, who has more than 5.1 million followers on TikTok alone, has already amassed more than \$1 million in NIL deals. "I honestly didn't think the NIL rule was going to change while I was in college, but the fact that it did is pretty historical and very cool," Dunne told 225 Magazine.

Additionally, during the last nine months, many brands have been tapping into female college athletes.

- Nike signed their first-ever collegiate NIL deal with UCLA women's soccer player Reilyn Turner. The partnership includes Nike and Turner partnering with community organizations to encourage young girls to be active and participate in sports.
- Gatorade signed University of Con-



**John Acunto**

necticut hoops star Paige Bueckers to an NIL deal, making her the first college athlete to ever sign a deal with the sports performance drink company.

- H&R Block partnered with Iowa's Caitlin Clark and South Carolina's Zia Cooke for an initiative called "A Fair Shot" which will provide \$1 million in sponsorships and support for women college athletes, as part of their program to champion equity in college sports.
- For the NCAA basketball tournament Wingstop, a national aviation-themed restaurant specializing in chicken wings, partnered with 11 female basketball players who play the wing position, to celebrate the talent of women.

As female college athletes and companies have jumped headfirst into NIL, and there has been some success, there is still more that can be done.

The reality is that recent research still has male college athletes receiving nearly 71.7% of total NIL compensation vs. 28.3% for female college athletes in Division I.

As for communications professionals, both with schools and with major brands

See **FEMALE** on Page 19

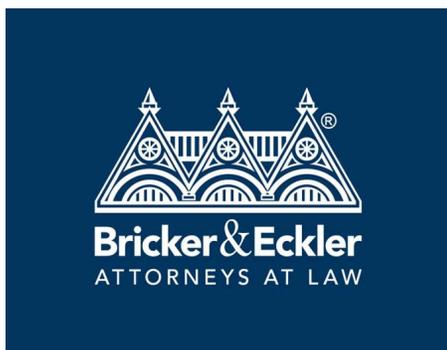
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## LEGAL presented by Bricker &amp; Eckler

# Why NCAA's (very tardy) NIL guidance might not matter to future of NIL, but will underscore the uncertain future of

## NCAA

By Erin E. Butcher and Kasey Nielsen



SPONSORED CONTENT

Almost a full year after the NCAA was essentially forced to permit college student-athletes to financially benefit from their NIL, beginning July 1, 2021, the NCAA will release recommendations on a way forward in college NIL. The NCAA's recommendations or guidance will matter, but, with the emergence of powerful NIL collectives, they will matter not as much for the future of NIL, as for the future of the NCAA.

It's no secret that the NCAA will release a report in April 2022 examining how NIL has impacted (if at all) transfers, academics, mental health and college choice and guidance in June 2022 on NIL. It's also no secret that the NCAA has been reeling to find its identity in the face of unfavorable court decisions,<sup>1</sup> all while battling a

<sup>1</sup> See *NCAA v. Alston*, No. 20-512, 594 U.S. \_\_\_ (June 21, 2021) (effectively striking down the NCAA's amateurism rules for compensation to student-athletes); see also, e.g., *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (affirming,

popularity problem among some larger D1 conferences.<sup>2</sup>

While the NCAA has been undoubtedly reassessing its future, since July 1, 2021, countless student athletes have already entered into contracts with third-party businesses or, the growingly popular, NIL collectives.

NIL collectives are entities – sometimes set up as non-profits and sometimes profiting from subscription fees—usually made up of business people, VIPs, boosters, and/or fans. For those that are created to benefit a specific college or team, they are not directly connected to that college or team but raise money for and/or facilitating deals for that specific college or college team. Think of them kind of like super Political Action Committees (“PACs”) and political campaigns – they clearly back a side or interest, but are not directly sponsored by or funded by the candidate or issue they support (you know, the TV spots around elections with the “paid for by the committee to...”). It seems like every day a new NIL collective is created, a collective-brokered deal is signed, or a new VIP member is named to the board of an NIL collective.

But the really interesting component to NIL collectives is actually not the \$8

in part, finding the NCAA's compensation rules were subject to antitrust scrutiny and plaintiffs suffered injury as a result of compensation rules).

<sup>2</sup> See Pat Forde, *Explosive Weekend Raises Doubts About Whether the NCAA Can (and Should) Survive*, Sports Illustrated (Aug. 2, 2020), <https://www.si.com/college/2020/08/02/ncaa-doubts-survive-explosive-weekend-power-5-breakaway> (detailing the Power 5 Conference's leader's discussions about staging a breakaway from the NCAA fall championships, shortly after the Pac-12 football players announced a proposed boycott of the NCAA, underscoring preexisting tensions exacerbated by NCAA decisions during COVID-19).

million-dollar-deal contracts<sup>3</sup> or team-wide offers themselves, it's the impact on recruitment efforts for colleges and improper inducements...that are not directly connected to colleges.

Take for example, ahead of the transfer portal when Coach Steve Sarkisian publicly commented that his team was in need of offensive line recruits.<sup>4</sup> Within the week, a nonprofit NIL collective (one of several for UT), Horns with Hearts, popped up in town and offered \$50,000 to any potential recruit to a position of offensive lineman to Texas for participation in charity work (no structure to this by the way).<sup>5</sup> And, like a miracle, suddenly Texas had seven top commitments from offensive linemen for the 2022-2023 season by February 2, 2022.<sup>6</sup> While this may look and smell like

<sup>3</sup> See Madeline Coleman, *Report: Class of 2023 Football Recruit Signed NIL Deal Potentially Worth Over \$8 Million*, Sports Illustrated (Mar. 12, 2022), <https://www.si.com/college/2022/03/12/five-star-recruit-signed-nil-deal-8-million>.

<sup>4</sup> For example, see quote from Coach Sarkisian, “We've got to improve our depth on the offensive linemen.” Brian Davis, *Quarterback, pass, rush, offensive line depth, injury: Plenty of issues ahead for Texas Longhorns*, Hook'em.com (Nov. 22, 2021, 4:48 PM), <https://www.hookem.com/story/sports/football/2021/11/22/texas-longhorns-football-coach-steve-sarkisian-offseason-plenty-issues-ahead/8726720002/>.

<sup>5</sup> See Wescott Eberts, *Horns with Heart to pay Texas OL \$50,000 annually for charity work*, Burnt Orange Nation (Dec. 6, 2021, 1:37 PM), <https://www.burntorangenation.com/2021/12/6/22820911/horns-with-heart-texas-longhorns-offensive-line-nil>.

<sup>6</sup> See Cami Griffin, *Full look at Texas' stellar offensive line class for the 2022 recruiting cycle*, Longhorns Wire (Feb. 2, 2022, 9:56 AM), <https://longhornswire.usatoday.com/lists/texas-recruiting-class-longhorns-2022-signing-day-offensive-line-devon-campbell->

See WHY NCAA'S on Page 11

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## Why NCAA's (very tardy) NIL guidance might not matter to future of NIL

Continued From Page 11

improperly inducing recruitment, neither the University of Texas nor Coach Sarkisian directly brokered this deal or were even arguably involved. This underscores that uneasy relationship between NIL collectives and their colleges and the recruiting impact arms race they can create. And, this separation between colleges and their programs and the NIL collectives is crucial and may have painted the NCAA into a corner.

From the perspective of some student athletes – especially those with the opportunities to benefit from these NIL deals – it's completely understandably why they would want to make professional athlete-level money off their skills as early as they can and before potential career-ending injuries. Similarly, many excellent student-athletes do not have a professional sport to transition into or, even if one exists, make a living from what they can now potentially attain through NIL. There are certainly those fans, colleges, college programs, and student-athletes that just want collegiate sports for enjoyment and on an even playing field – for some sports, especially in D1, those days may be over (to mention the impacts of sports betting and gambling).<sup>7</sup>

Not only have businesses, colleges, and student-athletes now had a taste of what can be with NIL unfettered by the NCAA, but also, the NCAA could be in a legal quandary if it tries to enforce new guidelines (whatever they may be), or further threaten its own existence.

As discussed above, NIL collectives are, by their creation, not directly related to the colleges or college programs they rally around and, even if colleges wanted to curb the impact of NIL collectives and deals, it is unclear how the NCAA could expect colleges to effectuate this within the confines of the law. Specifically, colleges cannot interfere in the contracts of student-athletes with third-parties. Like NIL laws currently, contract interference is a state law issue. As we've seen with NIL laws, the 50 states each have their own ways of doing things.

Largely because the NCAA has been behind the eight ball on this, if the NCAA decides to come out now and enforce new guidelines (whatever they may be) on the colleges or student-athletes directly, the NCAA could find itself defending contract interference cases across the country (let alone the various other types of state law claims that could arise). Setting the colleges and student athletes aside (sadly), just think how much money, exposure, and influence the emerging economy around NIL deals provides for collectives, agents, and businesses (again, not to mention sports betting and gambling entities).<sup>8</sup> It is unlikely that stakeholders in this new NIL economy are going to watch it implode over NCAA guidelines without

a legal fight (or many, spread throughout the country).

Further, as mentioned above, the NCAA has a popularity problem with some of the same conferences that include teams with large NIL deals – and that matters when colleges can, and have been thinking about, opting out of the NCAA. Certainly, appearing to interfere with the NIL economy is not going to raise the popularity of the NCAA with certain colleges and student-athletes that have embraced NIL and grumbled about the NCAA in the past. But failing to regulate NIL with any teeth may also alienate colleges, programs, and student-athletes that do want regulation and, more importantly, leave colleges wondering what the NCAA is for, if not regulation.

So now, the NCAA continues to find itself in an unenviable position. If it tries to regulate NIL with any real impact, the NCAA is certain to tie itself up with lawsuits from NIL stakeholders, including the powerful NIL collectives. If defending itself from lawsuits across the country doesn't batter down the NCAA, the revolt and possible exodus of some of the big conferences may also follow. If the NCAA doesn't move forward with recommendations with any impact on NIL, the NCAA further paints itself into the role of being unnecessary in the NIL landscape and possibly regulation in general. Under any of these scenarios, NIL is alive and well, but the NCAA's future is uncertain. ■

<sup>8</sup> E.g., Sean Gregory, *As College Athletes Finally Start Cashing In, Entrepreneurs Big and Small Also Look to Score*, Time Magazine (Sept. 10, 2021, 2:29 PM), <https://time.com/6094842/college-sports-nil-operndorse/>; Dennis Dodd, *Inside the world of 'collectives' using name, image and likeness to pay college athletes, influence programs*, CBS Sports (Jan. 26, 2022, 1:03 PM), available at <https://www.cbssports.com/college-football/news/inside-the-world-of-collectives-using-name-image-and-likeness-to-pay-college-athletes-influence-programs/>.

[kelvin-banks-kyle-flood/](https://kelvin-banks-kyle-flood/).

<sup>7</sup> Admittedly, the field was not "even" before, given the size, funding, and legacy of certain teams, but relatively speaking, the disparities are about to get worse (even setting aside the consequences of gambling and sports betting – a huge topic for another day).

## LEGAL presented by Bricker &amp; Eckler

## Alabama Repeals State NIL Law After Less Than One Year

By Andrew Bondarowicz, Adjunct Professor of Sports Law at Rutgers Law School

On February 3, 2022, Alabama Governor Kay Ivey signed [Alabama House Bill 76](#), into law. The new law repealed Alabama's law preventing restriction of student-athletes' Name, Likeness, and Image (NIL) rights and the commercial opportunities emanating from them. This underlying legislation, itself, was enacted on April 20, 2021, as a tidal wave of NIL legislation was passed in state capitols nationwide.

Alabama originally jumped on the NIL bandwagon to stay competitive in college football recruiting for its major state universities. As other states were passing their own legislation, football-rabid Alabama legislators feared that the lack of NIL legislation would hurt their schools in recruiting and retaining top talent against schools located in states that had legislation authorizing NIL rights. Both Auburn University and the University of Alabama were supportive of the NIL Act's passage at the time.

The key provisions of Alabama's NIL law were:

- It prevented schools from offering direct NIL benefits or arranging for NIL deals on a student-athlete's behalf.
- A student-athlete could not enter into an NIL contract in conflict with an institution's contractual obligations (such as conflicting apparel sponsors).
- A student-athlete must disclose NIL contracts to the school.
- A contract for a student athlete's NIL could not extend beyond the student athlete's participation in the sport at the educational institution.
- A student athlete could not use any of a school's intellectual property without first obtaining written permission.

- Most importantly, a student athlete could not receive NIL compensation as an inducement to attend or enroll in or continue attending a specific educational institution.
- Schools could prohibit student-athletes from entering into deals with restricted categories such as alcohol, gambling, or controlled substances.

Two key developments later in 2021 – after Alabama enacted its NIL law—made the NIL Act's fate somewhat nebulous. First, the US Supreme Court unanimously ruled against the NCAA in *Alston v. NCAA* and struck down its caps on academic benefits for student-athletes. Reacting to the defeat in *Alston*, the NCAA acquiesced on name, likeness and image rights for student-athletes and initially removed all restrictions in light of the mounting number of states with NIL laws aimed at it. They adopted interim rules shortly after that, for the first time, permitted student-athletes to profit from exploitation of their name, image, and likeness and put only the most basic guardrails up as guidance for schools seeking to maintain compliance.

As a result of the new interim rules, Alabama's NIL Act was actually viewed as more restrictive than the NCAA's new NIL guidance. Schools in states without NIL laws benefit from more flexibility in tying NIL opportunities into their recruiting efforts. It was reported that Texas A&M boosters committed between \$25-30 million to support the school's recruiting class. Other Texas schools have seen their boosters organize for-profit as well as nonprofit collectives for funneling money to their student athletes. As one school compliance director put it, "Boosters could now do all of the things they did 'under the table' to funnel money to prospective student-athletes legally, so many of them are getting creative in pooling their assets and targeting high profile recruits in

the transfer portal and signing day."

With the NCAA's defeat in the *Alston* case last summer, the NCAA's interim policy on NILs is very high level and generic as there was hesitation to implement more stringent rules that may open new antitrust claims. The guidance to college athletes, recruits, their families and member schools:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities (not the NCAA) are responsible for determining whether those activities are consistent with state law.
- College athletes who attend a school in a state without an NIL law can engage in deals without violating NCAA rules related to name, image and likeness.
- Individuals can use a professional services provider for NIL activities.
- Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.

Therefore, the NCAA largely left the door open to schools to regulate themselves within the bounds they have under either state law or conference regulations. For Alabama schools, the presence of the state law on NILs imposes a level of constraint that their competitors may not be subjected to. Some of these restrictions include restrictions on the types or categories of sponsors, disclosure requirements, use of collectives and other mechanisms that are flooding into the NIL marketplace. Having no state law in place allows Alabama schools more flexibility and adapting to the quickly changing marketplace rather than having to stay within the constraints of the state law. While Alabama's law was not more restrictive than other states that passed NIL laws, it was still

See **ALABAMA** on Page 19

## Use of School Colors Poses yet Another Potential Legal Issue on NIL Landscape

By Steve McKelvey, J.D. and Anita Moorman, J.D.

There has been an avalanche of endorsement deals for college athletes since NCAA bylaws restricting promotional activities were relaxed in June 2021. Almost 30 states now have enacted specific legislation preventing educational institutions and amateur athletic organizations from enforcing rules that limit athletes' ability to use their name, image, and likeness (NIL).<sup>1</sup> In addition, now most universities have adopted institutional NIL policies describing how NIL activities should be conducted by their athletes. Some legislation and NIL policies expressly permit athletes to use institutional intellectual property (school IP) with written permission or through existing licensing partners; while others expressly prohibit any use of school IP by athletes in their NIL activities.

As athletes enter into endorsement agreements with companies (NIL deals), they may be featured in advertising or engage as a brand influencer through social media. In so doing, they must carefully navigate the school NIL policy and the use of school IP. Even if they do not use official school IP, how they represent their affiliation with their respective universities can still create challenges. One way in which their affiliation may be recognized or acknowledged is from the apparel they wear in their advertising and social media posts.

### NIL DEALS AND UNIVERSITY INTELLECTUAL PROPERTY

While in one of the earliest national NIL deals, Dr. Pepper saw it advantageous or

necessary to feature Clemson QB D.J. Uiagalelei in a generic "Clemson" orange football jersey<sup>2</sup>, other companies and brands may find that there is a genuine appeal to aligning with student-athletes without incorporating any school colors or uniforms in their advertisements. However, a large part of an NIL deal is the opportunity for a brand to align with both the athlete and the school.

However, if use of school IP is not permitted, or if the company cannot afford an official sponsorship or licensing arrangement, or if a competitor has exclusivity for a sponsorship category, the company can choose to feature the athlete in what we affectionately refer to as "pajama-wear" – generic uniforms void of school IP but showing the school color or color combination. One such example is Chris Rodriguez, Jr., University of Kentucky football player, who was featured on a billboard and festival signage in Lexington, Kentucky promoting Bluegrass Roofing & Consulting. Rodriguez is featured fully clad in a blue and white football uniform (including the checkerboard design on the shoulder) and helmet but without any official marks or logos of the University of Kentucky.<sup>3</sup>

In scenarios such as this, might a univer-

sity have a potential cause of action against an advertiser for use of their university colors or uniform color schemes? For color to meet the legal requirements of a trademark, it must possess those basic legal requirements of distinctiveness, source identification, and non-functionality. The color or color combination must have acquired what is referred to as "secondary meaning": a mental association in the mind of the consumer that links the color(s) with a single source.<sup>4</sup> Think the iconic Tiffany blue for Tiffany & Co. and the combination of green-and-yellow on John Deere tractors.

### UNIVERSITY COLOR SCHEMES AND TRADEMARK INFRINGEMENT

The Fifth Circuit's decision in 2008 in Board of Supervisors of LSU, et. al. v. Smack Apparel Company<sup>5</sup> provides some guidance for a Lanham Act claim for trademark infringement based on uniform color schemes. In Smack, LSU, Oklahoma, Ohio State, and USC sued an apparel company for using the schools' colors on t-shirts. The universities asserted that their color combinations functioned as source identifiers, were distinctive colors used to represent their universities, and thus had acquired the requisite secondary meaning to warrant trademark protection. The Fifth Circuit affirmed the trial court's finding that the universities had established secondary meaning in their color schemes and designs. One important fact to note though is that, in addition to using the color combinations, Smack Apparel also included references to the universities' athletic achievements that

1 Tracker: Name, image and likeness legislation by state. (2022, March 10). Business of College Sports. <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/>

2 South Carolina's NIL state law was thought to prohibit athletes from using institutional trademarks, but Clemson's NIL policy at the time expressly permitted athletes to wear clothing in advertising featuring Clemson's purple and orange colors so long as school IP was not used. Clemson University. (2021). Clemson compliance: Student-athlete education – eligibility edition. <https://clemson.tigers.com/nilinfo/>

3 Bluegrass Roofing & Consulting. (2021a, July 27). <https://www.facebook.com/bluegrassroofingandconsulting/photos/170978881765605>. UK's NIL policy only permits student athletes to use the university's trademark consistent with its licensing program.

4 Wal-Mart Stores, Inc. v. Samara Bros. Inc., 529 U.S. 205 (2000).

5 550 F.3d 465 (5th Cir. 2008).

See USE on Page 17

## LEGAL presented by Bricker &amp; Eckler

## Facilitation and NIL: Do Recent Moves Suggest Schools May Go Beyond Just Connecting Athletes with Sponsors?

By Holt Hackney

When news came down earlier this month that the NCAA was no longer scrutinizing BYU and its team-wide Name, Image and Likeness deal with Built Bar, the sighs of relief could be heard well beyond the streets of Provo, Utah.

That's because not only did it provide guidance that was specific to that deal, but some felt it may have sent a signal that the level of involvement that athlete department officials can have in NIL deals may go beyond just being a connector. In fact, some schools are pushing the envelope in that direction.

Case in point, Ohio State University's varsity sports will have designated staff to work with on NIL matters.

In a statement earlier this winter, the school was quick to point out that 220 student-athletes have engaged in 608 reported NIL activities with a total compensation value of \$2.98 million.

The "strategic new resource" is being called "the NIL Edge Team" and it was "developed by the Department of Athletics that will help create and foster best-in-class NIL opportunities for them."

It will "assist in connecting and coordinating NIL activities for our student-athletes," said Carey Hoyt, Ohio State senior associate athletics director and primary administrator for Ohio State's NIL programs.

The operative word is "coordinating."

Hoyt continued: "Our guidelines were initially created to be restrictive, but now that we have a better understanding of NIL, it's clear that we can provide more assistance in connecting student-athletes with interested brands. By allowing some OSU staff to interact with the brands and to educate and answer questions, we can eliminate hesitancy from brands, and donors,

who were concerned about breaking rules."

According to a press release, the Edge Team "may work with companies and brands to assist in the NIL process."

Previously, the athletics department, like a lot of FBS athletic departments that were unsure about how the NCAA might react, "was focused primarily on protective education and personal brand management during the initial six months of NIL. The ever-changing landscape, including the emergence of donor-led collectives, has created the need to have a dedicated internal team that can directly assist student-athletes as they continue to monitor the NIL landscape."

In addition to creation of the Edge Team, the new Ohio State guidelines will designate operations directors – not coaches – from virtually all of Ohio State's 36 varsity sports who will be educated and tasked as NIL point-of-contacts for their sports. The operations directors will be able to assist with facilitating a connection for an NIL activity while also educating outside entities on NIL best practices at Ohio State.

The latter is important, according to Hoyt.

"We have watched national trends and we are learning from the emerging NIL collectives," she said. "Every state and every institution has its own set of NIL rules or guidelines. Updating our NIL guidelines at this time is what we needed to do to stay competitive in this ultra-competitive landscape."

While NCAA rules still prohibit schools from directly paying athletes and from using NIL deals as recruiting inducements, the NCAA has taken a mostly hands-off approach to regulating NIL, creating an environment that Ohio State AD Gene Smith describes as "the wild, wild west." Creating the NIL Edge team can be con-

strued as Smith's way making "sure we don't lose ground in our competitive advantage in this space."

### BYU – FINDING THE PROPER BALANCE

The BYU experience may have served as an impetus for Ohio State and others.

Initially concerned that it was being investigated, athletic department officials subsequently found out that that was not the case.

BYU NIL Coordinator Randy Smith was interviewed by the media about the NCAA and how it ultimately backed off.

"They seem very satisfied with the answers they received from the university and from the athletic department," Smith said. "There's been no follow-up saying, well, why did you do this, or anything? It was just, here's the questions about what happened, here's the response. And by the time that report came out, man it was three months or so after? We already answered the questions and they said, 'looks good.'"

A young journalist at the The Daily Universe, an educational lab tied to the curriculum of the journalism sequence in the BYU School of Communications, referenced Smith as adding that "the NCAA wanted to ensure that the Built Bar deal was not brokered by the university or athletic department. They were especially curious about the Built Bar announcement being done on campus at the Student-Athlete Building. As a result, this served as a learning moment. When SmartyStreets wanted to make a deal with all female BYU athletes, the athletic department requested they do their announcement off-campus.

"Smith said the NCAA did not come back and ask any further questions after

See MIGHT on Page 19

## **NIL Opportunities and the Impact on Student-Athletes Entering the NCAA’s ‘Transfer Portal’**

*By Robert J. Romano, JD, LL.M., St. John’s University*

In October 2018, the NCAA’s Division I Council enacted a ‘notification-of-transfer’ rule which has come to be known as the ‘transfer portal’. This ‘transfer portal’ allows student-athletes, without the permission of either their current coach or athletic department, to transfer one time during their college athletic career from one four-year NCAA member institution to another.<sup>1</sup> All a student-athlete needs to do under the portal system is inform his or her current school of an intent to transfer, which then requires that institution to enter the student-athlete’s name into a national transfer database within two business days.<sup>2</sup> Once entered, coaches from other NCAA colleges or universities are free to contact that student-athlete without fear of violating any NCAA rules or regulations.<sup>3</sup> The ‘transfer portal’ system also allows for transferring student-athletes to compete immediately, without the need to sit out a year in residence as required under the old rule, provided the athlete is academically eligible.<sup>4</sup>

1 This one-time transfer exception doesn’t apply to baseball, men’s or women’s basketball, football or men’s ice hockey. Student-athletes in these sports must file for a waiver to be able to compete without sitting out a season

2 <https://www.ncaa.org/news/2018/6/13/new-transfer-rule-eliminates-permission-to-contact-process.aspx>

3 <https://www.ncaa.org/news/2018/6/13/new-transfer-rule-eliminates-permission-to-contact-process.aspx>

4 Until the rule adoption in 2018, student-athletes had to be granted permission from their current school to transfer and then they were required sit out a year as a penalty for transferring. If a transfer was denied a by the coach or athletic department, a long process would follow.

Three years after the ‘transfer portal’ system went into effect, in July 2021, the NCAA, as various state laws were scheduled to go into effect, implemented rule changes that would now allow student-athletes to monetize their Name, Image and Likeness (NIL) without the fear of losing either their scholarship or athletic eligibility. Although the NCAA did not officially adopt its own rule allowing student-athletes to monetize their NIL, what it did was approve a policy which states that “if a student-athlete elects to engage in NIL activity that is consistent with and protected by a valid and enforceable law of the state in which the institution at which such individual enrolls is located, the individual’s eligibility for intercollegiate athletics will not be impacted by application of Bylaw 12.”<sup>5</sup>

When the transfer rules were amended by the NCAA in 2018, student-athletes would enter the ‘transfer portal’ for a number of different reasons: their coach took a position at another institution, thinking they could get additional playing time to showcase their talents and skills elsewhere, a bigger program, a smaller program, or simply because a change of scenery was needed.<sup>6</sup> With the modification to the NIL rules, however, there is speculation that colleges and universities with the most attractive or advantageous NIL policies, provided to them either through their state’s law or their own initiated guidelines, are using such as a recruiting tactic to lure student-athletes utilizing the ‘transfer portal’ system to their schools.

According to Rick Allen, co-founder of

5 NCAA Interim NIL Policy.

6 <https://georgiastatesignal.com/nil-deals-shaping-the-future-of-recruiting-and-the-transfer-portal/>

*InformedAthlete.com*<sup>7</sup>, such speculation is true . . . to a limited extent. When interviewed on the subject, Mr. Allen stated that, “In most college sport, the non-revenue sports, I don’t see a direct connection when it comes to transfer athletes choosing a school based on its NIL rules. I do, however, see a connection when we talk about the revenue producing sports of football and men’s basketball.” And even though the NCAA’s policy states that “NIL opportunities may not be used as a recruiting inducement . . . ,”<sup>8</sup> this belief that transfer students will be courted by programs with promises of profitable off-the-field opportunities was affirmed by Mike Hughes of Journal Enterprise when he was quoted saying, “What we are going to see happen is that bigger colleges with winning histories are going to use NIL to their advantage.” But favorable NIL policies or not, the question remains, how significant are these NIL agreements for student-athletes, whether a transfer student or not?

Current data, though limited, suggest that the impact is nominal, with most student-athletes making some, but not a significant amount of money from a NIL arrangement with a brand or company. For instance, one athlete marketing and NIL platform reported that from July 1, through December 31, 2021, NIL deals passing through its platform earned a student-athlete an average (not median) of

7 Informed Athlete is a consulting service that helps guide student-athletes through the transfer process. Additional information can be found at: <https://informedathlete.com/>

8 [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_QandA.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf)

**See NIL OPPORTUNITIES on Page 19**

LEGAL presented by Bricker &amp; Eckler

## LEAD1 Interviews Oliver Luck on Hutton-Button NIL Issues

LEAD1 President and CEO, McMillen, and former NCAA Executive, Luck, discussed college sports regulatory issues.

Prepared by LEAD1 Association

LEAD1 President and CEO, Tom McMillen, recently interviewed former West Virginia University (WVU) Director of Athletics, and NCAA Executive, Oliver Luck, about some of the latest name, image, and likeness (NIL) trends and other relevant college sports regulatory issues. The interview is particularly timely as Luck recently announced the creation of “Country Roads Trust,” an independent company set up to obtain contributions to create NIL opportunities for WVU college athletes. ***Here are some of the important takeaways from the interview:***

1. ***“Outside” NIL collectives are dominating the NIL headlines, but questions remain as to whether NIL facilitation should fall under direct institutional control.*** Because of various state laws and institutional policies prohibiting athletics departments from arranging or facilitating NIL agreements, NIL collectives have surfaced, whereby resources from businesses, boosters, fans, and donors are pooled together to create NIL opportunities for college athletes. Although these collectives are typically unaffiliated with the university, more and more collectives have emerged, so that institutions can compete with their counterparts in presenting NIL opportunities to their athletes. According to Luck, on collectives, the essential regulatory consideration is whether outside third parties, such as collectives, should control NIL opportunities for college athletes or whether these collectives should fall under the jurisdiction of athletics departments, so that they can have more oversight of NIL. Under the latter scenario, however, legal questions remain as to whether any institutional affiliation with a collective would trigger Title IX scrutiny, given potential involvement of the institution.
2. ***As the NCAA transforms itself, “pay for play” will be harder to define and enforce in the future.*** The NCAA’s Interim NIL Policy prohibits pay for play and improper recruiting inducements. According to Luck, while “pay for performance” (i.e., NIL compensation for scoring a certain number of points) and “recruiting inducements” (i.e., an institution cannot promise an athlete any benefit related to NIL) can be policed to some extent, “pay for play” is much harder to regulate given that the term is ill-defined, and all athletes can now monetize their NIL. “It’s going to be hard for the NCAA to get the horse back into the barn in any meaningful way,” said Luck. While the new NCAA Constitution states that institutions may not compensate athletes for “participating in a sport,” according to McMillen, as the Constitution is currently written, a third party or even a conference could decide to be more “open” to pay for play. According to McMillen, the more disconnected that intercollegiate athletics is from higher education, the more interest that it may create for the Congress
3. ***NIL and the transfer portal are “perfectly synced.”*** Because athletes in all sports can transfer immediately, there are now three “moments” of athlete retention that institutions must focus on including (1) the recruitment of athletes from high school, (2) keeping athletes on campus, and (3) monitoring the transfer portal. The new transfer environment has essentially created “free agency” in college sports with very limited restrictions. According to Luck, this environment “perfectly syncs” with the new NIL universe as college athletes can base their transfer decisions, at least to some degree, on NIL opportunities. While it is unlikely that the enterprise will be able to place any significant restrictions on this new transfer environment, there has been some discussion around placing restrictions on transferring during certain time periods.
4. ***Given the devolution of the NCAA, Luck is “not optimistic” that a national college sports enterprise can be effectively run at the conference level.*** According to Luck, the lack of consensus on College Football Playoff (CFP) expansion may be emblematic of the ability for various conferences to effectively work together. It is worth noting that Luck is open to the concept of a separate governing structure for Football Bowl Subdivision (FBS) football. ■

## Use of School Colors Poses Potential Legal Issue on NIL Landscape

Continued From Page 13

further reinforced the connection between the t-shirt and the respective universities (i.e., “Bourbon Street or Bust” referring to a team’s upcoming appearance in the Sugar Bowl).

Having established that the schools had protectable trademarks in their color schemes, the next step was to assess whether Smack’s unauthorized usage violated § 1125 of the Lanham Act. Section 1125 prohibits false or misleading representations that are “likely to cause confusion” as to the origin, sponsorship, or approval of the goods, services or commercial activity.<sup>6</sup>

In assessing “likely to cause confusion,” the court applied the so-called “digits of confusion” which include 1) the type of mark, 2) similarity of the marks, 3) similarity of the products or services, 4) the identity of the retail outlets and purchasers, 5) the identity of the advertising media used, 6) the defendant’s intent, 7) evidence of actual confusion and 8) sophistication of the buyer.<sup>7</sup> In this particular case, virtually every factor weighed in favor of the plaintiff universities, particularly given that both plaintiffs and defendants were selling the same product (t-shirts) in the same retail environments to the same consumers. The court also placed strong weight on the intent of the defendant (digit 6); in fact, the defendant admitted as much that they “used the school colors and ‘other indicia’ with the intent of identifying the university plaintiffs as the subject of the message expressed in the shirt design.”<sup>8</sup> On the heels of the universities’ victory in Smack Apparel

at the trial court level, this precedential case was followed by a similar decision in Texas Tech University v. Spiegelberg<sup>9</sup> (use of red and black color scheme on T-shirts found to cause consumer confusion).

### APPLYING SMACK TO NIL DEALS

Turning now to the unauthorized use of university color schemes in NIL advertising campaigns, we now ask to what extent Smack Apparel might apply and support a university’s cause of action?

The initial step in this inquiry requires the university to establish that its color scheme has in fact acquired secondary meaning such that it has a valid trademark to protect in the first place. While Smack Apparel and Spiegelberg provide precedent, it is by no means a slam dunk. There has been a myriad of non-sport cases, as well as one college case in particular (University of Kansas and Kansas Athletics v. Sinks)<sup>10</sup> refusing to acknowledge that a color or color scheme has acquired secondary meaning. Similarly, the Trademark Trial and Appeal Board (TTAB) determined that the University of Alabama’s houndstooth pattern lacked acquired distinctiveness to function as a source or sponsorship indicator.<sup>11</sup> Even though this decision was later vacated due to a settlement between the parties, the TTAB analysis suggests universities may have challenges to establish secondary meaning in their color schemes or uniform

designs/patterns.

Let’s assume however, for purposes of this discussion, that the university has successfully established secondary meaning in its color scheme and hence brings a cause of action against an advertiser using an athlete adorned in its color scheme? The next hurdle would be to establish a “likelihood of confusion” amongst the relevant consumers. This, too, is no chip shot! As noted in Smack Apparel, likelihood of confusion “is synonymous with a probability of confusion, which is more than a mere possibility of confusion.”<sup>12</sup>

The type and similarity of the mark (digits 1 and 2) are typically going to squarely favor the university. However, the first major hurdle arises related to the nature of the product, method of advertising, and distribution channels (digits 3-5). Smack involved a tangible product (t-shirts) offered for sale through retail outlets to local sport fans. Hence, in seeking to apply digits 3-5 in that case, there was strong overlap between the university’s product, advertising, and distribution and that of Smack. The university was selling t-shirts in the same retail locations to the same consumers, and hence it is also much easier to grasp the economic harm or loss here for the university.

The NIL activities in scenarios such as Bluegrass Roofing is not as clean a comparison and the similarities not as stark when you consider the use of a color scheme in a billboard advertisement for roofing services. Bluegrass is by and large marketing a different service, in a different place, to a different consumer. The much closer analogy to Smack Apparel would be if a company were providing educational

6 Lanham Act, 25 U.S.C. § 1125

7 Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658, 663 (5th Cir. 2000)

8 Smack Apparel, at 661. See also, Univ. of Ga. Athletic Ass’n v. Laite, 756 F.2d 1535 (11th Cir. 1985), on extra weight afforded defendant intent: “[T]here can be no doubt that Laite hoped to sell ‘Battlin Bulldog Beer’ not because the beer tastes great, but because the cans would catch the attention of University of Georgia football fans.” Id. at 1545.

9 Texas Tech University v. Spiegelberg, 461 F. Supp. 2d 510 (N.D. Tex. 2006).

10 2008 U.S. Dist. LEXIS 23765 (D. Kan. 2008), jury verdict, Case No. 06-2341-JAR (D. Kan. 2008) (in addressing the issue of protection of Kansas’s color scheme as used the t-shirts, the court held that “... the distinctiveness acquired by plaintiffs for its mark does not dictate a finding of liability against defendants for every blue and red shirt it produces with a possible reference to KU on it.”)

11 Board of Trustees of the University of Alabama v. Pitts, 2013 TTAB LEXIS 370 (TTAB 2013). <https://ttabvue.uspto.gov/ttabvue/ttabvue-91187103-OPP-71.pdf>

12 Smack Apparel at 478, citing Westchester Media v. PRL USA Holdings, Inc., 214 F.3d 658, 663-64 (5th Cir. 2000).

See USE on Page 18

## Use of School Colors Poses Potential Legal Issue on NIL Landscape

Continued From Page 17

services or sport entertainment services and thus creating more likelihood of confusion with what the University of Kentucky does. And even more dubious example would be a company that is providing products or services similar to an official university partners' products or services, but dissimilar to any products or services of the university.

Another important factor in Smack Apparel was that the court reasoned that it was not only the color scheme that created the likelihood of confusion, but it was the color scheme in concert with the other messaging that solidified the association between the products and the universities. One argument could be that the mere identification or recognition of the athlete as an athlete at a particular university in connection with that athlete's NIL activities is sufficient "other indicia of the university" to trigger a potential trademark infringement claim if the athlete incorporates the university colors and color schemes in their promotional activities. Conversely, one could argue that so long as the athlete was not using official school IP or promoting similar commercial products as the university produces, such as, t-shirts, apparel, souvenirs, caps, etc. – the mere fact that the athlete's association with the university is recognizable would not satisfy the likelihood of confusion standard for proving trademark infringement.

Finally, the court in Smack Apparel placed a heavy weight on the defendant's intent to cause consumer confusion. This construct has always been at the core of traditional "ambush marketing" as well (an intentional effort to confuse consumers as to who is the property's official sponsor), but it is also difficult to establish this digit of confusion (absent an admission from the defendant).

### CONCLUSION

In sum, it will be an uphill battle from a legal standpoint for universities bringing trademark infringement claims based on the unauthorized use of a university's color scheme in athlete NIL advertising. The burden is on the university to establish acquired distinctiveness for their color schemes and to prevail on the digits of confusion analysis. Additionally, the use of color schemes in advertising (e.g. a social media post) is far different than on tangible products (e.g. t-shirts/jerseys). Even though the legal path may be difficult, the university is not without leverage. Obviously most athletes would not want to risk the university's ire for partnering with an advertiser who engages in potentially questionable or disruptive marketing practices. However, preparing and litigating these types of cases (often requiring robust consumer surveys) is both

time-consuming and costly. Most universities are reticent to sue local businesses ... especially when that lawsuit would implicate that university's own student-athlete. Conversely, at a time when universities are actively engaged in lucrative licensing programs dependent upon the value of their intellectual property, and the potential importance of asserting trademark protection for color and color schemes to that overall value proposition, it is not a good time to be acquiescing when infringing activities occur. We suspect that, as the NIL marketplace continues to expand, there will arise "the perfect storm" scenario where we'll get to see Smack Apparel put to use!<sup>13</sup> ■

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<sup>13</sup> See, generally, John Grady and Steve McKelvey, Trademark Protection of School Colors: Smack Apparel and Sink decisions trigger color-ful legal debate for the collegiate licensing industry. *Journal of Legal Aspects of Sport*, 18(1), 207-242.

## Schools Embrace Education To Prevent Gambling Harm

Continued From Page 8

for Student Athletes will visit schools throughout the spring semester, into the late summer training season and the fall sports calendar.

By the end of this year, we expect that many more colleges and universities will invite EPIC to bring its positive message to their student athletes, coaches, and support staff.

With EPIC's experts, this program for student-athletes demonstrates how education, training and awareness can help to avoid and mitigate gambling risks. *That's* positive momentum. ■

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## Might Schools Go Beyond Just Connecting Athletes with Sponsors?

Continued From Page 14

the completion of the SmartyStreets deal.”

### EXPERT URGES CAUTION

All that said, Professor Richard Karcher, the recently named FAR at Eastern Michigan University and an expert on NCAA compliance rules, urges caution.

“The fact that the enforcement staff has not issued any Notice of Allegations to any schools regarding ‘NIL’ activity is not a signal that schools can become more involved in

facilitating transactions,” he told us. “Indeed, the enforcement staff has recently sent to a number of schools what it is referring to as a ‘Letter of Inquiry’ requesting information about:

- “a variety of ‘NIL’ activities; what actions the school has taken to investigate these matters;
- whether the school has any institutional policies related to ‘NIL;’
- whether the school’s policy has been

complied with; and

- whether the school believes an NCAA violation occurred, etc.

“The ‘interim policy’ adopted by the D-I Board of Directors appears to combine amateurism and recruiting rules and it just remains to be seen what position the enforcement staff ends up taking in regards to ‘pay for play’ and booster recruiting inducements.” ■

## Impact on Athletes Entering ‘Transfer Portal’

Continued From Page 15

\$1,036.00.<sup>9</sup> A second marketing and NIL platform called *INFLCR* reported the same average of \$1,306.00, but, interestingly, a median dollar amount of just \$51.00.<sup>10</sup> In terms of which sports and schools are benefiting the most, another platform stated that approximately sixty-four percent of the NIL deals involve football, followed by men’s basketball and women’s volleyball, with a large percentage of the endorsement money going to athletes playing for colleges

or universities within the Big Ten, Big 12, ACC, and SEC.<sup>11</sup>

Although there is no significant data to date to determine whether or not favorable NIL rules influence a transfer student’s decision-making process, the available data does indicate that NIL deals, for the most part, have little impact on a student-athlete’s overall finances. That being said, all indicators do suggest that top-tiered colleges and universities, in spite of NCAA rules to the contrary, will continue to use the lure of potentially lucrative NIL deals as an enticement to draw transfer athletes to their institution. ■

<sup>11</sup> Id.

<sup>9</sup> *NIL Industry Insights*, Opendorse (Dec. 31, 2021), <https://opendorse.com/nil-insights/>.

<sup>10</sup> Alan Blinder, *The Smaller, Everyday Deals for College Athletes Under New Rules*, New York Times (Dec. 9, 2021), <https://www.nytimes.com/2021/12/09/sports/ncaaf/college-athletes-nil-deals.html>.

## Alabama Repeals State NIL Law

Continued From Page 12

held that any state legislation would have the unwanted consequence of hampering Alabama schools in their student-athlete recruiting efforts.

While Alabama is the only state to so far repeal a state NIL law, this development will be closely watched by schools in other states who could apply pressure in their own state legislatures for similar repeals. ■

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## Female Athletes Making Their Mark

Continued From Page 9

aligning with these incredible female athletes, it is important to continue to not only provide the proper resources and guidance, but to tell their stories.

Give these female athletes a continued voice.

Continue to push their stories, just as you do for the male athletes. Continue to give them a platform to inspire future generations, and the opportunities to market themselves.

NIL has provided a unique opportunity for student-athletes. Let’s make sure we bring that PR creativity, the national and local storytelling, and opportunities to achieve visibility and success not just for male college athletes, but female college athletes as well.

They deserve it. ■

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## A Unified NIL System for Student-Athletes, Businesses, Collectives

Continued From Page 6

that the VICTORS Exchange was an annual software investment solely paid for by their athletic department and not paid for in any way by their collective (Valiant Management), their business community or the student-athletes. Owning the system and the data associated with it, is both a compliance and business responsibility that UM felt strongly about.

Eliminating any transaction fees was important for two reasons: first, transaction fees deter student-athletes and third parties (e.g. Valiant, local businesses, donors, etc.) from using the platform. This would prevent accurate data collection and defeat UM's centralization strategy. Most importantly, it was ethically important to UM that they maximize the value provided to their collective, business community and student-athletes.

### TAKE BUSINESS RESPONSIBILITY

*Michigan's System Is Paid For & Owned By The University*



- Maximized NIL Data
- For Compliance Oversight
- For Coach Communications
- UM Athletics Pays Annual Software Fee For VICTORS Exchange
- No Transaction Fees
- Free Service For Student-Athletes To Manage Their NIL Business
- Free Service For The Valiant Management Collective & Any Registered Companies To Find, Message, Pay & Report On Behalf Of Student-Athletes
- Eliminate Any Usage Deterrence Due To Transaction Fees

Maximized NIL Data

- For Compliance Oversight
- For Coach Communications

INFLCR contracts with the institution as a focused partner in the ongoing mission to empower student-athletes through a single NIL system – that is, the VICTORS Exchange – that provides the best possible free system for the Valiant Management collective, the entire business community, and the UM student-athletes to use for all NIL activity.

Other athletics departments are building their NIL system in similar ways, empowering their student-athletes to grow their NIL businesses. In fact, 10% of our partner institutions have already added an INFLCR+ Local Exchange platform and we expect more than 50% to establish their Local Exchange by the end of 2022. ■

## What are Student-Athletes doing with their Money?

Continued From Page 7

decisions in fractions of a second in their sport and slowing that process down for financial decisions isn't intuitive. It must be taught. Fast-paced financial decisions can result in impulse purchases that induce buyer's remorse, or worse, debt accumulation.

We teach student-athletes to build a personal financial game plan (a budget) to achieve their goals. Those goals are defined by an exercise centered on themselves to define their needs (fixed costs) and wants (variable costs). In every design-thinking exercise we've done with student-athletes, there are always non-monetary needs and wants listed. This reinforces the individuality of this

**Student-athletes will need to establish healthy financial habits at the beginning of their financial journey – doing so will enable success in both NIL and in budgeting and other spending decisions.**

process and the importance of defining their own path. It also shapes spending decisions which will support that path.

We continually remind student-athletes, "it's **your name, your image and your likeness**. It's **your money, they're your decisions and they're your goals**. You just need to define a plan to get there. We encourage them to focus on their goals and their plan, not just the numbers. The plan dictates when they'll achieve their goals and/or when they need to adjust and adapt. The relatable and repeatable process of building a budget based on goals, adjusting when necessary, and executing the plan is straightforward and sustainable for life. ■