
Name, Image, and Likeness Compensation for Student-Athletes: From the Playing Field to the Courthouse, Is the Ball Now in Congress Court

The Legal Intelligencer

May 21, 2024

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For decades, student-athletes have asserted that colleges and universities have benefitted from their participation in collegiate athletics, while the student athletes themselves receive nothing in return. A college scholarship certainly has value; however, student-athletes have pushed for more, using the court system for the past 15 years to advance their cause, and the entire sports landscape is still trying to figure out what is legal and what balance to strike.

Before getting to the challenges brought by student-athletes over the past 15 years, we should look back at how we got here. Courts had consistently set precedent that student-athletes should not be compensated. For example, the Texas Court of Appeals ruled in 2000 that a student-athlete football player, who had suffered paralysis as a result of playing in a collegiate football game in 1974, was not entitled to reimbursement for medical expenses. *Waldrep v. Texas Employers Insurance Association*, 21 S.W.3d 692 (Tex. App. 2000). In 1984, the U.S. Supreme Court took up the case between the NCAA, college sports governing body, and the University of Oklahoma. The University of Oklahoma brought an action pursuant to the Sherman Antitrust Act and the Clayton Antitrust Act after the University of Oklahoma joined a collection of powerhouse universities in the College Football Association to negotiate television contracts. The NCAA asserted that it was solely responsible for negotiating those contracts and threatened to ban any colleges from participating in any NCAA sports if the schools continued to band together. *The Board of Regents of the University of Oklahoma, et. al. v. National Collegiate Athletic Association*, 546 F. Supp. 1276 (W.D. Okla. 1982), 707 F.2d 1147 (10th Cir. 1983); cert. granted, 464 U.S. 913 (1983). While the main ruling found that the NCAA violated the Sherman Antitrust Act, the line that endured to the detriment of student-athletes came from Supreme Court Justice John Paul Stephens, writing for the majority, who stated In order to preserve the character and quality of the product, athletes must not be paid *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85 (1984).

While student-athletes asserted to the public that they were entitled to compensation, the NCAA guarded its pre-2009 system with the blanket assertion that it was protecting amateurism. Amateurism and the concept that athletes received the proper benefit via scholarships and the opportunity to earn an academic degree was put to the test when former UCLA basketball student-athlete, Ed OBannon, brought a class action lawsuit against the NCAA and the Collegiate Licensing Company, asserting antitrust claims under the Sherman Antitrust Act. *OBannon v. National Collegiate Athletic Association*, 7 F. Supp. 3d 955 (N.D.

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Cal.2014), *OBannon v. National Collegiate Athletic Association*, 802 F.3d 1049 (9th. Cir. 2015).

OBannon, and the members of the class (a myriad of former student-athletes including NBA Hall of Famers Bill Russell and Oscar Robertson), argued that the defendants were profiting off the name, image, and likeness (NIL) of the student-athletes during television broadcasts without the consent of or compensation to those very same student-athletes. A year later, after defendants failed in their attempt to have the case dismissed, another suit was brought by former University of Nebraska and Arizona State University football student-athlete, Sam Keller. Keller asserted that the NCAA, the Collegiate Licensing Company, and Electronic Arts (a video game creator) were profiting from the name, image, and likeness of student-athletes in video games. *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724, F.3d 1268 (9th Cir. 2013). Electronic Arts produced popular sports video games, including for college basketball and football, which the student-athletes asserted were their images and likenesses. While Electronic Arts did not use the actual name of the student-athlete on the individual player avatars, each avatar included the name of the college or university, the same jersey number as the real student-athlete used, and their physical characteristics, including skin color, hair color, height, and weight.

In August 2014, the California trial court ruled that the NCAA's long-standing position that student-athletes could not be paid for their name, image, and likeness was, in fact, a violation of antitrust laws. Judge Wilken opened the door to payments of up to \$5,000 for each athlete for each year of collegiate eligibility, which sums were to be maintained in a trust until their graduation. The Supreme Court denied certiorari, allowing the decision to stand.

OBannon was just the beginning for student-athletes, who continued to assert that the \$5,000 annual cap still deprived them of their rights to earn on their name, image, and likeness and the courts agreed. In June 2021, the U.S. Supreme Court upheld the lower courts ruling that the Sherman Act prohibited academic institutions from limiting the education related compensation of student-athletes. *National Collegiate Athletic Association v. Alston*, 141 S. Ct. 2141 (2021). The floodgates opened and student-athletes began legally receiving hundreds of thousands, and sometimes millions of dollars, for the use of their name, image, and likeness.

But again, this was not the end. The NCAA has continued to try to keep what was left of its control of how name, image, and likeness are used, namely by prohibiting schools from using NIL to recruit student-athletes. In January of 2024, the Commonwealth of Virginia and the State of Tennessee brought actions against the NCAA to bar it from restricting the manner in which student-athletes use name, image, and likeness. *State of Tennessee, and Commonwealth of Virginia v. National Collegiate Athletic Association*, No. 3:24-cv-33 (E.D. Tenn. Jan. 31, 2024). In February 2024, the district court granted the request for a preliminary injunction, thereby barring the NCAA from enforcing its NIL-related recruiting prohibitions. The court reasoned that to allow such a ban by the NCAA prevents student-athletes from fully understanding and negotiating their full NIL value.

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Again, the NCAA could not get ahead of this issue and more questions remain about finding the correct way to balance the NIL rights of student-athletes and maintaining rules for competitive balance. The NCAA continues to try to write and enforce rules, putting their member institutions and the student-athletes in peril of running afoul of those rules. The answers are not clear, but many have suggested that Congress needs to make laws to bring order to the chaos. At the moment, the changing landscape leaves many questions, including how to create uniform rules across states, how to compensate student-athletes fairly and how to ensure that bad actors don't abuse these developments to create unintended advantages. Meanwhile, academic institutions are forced to hire NIL general managers and consult with counsel to avoid lengthy investigations and penalties.

ABOUT THE AUTHOR

Jeffrey A. Cohen is chair of Flaster Greenberg's Litigation Department. He counsels clients in complex litigation disputes and provides guidance to proactively address business issues. He collaborates with a diverse range of clients including a variety of industries in matters related to sports issues, antitrust disputes, commercial contracts, shareholder and partnership agreements, intellectual property, insurance coverage, and commercial construction. Jeff also co-hosts The Heart of Sports radio show on 860 WWDB & 97.5 HD2 Philadelphia every Friday from 4-5 PM ET (and replay podcasts) to discuss legal issues in professional and amateur sports.

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