

Sports Litigation Alert

Reprinted from Sports Litigation Alert, Volume 16 Issue 22, November 22, 2019. Copyright © 2019 Hackney Publications.

Name, Image, Likeness and the NCAA: What You Need to Know

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On September 30, 2019, Gov. Gavin Newsom signed California's Fair Pay to Play Act, a law targeted at providing compensation to student-athletes for use of their name, image and likeness. The California law also allows student-athletes the opportunity to engage agents who can broker such business and sponsorship deals. Numerous other states, including Florida, New York, South Carolina, Minnesota and Georgia, quickly followed suit and have started the process of filing similar legislation, setting up a direct collision with the NCAA's amateurism rules. As just one example of the money currently on the table, in 2016, the NCAA and CBS reached an extension of their deal for the licensing rights to March Madness, bringing a total payout to the NCAA of more than \$1 billion a year. Despite the NCAA's explanation that this money goes entirely toward funding programs for student-athletes, the sheer dollar amounts have drawn skepticism about whom the NCAA's amateurism rules truly benefit. Many were already predicting a drawn-out legal process when, on Oct. 29, the NCAA board of governors made the unprecedented move of announcing their unanimous support for benefits for student-athletes based on their name, image and likeness. Questions abound about where the amateur system goes from here.

Name, Image and Likeness

While California's law is new, litigation over names, images and likenesses of student-athletes is not. The most famous example is *O'Bannon v. National Collegiate Athletic Association*, 7 F.Supp.3d 955 (N.D. Cal. 2014), in which former UCLA basketball player Ed O'Bannon filed an antitrust class action lawsuit in the Northern District of California on behalf of the NCAA's Division I football and men's basketball players, challenging the NCAA's use of images of its for-

mer student-athletes. The O'Bannon plaintiffs argued that upon the student-athlete's graduation, a former student-athlete should be entitled to financial compensation for the NCAA's use of his or her image. District Judge Claudia Wilken found for the O'Bannon plaintiffs, holding that the NCAA's rules on compensation violated federal antitrust laws and ordering schools be allowed to offer full cost-of-attendance scholarships to athletes, thus including cost-of-living expenses not currently part of NCAA scholarships. The NCAA appealed to the Ninth Circuit, which affirmed in part but reversed the lower court's order providing for \$5,000 per year beyond the cost of attendance. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015). The O'Bannon decisions provided a valuable model for current and former student-athletes to challenge the NCAA amateurism rules via the antitrust laws. A similar case wound its way through Judge Wilken's court last year, with Judge Wilken again ruling that the NCAA and its 11 major conferences were violating antitrust law by capping the value of athletic scholarships. In *re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, No. 14-md-02541 (Mar. 8, 2019). Judge Wilken ordered the NCAA to revise its grant-in-aid rules, allowing member schools



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to offer scholarships of higher value. In reaching her conclusion, Judge Wilken emphasized the “great disparity” between the NCAA’s “extraordinary revenue” and “modest benefits” received by college athletes.

Board of Governors’ Decision

With states lining up to institute legislation similar to California’s, many predicted a protracted legal battle, and with good reason. When the NCAA was founded in 1906 to determine the relevant safety standards of college football, amateurism was foundational to its mission. At its inception, the NCAA had a vision of the student-athlete as a well-rounded gentleman who played sport purely for entertainment with no designs on (or need for) compensation. These historic sensibilities were then ingrained in the rules themselves. The relevant NCAA bylaw, Article 12, mandates that athletes must be student-athletes, explaining “[t]he student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.”

Considering its long history and defense of the purity of college athletics, the board of governors’ decision was a striking change in tone. Its action directs each of the NCAA’s three divisions to immediately consider updates to the relevant bylaws and policies to, as Chairman Michael V. Drake explained, “embrace change to provide the best possible experience for college athletes.” The board did release certain principles to guide their divisions as they revise the relevant policies; specifically:

- Assure student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate.
- Maintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success.
- Ensure rules are transparent, focused and enforceable and facilitate fair and balanced competition.
- Make clear the distinction between collegiate and professional opportunities.
- Make clear that compensation for athletics performance or participation is impermissible.
- Reaffirm that student-athletes are students first and not employees of the university.
- Enhance principles of diversity, inclusion and

gender equity.

- Protect the recruiting environment and prohibit inducements to select, remain at, or transfer to a specific institution.

Key Takeaways From the NCAA’s Guidance

Certain takeaways emerged in the NCAA’s statement that can aid schools as they try to figure out the best path forward while awaiting further guidance.

- 1. No Pay for Play:** These guidelines spell out that, despite the California act’s title, whatever benefits are ultimately allowed cannot be tied to performance. This directly ties in to the anti-trust challenges in the California courts, further drawing the distinction of what is open for monetization.
- 2. Title IX Remains Important:** The guidelines make a point of praising diversity, inclusion and gender equity. The subtext here goes to the traditional moneymakers in college athletics: men’s football and basketball. The NCAA is telegraphing its commitment to women’s sports and those sports that are not as financially lucrative. This is a clear charge to colleges and universities to continue these important programs, which add to the depth and diversity of the whole student body, as well as to continue the focus on Title IX compliance.
- 3. No Agents:** One notable area of departure from the California Fair Pay to Play Act concerns the legality of a college athlete engaging an agent. While the California law allows a student-athlete to retain an agent, the NCAA guidelines are silent on this matter, with a strong emphasis on the “distinction between college and profes-

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sional opportunities.”

4. Recruiting Processes Will Need to Be Carefully Monitored: With increased visibility and sponsorship opportunities at certain schools comes an increased potential for manipulation and corruption when recruiting top talent. This issue came front and center in September 2017, when the FBI and the Department of Justice launched full criminal investigations into certain Division I programs. *U.S. v. James Gatto et al.*, 17-cr-00686, *U.S. v. Chuck Person and Rashan Michel*, 17-cr-00683, and *U.S. v. Lamont Evans et al.*, 17 cr-00684. Two different schemes were at play in the FBI’s investigation. The first involved the University of Louisville men’s basketball program, in which recruits were guaranteed post-graduation contracts with Adidas if they committed to Louisville, an Adidas-sponsored school. The second part of the FBI’s investigation concerned actual pay for play routed through certain assistant coaches to star players. These targets sent a strong message that the federal government is prepared to step in when the NCAA has not acted. Given the myriad opportunities for corruption, careful inquiry into recruiting procedures is necessary to properly set the standards for this new regime.

5. A Legal Battle Still May Be Coming: Although it has made a change in course, the NCAA still may choose to engage in a legal battle over the California law and other similar-

ly drafted state laws. Despite its current pivot, the NCAA strongly believes that the California law is unconstitutional, with previous statements on the matter indicating that a legal challenge may be found in the commerce clause. At this stage, the NCAA remains committed to the tenet that college sports must be regulated at the national level rather than through an ad hoc framework of state laws.

What Next?

The NCAA’s Federal and State Legislation Working Group will continue working through recommendations until April 2020, with new rules in place for the NCAA’s three divisions no later than January 2021. While the California law does not take effect until Jan. 1, 2023, states, as well as the NCAA’s member schools, will find themselves working against the clock to figure out best practices. As more and more states follow California’s lead, colleges and universities will need to pay careful attention to their state’s laws while establishing proper compliance procedures for their athletes and employees. Numerous issues abound for schools, with everything from corruption to tax fraud by student-athletes possibly in play. Those looking to immediately receive compensation should proceed with caution. Although a departure from the board of governors’ previous stance, the decision still aligns with the NCAA’s stated core institutional values of student-athletes remaining students. While at a turning point in the discussion, student-athletes are still a long way from actual pay for their play.