NEW JERSEY LAWYER

February 2021

No. 328

# SPORTS LAW


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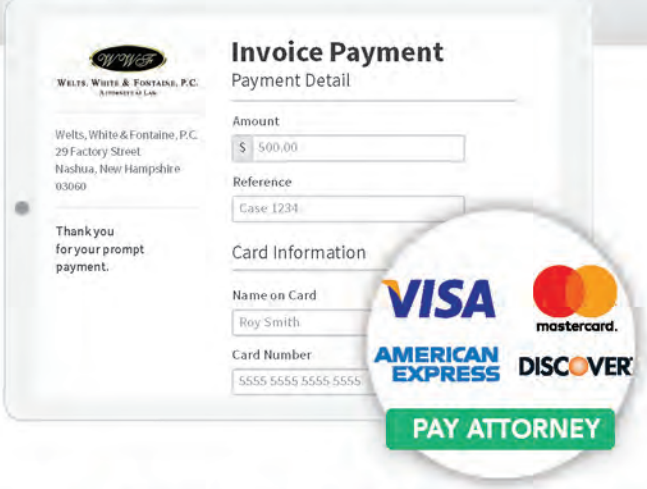


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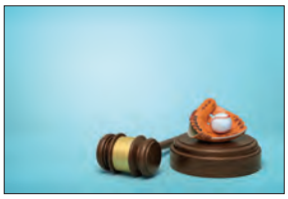

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## DEPARTMENTS

KIMBERLY A. YONTA

# Hear Us. Recognize Us. The Power of Women Speaking Up.

It was my pleasure just a few weeks ago to kick off the New Jersey State Bar Association Women's Leadership Conference program "I Dissent: Celebrating the Legacy of Justice Ruth Bader Ginsburg and the Power of Speaking Up," which was presented by the Association's Women in the Profession Section and the Diversity Committee.

As historian Jill Lepore wrote in the *New Yorker* after Ginsburg's death in September 2020 at age 87: "Ginsburg bore witness to, argued for, and helped to constitutionalize the most hard-fought and least-appreciated revolution in modern American history: the emancipation of women. Aside from Thurgood Marshall, no single American has so wholly advanced the cause of equality under the law."

Yet Ginsburg "faced discrimination on the basis of sex at every stage of her career," Lepore wrote.

Here are some figures to consider: For the last 20 years, about half of law school graduates in the U.S. have been women, yet only 36% of lawyers at law firms are women. And of those, only 22.7% are partners and 19% equity partners. Women are in the profession, but we still have a way to go.

As I read Justice Ginsburg's biography, *My Own Words*, from 2006, I have been heartened for the progress of women at the bar and on the bench in our state and across the country.

"Yet," Ginsburg wrote, "as the numbers reveal women in law, even today, are not entering a bias-free profession. Social science research can aid in why that is so and perhaps in solving persistent problems."

She offered the story of Arabella Mansfield who in 1869 became the country's first woman to be admitted to the practice of law. That year marked the first time women would be admitted into law school. But they were not always welcomed with open arms. "An example from the University of Pennsylvania Law School, in 1911 the student body held a vote on a widely supported resolution to compel members of the freshman class to grow mustaches. A 25-cent per week penalty was to be imposed on each student who failed to show substantial progress in his growth. Thanks to the 11th hour plea of the student who remembered the lone woman in the class, the resolution was defeated, but only after a heated debate."

"The bar's reluctance to admit women into the club, played out in several inglorious cases…. The few women who braved law school in the 1950s and '60s, it was generally supposed, presented no real challenge to or competition for the men. One distinguished law professor commented at a 1971 Association of American Law Schools meeting, when colleagues expressed misgivings about the rising of enrollment of women that coincided with call up of men for Vietnam war service, 'Not to worry,' he said, 'What were women law students after all? Only soft men.'"

Ginsburg rhetorically asked: "Why did law schools wait so long before putting out a welcome mat for women? Arguments range from—anticipation that women would not put their law school degrees to the same full use as men—to the potty problem…. In the 1960s, women accounted for about 3% of the nation's lawyers…. In the law schools, women filled about 3 and 4.5% of the academic seats for each of the years between 1947 and 1957."

So, we have come a long way. Strides in law practice are similarly marked as I mentioned earlier. But note, that since Ginsburg's biography was published in 2006, Alabama has had three women bar association presidents up to today. At the time of her book, in 2006, more than 160 women had already served as state bar association presidents. And here in New Jersey, I am the ninth woman to serve as president in 122 years, with two more women following me in the next five years. As of this year, there have been 10 female American Bar Association presidents, including our own Paulette Brown, the first woman of color to lead the ABA.

So where do we go from here?

In quoting her friend and colleague, U.S. Supreme Court Justice Sandra Day O'Connor said, "For both men and women, the first step in getting power is to become visible to

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NEW JERSEY LAWYER

February 2021 No. 328



***New Jersey Lawyer*** (ISSN-0195-0983) is published six times per year. Permit number 380-680. • Subscription is included in dues to members of the New Jersey State Bar Association ($10.50); those ineligible for NJSBA membership may subscribe at $60 per year. There is a charge of $2.50 per copy for providing copies of individual articles • Published by the New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Periodicals postage paid at New Brunswick, New Jersey 08901 and at additional mailing offices. POSTMASTER: Send address changes to *New Jersey Lawyer*, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. •  **Printed** in U.S.A. • Official Headquarters: *New Jersey Lawyer*, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. 732-249-5000 • **Advertising** Display 732-565-7560.

# FROM THE SPECIAL EDITORS

## Litigation, Transactions, Compensation, and More

### A Look at the Diverse Practice Area of Sports Law

It is not an understatement that sports law is a diverse practice area of law that encompasses the representation of athletes, sports teams, universities, stadium managers, corporations and the like, for a myriad of issues. It is an area of the law that is just as competitive as the lawyers and the clients they represent. The cases and issues are just as unique, covering such arenas as the NCAA, NFL, NBA, MLB, NASCAR, the Olympics, and high school sports. Sports lawyers participate in litigation, arbitration and collective bargaining matters. They get involved in the purchase and sale of stadiums, franchises and other corporate matters. They work with their clients on marketing, promotions, branding and social media issues. Branding for professional athletes is a considerable concern as it also impacts trademark, endorsement and charitable events that may be associated with their reputation. This special edition opens this diverse practice area and touches upon compensation, fairness and diversity in such a competitive and diverse area of the law.

The piece written by Nicholas A. Plinio and Gregg E. Clifton not only touches upon branding issues in their article, Student-Athlete Name, Image And Likeness Rights, What To Expect In 2021 And Beyond, but is a cutting-edge article addressing an issue being considered by nearly 30 states, i.e., the issue of NIL rights, allowing students to receive compensation for their marketing rights without violating NCAA bylaws or losing their amateur status, which is directly addressed in the New Jersey Fair Play Act enacted in September 2020.

**ALBERTINA WEBB,** *partner at Hill Wallack, concentrates her practice on family law and commercial litigation. She is a certified 1:40 mediator and domestic violence mediator, the VP of the Southern Region of the Hispanic Bar Association, chair of the Family Committee for the Hispanic National Bar Association, Chair of the North of the NJSBA JPAC, Early settlement panelist for Ocean and Middlesex counties and ISC panelist for Monmouth County.*

**SUSAN NARDONE** *is a management-side employment attorney at Gibbons, P.C. in Newark and an experienced mediator. She is a member of the NJSBA Board of Trustees and current Chair of the Women in the Profession section.*

Andrew Bondarowicz provides a larger perspective on this topic with his article, The NCAA's Historical Challenges With Antitrust Issues And Its Current Battle For Continued Relevance. The bigger question is, who should benefit from the student's abilities, the student, their college or NCAA? Are the Big Brother tendencies of the NCAA soon to leave the students making their own destiny with the money they get from their skills? That answer depends on whether the NCAA backs down on its historical position since it does not appear that the athletes are backing down anytime soon.

Furthermore, Desha Jackson and Victoria Nguyen make it clear in their article, It's All About the Benjamins: College Athletes Getting Paid for Their Name, Image and Likeness, that NIL is a problem that is not going away, and the most welcome outcome is that the students are finally going to be able to cash in on their sweat equity. Their article presents and answers questions like how much money are student-athletes permitted to earn, should they hire an agent who is an attorney and will the student-athlete be required to hold their money in a trust account? All good questions with very common-sense answers.

Addressing the NIL issue with female professional athletes is covered in the article by Mari Bryn Dowdy and Mailise Marks in The Fight Off the Field: Legal Issues Surrounding Compensation of Female Professional Athletes. This article addresses the ever-relevant issue of female professionals making less than their counterpart male professionals and the frustration faced by the players and their agents and lawyers. Gendered pay discrimination discussions are or should be happening every day. This refreshing article, starting with the U.S. Women's National soccer Team, presents hope that after the WNBA collective bargaining victory in 2020 (allowing athletes with children no longer lose pay when they have childcare issues), negotiations for the USWNT should follow suit.

An article addressing gender equity or inequity is written by one of our colleagues and Abby's former associate, Jan L. Bernstein and Gregory L. Grossman, Title IX and the Continuing Fight for Gender Equity in Athletics. This article goes to the core of sports participation and representation, i.e., women and men should have equal right and access to participate in sports, based on their ability, not their gender. We might add they should be paid equally as well.

William P. Deni provides a unique outlook on the New Jersey Fair Play Act in his article, New Jersey Fair Play Act Creates An Uneven Playing Field for Lawyers: Athlete Agents for College Students Held to Different Standard, that echoes similar concerns as the other articles in this special edition. He highlights that while attorneys are supervised and subject to discipline by the Office of Attorney Ethics, there is no enforcement body that exists to oversee and discipline a sports agent doing business in the state. A problem that should be rectified.

Christopher C. Schwarz tackles the obvious question of, Has the Supreme Court's Sports Gambling Decision Opened the Door for Corruption in ESports, that many of us have likely pondered. Discussing the pivotal case of *Murphy v. National Collegiate Athletic Association*, may help you find the answer or at least be able to articulate your client's position in court and to your adversary.

And finally, but never last, is an expose by David P. Pepe peeking into MLB history in The Catalyst for Change in Baseball Labor Agreements: A Legal Look at Curt Flood's Impact on Free Agency. The first question that is answered, is who is Curt Flood? Arguably,

*Continued on page 59*

## President's Message

*Continued from page 5*

others, and then to put on an impressive show. As women achieve power, the barriers will fall. As society sees what women can do, as women see what women can do, there will be more out there doing things and we'll all be better off for it."

Today, I celebrate the visibility of women with all of you. Whether you are a new associate in a law firm or a partner in a large firm or own your own practice or you are a Supreme Court Justice, your visibility is important and your voice will help undoubtedly others.

Ginsburg is said to have spoken in a slow, measured and thoughtful manner. Her law clerks instituted what they called the "two-Mississippi rule," that is, to wait two beats after they asked her a question, her response would be forthcoming. Yet, as another *New Yorker* article said, "Her halting style in private never prevented her from vigorous advocacy before the bench."

Women speak in different voices; we just need to listen.

And finally, let me just say that speaking up is what I do. As president of the New Jersey State Bar Association, the state's 18,000-member strong organization for the legal profession, as a criminal defense attorney, as a wife and a mother. When I speak up, I want to be heard and recognized, just as all women do. I am not naïve to the fact that as women, we have faced and continue to face many societal barriers that have sought to squelch our voices. ⚖


## PRACTICE PERFECT

# How to Make Web Meetings Work

**By Jennifer Ramovs**
*Affinity Consulting Group*

Do you use web meetings to meet with clients? Read on to see why it might be a good time to start.

It is pretty likely that you have attended a "webinar" recently, either to remotely attend a CLE seminar or to obtain training of some sort. While webinars have introduced most of us to the idea of attending a seminar from the comfort of our own office (or couch, for that matter!), it's a good idea to think about using the same technology for meetings with clients, co-workers, and colleagues.

A web meeting is simply a live meeting held over the internet. As a meeting organizer, you must first select an online meeting provider. There are a bunch of them out there and PracticeHQ has a great comparison chart of all of them, which is available at affinityconsulting.com/comparewebmeetings. Once you have your provider in place, you can create a meeting, invite participants, and provide them with a link that will connect them to the meeting. The meeting is displayed on the computer screen (maybe with a shared PowerPoint or other presentation), and the audio portion is either transmitted simultaneously over the telephone or by using the computer's microphone and speakers.

While web meetings can be real efficiency boosters, remember that there is no substitute for an initial, face-to-face meeting with clients to help build your relationship. As the case goes on and you have developed a relationship with the client, web meetings can make scheduling easier, save time on travel, and even provide you with additional meeting options like recording. If seeing a face during a meeting is important to you, look for service providers that offer integration with your computer's web cam. Just make sure to remind everyone that the camera is rolling!

### Why you should try it

Whether you are trying to schedule a call with your client to go over discovery responses, meet with your associate who is out of town preparing for a trial, or trying to work collaboratively with opposing counsel on a settlement agreement, sometimes a remote meeting can be exactly what you need. It makes room

for the spontaneous meeting between people in different locations and enables larger groups to find agreeable times because they can attend the meeting from anywhere they have an internet connection.

Let's say your client receives some bad news about their case, and you really need to go over the last communication you have from opposing counsel with them. They can't get to your office and you can't get to them until next week. But if you both have time right now, you could jump on a web meeting, share your screen, bring up the letter that opposing counsel sent, and go over it together. This helps improve communication and since you don't have to wait days or weeks to set up a live meeting, you are able to jump on an issue with the right people the moment it comes up.

Trying to have a virtual office, and reduce overhead costs? Web meetings will be a critical component of that transition. Want to hire an associate who lives down state but are not sure how you will be able to collaborate? Web meetings.

If you are not sure whether web meetings are for you, try one of the providers that offer a free version. And if you decide web meetings are a good fit, review the feature comparison chart on PracticeHQ (see link above) and figure out which features matter to you. From things like whether they offer a toll-free number for audio to recording capabilities and more, make sure you know what you need and what is out there so you get the best fit. Remember, your PracticeHQ has just what you need to get started! ⚖

# Moving Your Case More Quickly During Pandemic

**By Hon. Margaret Goodzeit**
*Somerset County Superior Court*

The COVID-19 pandemic has significantly impacted the methods and speed by which the Courts provide justice. While a few limited categories of cases are not moving forward, and others have proceeded in a manner slower than usual, sight should not be lost of some methods by which certain civil matters can be addressed summarily, or, in other words, expeditiously.

If your matter is one "in which the Court is permitted by rule or statute to proceed in a summary matter, other than actions for recovery of penalties," the action may be commenced by Order to Show Cause pursuant to R. 4:67-1(a) and 2(a), seeking a summary disposition on the return date. Examples of actions that may proceed in a summary manner are those to cancel a mortgage of record (N.J.S.A. 2A:51-1), to confirm an arbitration award (N.J.S.A. 2A:27-7) and to gain reasonable access to property for remediation purposes (N.J.S.A. 58:10B-16). The Order to Show Cause should include reference to the statute or rule relied upon in filing the action to proceed summarily. A common mistake, however, is reliance on R. 4:52—which allows for entry of temporary and preliminary restraints—as the rule supporting the request for summary relief. R. 4:52 does not support an application under R. 4:67-1(a).

On the other hand, if your matter does not fall within a rule or statute that allows for summary disposition but you believe that your case can be resolved quickly and efficiently, either with no or extremely limited discovery, the action may be filed pursuant to R. 4:67-1(b). However, it is imperative that this rule, and the related rules which follow it, be followed carefully. At the outset, this type of matter is **not** commenced by Order to Show Cause. R. 4:67-2(b). Rather, the complaint is served with a summons. A separate motion in which the Court is requested to summarily dispose of the action, returnable **after** the answer is to be filed, may be served simultaneously with the complaint or soon thereafter. It is this writer's experience that attorneys most frequently fail to follow this process; they instead file an Order to Show which is then denied for failure to properly seek relief by way of a motion. Inevitably, this causes the client additional legal fees and the attorney embarrassment for having filed the request the wrong way.

Importantly, a motion to proceed summarily must be supported by proofs sufficient not only to demonstrate that the case can be decided summarily, but also sufficient to establish the plaintiff's right to relief on the underlying merits of the complaint. These proofs **must** include supporting affidavit(s) made pursuant to Rule 1:6-6. Only "if the Court is satisfied that the matter may be completely disposed of on the record (which may be supplemented by interrogatories, depositions and demands for admissions) or on minimal testimony in open court," may the court try the case at the return date of the motion for summary relief or on such short day as it fixes. R. 4:67-5.

What if your issue does not lend itself to summary disposition under R. 4:67-1(a) or (b), but all parties involved desire to avoid the expense and time of continued litigation and instead expedite a resolution of their issues? While the obvious answer is to attend private mediation or arbitration, often with attendant costs which can be substantial, another option available in several vicinages is the use of civil settlement programs which have been advanced by several of the counties' bar associations. In Vicinage XIII, for example, this writer and the presidents of the three included county bars have recently implemented a General Equity and Probate Settlement Program, in which volunteer attorneys assist counsel in resolving those types of cases. The program was based on similar programs in surrounding counties, which have been hugely successful. While only in its infancy, the Vicinage XIII program is already off to a very strong start. If your county does not have such a program, it is suggested that the creation of one be explored.

Expeditious resolution of cases—whether through the use of summary proceedings pursuant to R. 4:67, or through alternative dispute resolution, including settlement programs—may not always be possible. However, the availability of those tools should not be overlooked, as they can save the client substantial cost and, as well, free the courts to dedicate their resources to those cases for which litigation to the end is the only option. ⚖

## WORKING WELL

# Civility and Dealing With Difficult Adversaries and Judges

**By Megan S. Murray**
*Family Law Offices of Megan S. Murray*

Family law attorneys practice in a stressful field with high emotions. However, all attorneys must be vigilant about not allowing the emotion of a case to cause impetuous case handling decisions that may reflect poorly upon the attorney—not only in the case at hand but for his or her reputation going forward. Remember, you have one opportunity to make a first impression.

Integral to being a successful attorney is the ability to act in a professional manner regardless of the difficulty or emotional intensity of the case. Unprofessionalism and uncivility lead to a needless increase in counsel fees, a dissatisfied client and possibly a bad reputation for you.

Here are tips for all practitioners to follow to maintain civility with even the most difficult of adversaries and judges.

1. **Pick up the phone and personalize your adversary:** If my client's spouse has already retained an attorney, I make it a priority to make a telephone call to the adversary—especially in a case where I have not worked with or do not know opposing counsel. Calling an adversary allows you to build a rapport with them. Find common ground with your adversary on common interests; share a humorous story about the practice or bring up a (non-inflammatory) current event. The next time your adversary thinks about writing you a nasty letter, they are likely to give much more pause if they have a personalized relationship with the person on the receiving end.
2. **It's often true that you get more flies with honey:** When dealing with abrasive adversaries or judges, reciprocating with gratuitous hostility has almost never yielded good returns in my experience. A friendly tone in raising disagreement with a judge also helps to convince a judge that you are not attempting to attack them.
3. **Don't add fuel to a non-substantive fire:** Nasty-gram letters could be one of the worst ways to move a case forward. Nothing productive comes of it—so don't engage.
4. **Make the life of the judge easier:** Do what you can to free up time for the judge. Make sure your motion is in compliance with the Rules of Court. Make sure your letters are succinct and relay your client's position clearly. Prior to trial, meet with your adversary to reach stipulations to reduce trial issues. Trial binders should be prepared well in advance of the trial and exchanged with the adversary.
5. **Quit while you're ahead:** When arguing a case, recognize when you have won, are winning or losing the argument and sit down. Over-speaking does not endear attorneys to judges with very limited time.

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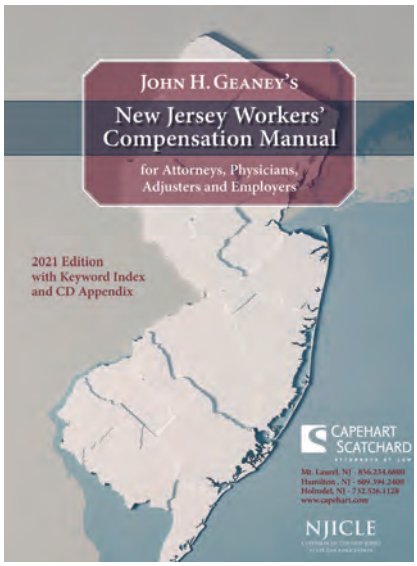


## Geaney's New Jersey Worker' Compensation Manual for Attorneys, Physicians, Adjusters, and Employers (2021)

Author: John H. Geaney, Esq.

**About the Treatise:**
The 2021 Manual is a compilation of prior editions with particular emphasis on cases decided in 2018-2020 as well as the addition of three new chapters and 50 new pages of text.

**Some of the 2021 Edition highlights are as follows:**
- New Chapter on The Thomas P. Canzanella Law passed in 2019 dealing with the rights of first responders to file for occupational disease claims
- New Chapter on L. 2020, c.84 regarding COVID-19 claims
- New Chapter on the Hand and Foot bill passed in 2020
- Expanded analysis on major and minor deviations

**Some of the 50 new cases that are analyzed in the 2021 Manual include:**
- *Caraballo v. City of Jersey City* (reasonable accommodation and workers' compensation)
- *Martin v. Newark Board of Education* (functional improvement is lodestar for ongoing pain management)
- *Calero v. Target Corp.* (Judge of Compensation can reopen terms of consent settlement to reconstruct wages)
- *Manuel v. RWJ Barnabas Health* (walk to hospital parking lot not covered)
- *Marconi v. United Airlines* (jurisdiction on the basis of localization of employer)
- *New Jersey Transit Corp. v. Sanchez* (employer has rights to pursue third party for economic losses where petitioner did not receive PIP benefits)
- *Wild v. Carriage Funeral Homes* (reasonable accommodation for use of medical marijuana off site)
- *Kocanowski v. Two. of Bridgewater* (statutory volunteers need not prove actual wage loss for temp)
- *Liberty Mutual Ins. v. Rodriguez* (correct method to calculate lien reimbursement in high third party settlements)
- *Malone v. Pennsauken Bd. of Educ.* (Judge of Compensation has right to enter judgment for reimbursement against a party)
- *McGory v. SLS Landscaping* (Dismissal of motion for med and temp violated due process rights of petitioner)
- *Hager v. M&K Construction* (Carrier ordered to reimburse petitioner for costs of medical marijuana - certificate granted)
- *Anesthesia Associates v. Weinstein Supply* (jurisdiction issues in MCP cases)

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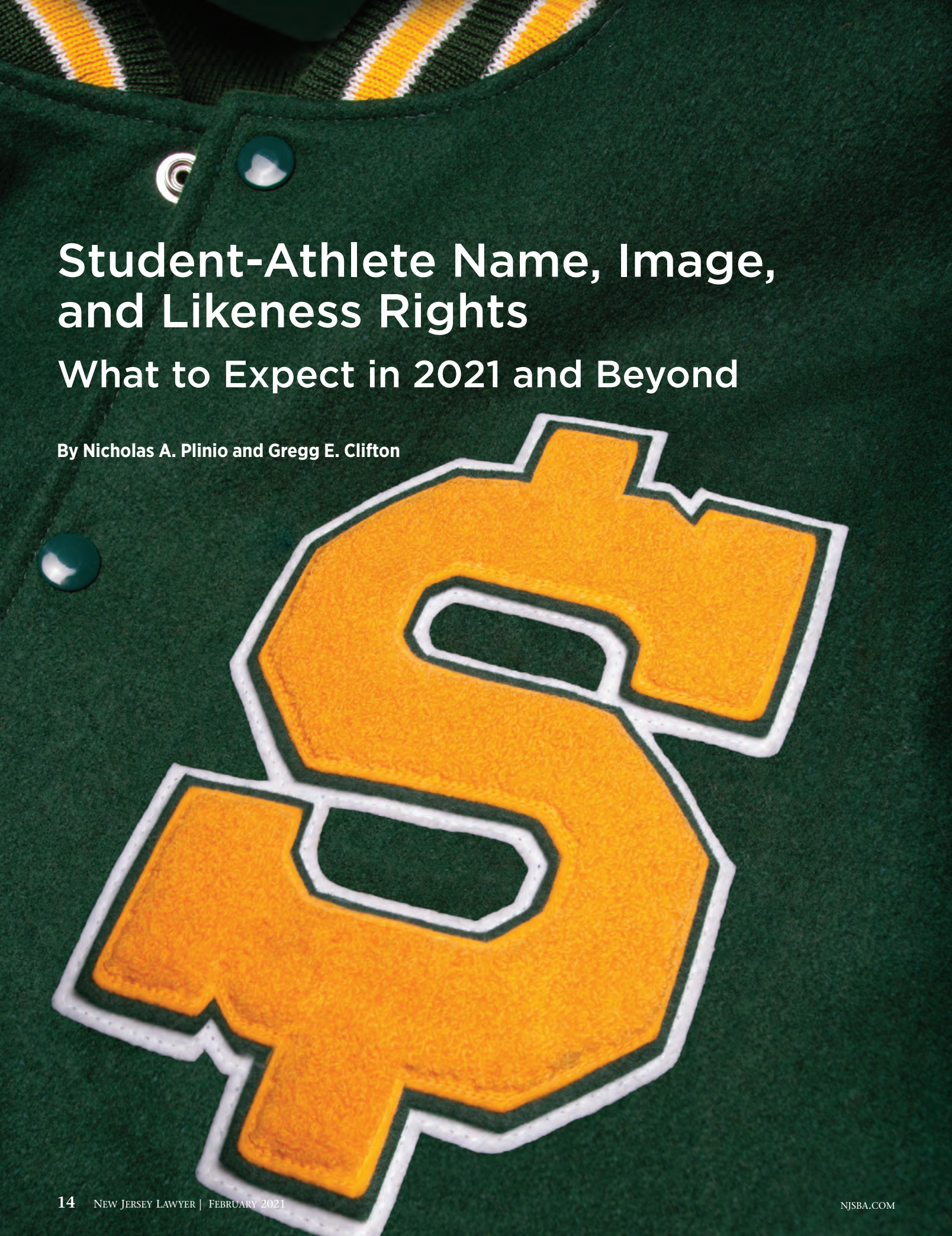
# Student-Athlete Name, Image, and Likeness Rights

## What to Expect in 2021 and Beyond

**By Nicholas A. Plinio and Gregg E. Clifton**



The world of college athletics is in a state of flux, largely revolving around student-athlete name, image, and likeness rights (NIL), which allow student-athletes to receive compensation for their marketing rights without violating NCAA bylaws or losing their amateur status. The issue of NIL rights is being considered by nearly 30 states, with six states having passed specific NIL laws. Several proposed federal bills also have been introduced in the Senate and House of Representatives. In addition, the NCAA is considering changes to its bylaws that would grant NIL rights to student-athletes.

In addition to state and federal legislative efforts, the U.S. Supreme Court has agreed to consider *NCAA v. Alston*, which could reshape college athletics by eliminating financial limits placed on student-athlete scholarships. This article details the current landscape of NIL rights and the developments and legal issues that will dominate 2021 and beyond.

### State NIL Legislation

Presently, six states (California, Colorado, Florida, Michigan, Nebraska, and New Jersey) have passed NIL legislation. The state laws that have been enacted all have significantly delayed effective dates, except for Florida law, which will become effective in July 2021. The delays are intended to give the NCAA or the federal legislature time to enact uniform standards governing the compensable rights of student-athletes marketing their name, image, and likeness.

**New Jersey Fair Play Act (S-971/A-2106).** New Jersey enacted its NIL law in September 2020, allowing student-athletes to earn financial compensation from the use of their name, image, and likeness. The Fair Play Act also authorizes student-athletes to use attorneys and agents to negotiate NIL opportunities without it affecting the student-athletes' ability to continue their collegiate careers and scholarship eligibility.

The Fair Play Act becomes applicable in the fifth academic year following its enactment. Under the Fair Play Act, a four-year institution is prohibited from upholding any rule or other limitation that prevents college athletes from monetizing the use of their name, image, or likeness. In addition, a four-year institution is prohibited from joining any athletic association, conference, or other organization with control over intercollegiate athletics if student-athletes are prohibited from earning compensation from their name, image, or likeness; a student-athlete is prevented from obtaining professional representation in relation to contracts or legal matters; or the association interferes with compensation reaching a student-athlete.

While granting the student-athletes the right to profit from their name, image, and likeness, New Jersey's law places certain obligations upon the student-athlete. The student-athlete must disclose any deal to market their name, image, or likeness to a university-designated official. In addition, student-athlete endorsers will be prohibited from earning compensation in connection with certain industries: adult

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entertainment, alcohol, gambling of any kind, tobacco and electronic smoking, pharmaceuticals, controlled dangerous substances, and firearms. *If a student-athlete earns compensation from any of these prohibited areas, their scholarship eligibility will be revoked.*

**California Fair Pay to Play Act (SB206).** California was the first state to pass NIL legislation in September 2019. The bill, with a delayed effective date until 2023, has served as the model for other state NIL legislation. The general premise of California's law is to allow NCAA student-athletes to personally market and earn compensation for the use of their name, image, and likeness without affecting their scholarship eligibility. SB206 also restricts a student-athlete from entering into shoe and apparel contracts that conflict with current university agreements. New Jersey's Fair Play Act, as well as all of the other state NIL laws, contain a similar provision.

**Colorado SB20-123, Compensation and Representation of Student-Athletes.** Like New Jersey and California, Colorado permits student-athletes enrolled in state higher education institutions to profit from use of their name, image, or likeness, and to hire representation to protect their interests and prevent athletes from losing eligibility for exercising NIL rights. In addition, like New Jersey and California laws, the Colorado law has certain specific disclosure requirements for athletes who do sign NIL agreements.

**Nebraska Fair Pay to Play Act (LB962).** Many of the provisions of Nebraska's NIL track those of the other NIL laws described here. However, unlike the others, the Nebraska law states that "each postsecondary institution shall determine a date on *or before* July 1, 2023" to begin applying the law. To date, no school has exercised this legal right to apply the new state law and risk potentially violating NCAA bylaws prior to the formal enactment date of July 1, 2023.

**Florida SB646, Intercollegiate Athlete Compensation and Rights.** Florida's NIL legislation, signed into law in June 2020, has gained significant attention because of its effective date: **July 1, 2021**. It is believed that the NCAA and affected conferences, like the SEC and ACC, which have schools in multiple states (including Florida), may seek injunctive relief to block the effective date of the law.

**Michigan House Bill 5217.** Michigan's bill is the most recently enacted state NIL legislation, effective July 31, 2022. Michigan's law places specific limitations and obligations upon student-athletes. For example, similar to New Jersey's law, prior to entering into any endorsement agreement, the student-athlete must disclose the opportunity to a university official at least seven days prior to committing to the opportunity. Additionally, student-athletes will be prohibited from using the University of Michigan name, trademarks, logos, or other intellectual property in connection with marketing their own name, image, or likeness.

## Federal NIL Legislation

Federal NIL legislation has been introduced in both the Senate and House of Representatives. Expect these bills to gain traction quickly as the federal government works to avoid a situation in which there is no uniform standard for NIL usage, leaving enforcement up to competing and conflicting state laws. It is likely a federal law will be in place before the fall of 2021.

In the Senate, New Jersey's Cory Booker, a former NCAA Division I football player at Stanford University, is leading the charge with a landmark proposal that he and Sen. Richard Blumenthal (D-Conn.) introduced in December 2020. The College Athlete Bill of Rights is by far the most aggressive NIL proposal to be introduced on the state or federal level. In addition to Booker's proposal, Sen. Roger Wicker (R-Miss.) has introduced the Collegiate Athlete and Compensation Rights Act. In the House, Reps. Anthony Gonzalez (R-Ohio) and Emanuel Cleaver (D-Mo.), both former NCAA Division I football players as well, have introduced the bipartisan Student Athlete Level Playing Field Act.

**College Athlete Bill of Rights.** Booker's proposal would provide substantial rights to NCAA student-athletes, including the right to benefit from their name, image, and likeness. A critical distinction in this proposal would also grant student-athletes the right to market themselves as a group to capture and potentially share revenue from the lucrative video game marketplace. The bill also would prohibit schools from preventing athletes from wearing shoes of their choice during mandatory team activities, which may open the door to endorsement deals in conflict with school equipment sponsorship contracts.

The broad language in the bill extends beyond NIL rights and includes provisions that could completely overhaul college athletics and the NCAA. The bill seeks to establish a nine-member "Commission on College Athletics," appointed by the President of the United States and include at least five former college athletes with legal expertise. The commission would take a majority of the responsibility of overseeing college athletics away from the NCAA. The commission also will regulate athlete endorsement contracts, certify athlete agents, monitor Title IX compliance, and establish health, wellness, and safety standards for college athletes. It also would be responsible for enforcing rules laid out in the law and given subpoena power to investigate violations, along with the authority to impose penalties against institutions, conferences, and the NCAA. These penalties may range from penalties in excess of $10 million to suspension of officials from working at a school or in college sports at all.

Booker's proposal also will undoubtedly significantly affect universities and their athletic departments. Indeed, the College Athlete Bill of Rights addresses not only the economic rights of athletes, but also their health and safety and educational opportunities. For example, the bill's sweeping provisions provide the following:

- Schools would be required to share profits from revenue generating sports with athletes who play those sports, after deducting the cost of scholarships;
- Student-athletes would be guaranteed a scholarship for as many years as it takes the student-athlete to obtain an undergraduate degree;
- A medical trust fund that would provide broad health care coverage for student-athletes and be accessible to them up to five years following the end of their athletic eligibility;
- A wide range of health and safety guidelines set by the Centers for Disease Control and Prevention;
- A requirement that athletic trainers, team medical personnel, academic advisers and tutors operate and provide services to student athletes "independently from the athletic department";
- A ban against coaches and staff influencing academic decisions such as the selection of academic majors and courses;
- A prohibition against schools imposing restrictions on student-athletes' speech beyond those imposed on other students;
- The elimination of restrictions and penalties related to transferring from one institution to another or breaking a national letter of intent;
- The ability for student-athletes to enter a professional draft and return to college athletics, so long as they do not get paid by a professional team and inform the school of their return within seven days after the completion of that draft;
- A requirement that athletic departments annually disclose revenues and expenditures, including department personnel salaries;
- A requirement that a school cannot cut a team "unless all other options for reducing the expenses of the athletic program, including reducing coach salaries and administrative and facility expenses, are not feasible";
- A requirement that schools have academic credit courses related to financial literacy and life skills consistent with the school's guidelines.

**Collegiate Athlete and Compensation Rights Act**. The Senate bill competing with Booker's College Athlete Bill of Rights is Wicker's College Athlete Compensation Rights Act. Like Booker's proposal, Wicker's bill would permit student-athletes to earn compensation for use of their name, image, or likeness, in effect creating a uniform, national framework for NIL compensation. Additionally, it would:

- Ensure student-athletes have access to educational resources regarding use and compensation for use of their name, image, and likeness;
- Protect student-athletes and their families from deceptive business practices or exploitation from unscrupulous actors;
- Prohibit third parties from entering into NIL agreements or offering NIL agreements to a student-athlete prior to enrollment at an institution; and
- Authorize and direct the Federal Trade Commission to select and oversee a private, independent, nonprofit entity to develop and administer NIL rules within collegiate athletics.
- Wicker's proposal focuses on preserving amateurism by prohibiting colleges and universities from classifying student-athletes as "employees." To that end, the bill also would expressly prohibit boosters from directly or indirectly compensating student-athletes and their families for use of the student-athlete's name, image, and likeness.

Unlike Booker's proposal, Wicker's bill proposes broad anti-trust protections sought by the NCAA and its member institutions, which protect them from liability under competition laws for making changes to NIL rules, among other things.

**Student-Athlete Level Playing Field Act.** Rep. Anthony Gonzalez (R-Ohio), former Ohio State University star and NFL player, introduced a bill in the House of Representatives that appears to present a "middle ground" between Booker's and Wicker's bills. Framed as a civil rights bill, the legislation is aimed at ensuring that student-athletes can capitalize on their earning potential in a similar way to their peers in music, art, or other studies who have always been able to earn compensation from their work product.

Like Wicker's proposal, the Level Playing Field Act places high importance on protecting amateurism by prohibiting athletes from being considered employees and preventing academic institutions from directly compensating athletes. It does not, however, include the same anti-trust provisions as Wicker's bill, which leaves the door open to potential lawsuits against institutions should they stand in the way of a student-athlete's ability to profit from their name, image, and likeness. The bill also does not contain group licensing provisions, which makes it a less attractive option for student-athletes.

### NCAA Response to NIL Legislation

In addition to the state laws described above, in late-January 2021, the NCAA delayed its anticipated approval of the most significant amend-

ments to its bylaws in recent history following receipt of a letter from the U.S. Department of Justice Antitrust Division. The letter cautioned the NCAA of potential anti-trust issues arising from granting name, image, and likeness rights to student-athletes. The delayed NCAA bylaw amendments, designed to provide a unified standard to govern all NCAA institutions, seeks to reduce the likelihood that various state laws will cause confusion and conflict. Originally, the NCAA sought to have their bylaw changes become effective prior to the 2021–2022 academic year. It is likely that the NCAA will still seek to implement some version of its proposed amendments following additional discussion with the Department of Justice.

**The Supreme Court Weighs In: *NCAA v. Alston***

While the legal focus in college athletics has been on the expansion of NIL rights for NCAA student-athletes prompted by state and federal legislation, the U.S. Supreme Court has shifted the focus to the courts. On Dec. 16, 2020, the Supreme Court agreed to hear an appeal from the NCAA and several high-level conferences in *NCAA v. Alston*, a case challenging the NCAA's restrictions on compensation student-athletes can earn while participating in collegiate athletics.[1] The appeal comes from a U.S. Court of Appeals for the Ninth Circuit ruling that the NCAA's limits on providing education-related benefits to student athletes violate federal antitrust laws. Relying on the 1984 case, *NCAA v. Board of Regents*,[2] the NCAA maintains that "athletes must not be paid" and seeks continued latitude toward its unique amateurism model.[3] Student-athletes argue that the NCAA is simply attempting to secure an antitrust exemption and that Congress and the states are already in the process of scaling back limits on student-athlete compensation. The case will likely be set for oral argument in the spring of 2021.

**Conclusion**

With groundbreaking state and federal NIL legislation on the horizon, the potential that the NCAA will adopt the most significant amendment to its bylaws in decades, and the Supreme Court ready to rule on student-athlete compensation, 2021 should see the most significant changes to collegiate athletics in history. With these changes will undoubtedly come unique legal issues that will shape the landscape of sports law for years to come. ⚖

**Endnotes**

1. *See American Athletic Conference, et al. v. Alston, et al.*, No. 20-520 (U.S. 2020).
2. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 102 (1984).
3. *See Alston, et al. v. National Collegiate Athletic Association*, Case No. 19-15566, Dkt. Entry 149 (N.D. Cal. 2020).

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# The NCAA's Historical Challenges with Antitrust Issues

## and Its Current Battle for Continued Relevance

**By Andrew Bondarowicz**

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On Jan. 12, 2021, the NCAA delayed what would be the most significant policy shift in the association in almost 40 years. The proposal would allow student-athletes, for the first time, to earn revenue and profit from their name, likeness, and image (NIL) rights—also known as their rights of publicity. The delayed vote prolongs the NCAA's complicated legal dance with antitrust law and a difficult history in living up to its original mission.

The NCAA is a tax-exempt, unincorporated association which recognizes over 1,100 colleges and universities as members. It sponsors over 90 championships in men's and women's sports and claims over 480,000 student-athletes participating. The policy-making body of the NCAA is its member schools. Unlike professional leagues that have unions that represent the player-workers, student-athletes do not have a direct voice in NCAA policy-making.

The NCAA was originally formed to protect the health and safety of students participating in the emerging sport of football. The NCAA was formed in 1906 in response to a call to action from then-President Theodore Roosevelt to university presidents to address the mounting injuries—and even deaths—in football among colleges around the country. A number of prominent schools chartered the organization as the Intercollegiate Athletic Association of the United States, which was later renamed to its present name in 1910. From the beginning, the NCAA's charge was to unilaterally protect the health and safety of students competing in intercollegiate athletics, initially by creating standards and regulations among its members to curb injuries and deaths due to participation in intercollegiate sports. The NCAA remained small as a governing organization—it did not hire its first full-time employee until 1951—but has mushroomed to over 500 employees today. Throughout its history, the NCAA has remained a private, non-governmental self-regulatory association.

As the popularity of college athletics grew since the early 1900s, the negative influences of competition drove schools to "recruit" high-level athletes to their universities and began to offer financial incentives in the form of academic aid to individuals to lure students to their institutions and to compete for the schools. In response, the NCAA established its first set of recruiting and financial aid rules in the late 1940s. At the time, the rules were very strict and limited the ability of schools to provide incentives to prospective student-athletes. These restraints were only intended to maintain the member-schools academic mission and not let the lure of financial windfalls of sports to drive students' school selections.

However, that did not stop schools from seeking a competitive advantage in other ways. In *University of Denver v. Nemeth*,[1] a former student sued for workers compensation when he suffered a back injury while participating for its intercollegiate football team and that injury prevented him from fulfilling his duties for an on-campus maintenance job that was arranged for him to help provide access to school and secure his participation in football. Nemeth prevailed in showing that the school routinely arranged employment for athletes and therefore participating in football was part of his job duties to the university. This led the NCAA to coin the term "student-athlete" and added it to its bylaws to draw a distinction between a student participating in intercollegiate athletics from anything else they may do on campus, including employment. It also clarified that student-athletes were not being compensated for athletic participation.

### The NCAA's Challenging History with Antitrust Issues

While there were many developments in the NCAA over its history, including a major restructuring in the late 1970s that created the current Division I, II, III structure to competition, the most significant development actually came from the U.S. Supreme Court in *Board of Regents v. NCAA*.[2] In this case, the University of Georgia and University of Oklahoma sued the NCAA claiming the association's restrictions on schools' rights to unfettered televised broadcasting of college football games was an unlawful restraint on trade. The NCAA used a "rule of reason" affirmative defense claiming that limiting an individual school's ability to appear on television and controlling the overall supply of televised games provided an overall benefit to member by encouraging live attendance at games and providing more schools with the opportunity to appear on television. The loss in this case essentially rendered the NCAA powerless and irrelevant in the expansion of televised college football and ultimately the tremendous growth and commercialization of college sports, namely football and basketball. Power immediately shifted to the College Football Association to negotiate broadcasting

deals with networks and began the shift of centralized control by the NCAA to a more decentralized power base with the conferences serving a more important role. This shift enabled the establishment of conference-based networks such as the Big Ten Network.

As the revenue from increased television exposure has grown since the 1980s, it has created a significant amount of upheaval within the NCAA. Schools started to shift alliances, creating widespread realignment that was based on revenue opportunities over regional rivalries and other synergies that were the traditional basis for conference membership. The growing importance of football revenues, and to a lesser extent basketball, provided coaches with leverage to demand skyrocketing salaries and other benefits which greatly increased schools' budgets. The NCAA's attempt to rein in coaches' salaries were thwarted in *Law v. NCAA*[3] on restraint of trade grounds where a group of basketball assistant coaches challenged an NCAA rule that placed caps on coaches' salaries.

However, the biggest challenge to the NCAA has been over a decade in the making. As schools' athletic department budgets have grown exponentially, the opportunities and benefits to players have not grown at the same rate. These additional revenues have largely flowed into even higher coaches' salaries and other department priorities such as facilities and multimedia. Student-athlete benefits have expanded mainly in reaction to bad publicity—such as players not being provided sufficient food and nutrition—to legal challenges.

In a progression that will transform college athletics, former UCLA and NBA star Edward O'Bannon filed a 2009 antitrust suit against the NCAA in U.S. District Court in California[4] claiming that the NCAA engaged in unauthorized use of student-athletes names, images, and likenesses in the broadcasting of college sporting events and that they should be compensated for such use after they graduate. While the plaintiffs initially prevailed at the trial court level, the decision was partially reversed on appeal. (The U.S. Supreme court denied certiorari in 2016.)

A separate suit, *Jenkins v. NCAA*,[5] challenged the NCAA caps on financial aid to student-athletes. These caps limited financial aid awards to the value of tuition, room and board, and required fees at each school. While plaintiffs initially prevailed, the verdict was rendered moot on appeal as the NCAA had already made some concessions in their bylaws to provide for "full cost of attendance" grants which provided student-athletes with allowances beyond the previous restrictions.

The most recent legal challenge will likely be the most significant as the U.S. Supreme Court has granted the NCAA's request for certiorari in *Alston v. NCAA*.[6] Plaintiffs in *Alston* claim that any caps on education-related benefits are unlawful restraints on trade while the NCAA has contested those claims on a "rule of reason" defense. Oral arguments are expected in early 2021.

## The Current Battlegrounds on NILs

While the NCAA has been facing almost constant litigation from student-athlete representatives, they have also faced a growing tidal wave as state legislation has been weaponized against it to allow players to otherwise capitalize on their rights of publicity—or more commonly NIL rights. California was the first state to pass legislation (S.B. 206) which essentially enjoins the NCAA and its members from placing any limits on the ability of student-athletes to capitalize on their NIL rights. The California law, however, provided a window for the NCAA to react to the legislation by delaying the effective date to Jan. 1, 2023. Other states though have not provided the same luxury—Florida's law is set to take effect on Aug. 1, 2021, and likely will create a great deal of chaos in the process. New Jersey, Colorado, and Nebraska have also passed similar legislation creating a complex compliance environment with varying effective dates and forced the NCAA to look to Congress to pass legislation to preempt these new state laws. Sens. Cory Booker (D-N.J.) and Richard Blumenthal (D-Conn.) introduced an athlete-friendly bill dubbed the "College Athletes Bill of Rights" while Sens. Marco Rubio (R-Fla.) and Roger Wicker (R-Miss.) have each introduced their own competing legislation making quick resolution in what will be a fiercely partisan Congress unlikely.

The right of publicity is a common law theory in many states (statutory in others) that provides an individual with the right to control the commercialization rights of their own persona. However, in the NCAA, the main differentiator between college sports and professionals is a concept known as "amateurism." Per NCAA Bylaw 2.9 (The Principle of Amateurism), "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." While amateurism has been challenged in court as well, it has so far withstood those challenges.

While amateurism is noble in theory, it fails to appreciate the reality of today's college sports landscape. Division I football and basketball games are routinely appearing in telecasts of games. Schools spend significant resources on multimedia and public relations to engage fans and grow not only their own brand, but also the brand of the student-athlete as a by-product of their success. Many col-

lege athletes have higher name recognition and commercial earning potential than not only other professional athletes, but also a local Congressperson, experts in their fields, as well as many television or film actors and actresses. NILs represent the unique platform that the sports industry presents.

The "celebrity factor" is the root of the current battle on the NIL front. The NCAA has traditionally eschewed student-athletes of any athletics-related revenue opportunities while simultaneously promoting many athletes to celebrity status. Many sports fans revered names such as Tim Tebow, Zion Williamson, and now Trevor Lawrence well before they even progressed passed their freshman years in college. The fear in the NCAA is that the dollar signs in the eyes of 17- and 18-year-old prospects will greatly undermine the recruiting process and further skew the competitive landscape. However, that is not much different than the current recruiting landscape where sports facilities are the most common mediums for luring top prospects.

### Where Does the NCAA Go From Here?

Granting players with the opportunity to capitalize on their NIL rights is the easy answer for the NCAA. It essentially allows student-athletes to control their own revenue potential while not costing NCAA schools anything by allowing them to remain amateur athletes and non-employees. The NCAA's paternalistic tendencies are pushing the organization to implement a rigid framework and "police" NIL deals; veiled attempts to manipulate the recruiting process will likely offer little benefit and add further complexity. Many industry watchers believe such measures are going to be a recipe for disaster and further alienate the NCAA from key members and move the organization beyond a point of no return. Instead, the NCAA would be better served by playing a moratorium on restrictions and allowing the market for NIL rights to develop before looking at how to control it. Existing bylaws would already provide a safety net for some of the negative behavior the NCAA is trying to control.

Meanwhile, federal legislation is greatly needed to bring common sense to college athletics. Unlike professional leagues where players and management collectively bargain and have mutual interests, college sports is a unique enterprise that needs oversight and guardrails against itself. Left to its own devices, the NCAA has proven itself to lack responsiveness and flexibility in taking often zealous stances to emerging issues. Secondly, the NCAA's authority itself has been increasingly challenged by its membership directly as evidenced in the academic scandal at the University of North Carolina and the sexual abuses incidents at Penn State and Michigan State. The NCAA's strict adherence to amateurism despite the tremendous explosion of technological innovation and multimedia has alienated others as well.

There is precedent for government oversight and monitoring of self-regulatory organizations. That has been the basis of regulation in the financial industry for decades where organizations such as the New York Stock Exchange, FINRA, and others have been granted regulatory authority to police themselves with government oversight of their activities. This approach would be a powerful step in bringing credibility back to the NCAA and allowing it to function more effectively. ⚖

### Endnotes

1. *University of Denver v. Nemeth* (257 P.2d 423).
2. *Board of Regents v. NCAA* (468 U.S. 85).
3. *Law v. NCAA* (134 F.3d 1010 (1998)).
4. (CV-093329 (N.D.Cal 2009)).
5. *Jenkins v. NCAA*, 4:2014-cv-02758, N.D.Cal 2018.
6. *Alston v. NCAA* (No. 19-15566 (9th Cir.).

# It's All About the Benjamins

## College Athletes Getting Paid for Their Name, Image, and Likeness

**By Desha Jackson and Victoria Nguyen**

College athletes are finally going to be able to cash in on some of their hard work, specifically from third-party endorsements. Since its inception at the turn of the 20th century, the NCAA has barred[1] student-athletes from earning money in an effort to preserve amateurism in college sports. As the name suggests, student-athletes are students first, athletes second, and not employees at all. Accordingly, the association has punished student-athletes and stripped them of their amateur status over prohibited conduct such as hiring an agent, entering a professional draft, and receiving payment based on athletic ability. In contrast, the college sports industry and athletic programs rake in $1 billion per year[2] while the players—without whom this success would not be possible—have not been able to earn anything more than the cost of attending university. Although education is valuable, some coaches earn millions of dollars annually while athletes who put in countless hours into training and competing are unable to access an equitable share for their hard work. Now, however, the wheels are in motion for student-athletes to hire agents and receive compensation from third parties for their name, image, and likeness (NIL).

In September 2019, California became the first state to pass a law that would allow college athletes to profit off their NILs and hire agents while prohibiting the NCAA from penalizing student-athletes for engaging in such conduct. The new law, Senate Bill No. 206[3] and better known as the Fair Pay to Play Act, is expected to take effect in 2023. The law will allow student-athletes to earn money for third-party endorsements both related to and separate from athletics, but it prohibits both colleges from getting involved with these deals and student-athletes from striking any deal that conflicts with their team contract. While there was initial resistance from the likes of the NCAA, the Pacific-12 athletic conference, and California schools, California's Fair Pay to Play Act started a domino effect across the country. The act forced the NCAA's hand to act quickly: the association formed a working group, which released a comprehensive report[4] recommending the NCAA Board of Governors get with the times and allow student-ath-

letes to be represented and paid for third-party endorsements. Such sweeping change takes time; it will be no small feat to undo rules that have prevented millions of student-athletes from getting paid for more than a century. Other college students, including those who are YouTubers and social media influencers have been able to profit off their NILs, while student-athletes have not.

Many states are following California's lead. Colorado passed a similar law in March and Florida recently passed its own NIL law that is set to take effect in July 2021 (18 months sooner than both California and Colorado). As of April 2020, at least 34 states have introduced bills that will allow college athletes to cash in on their NIL rights. This is a nightmare for the NCAA because NIL rules that differ by state will necessarily erode competitive balance. For instance, students may be more inclined to attend a school in a state that allows them to cash in on their NILs. This could create issues in recruiting, such as opening the door for boosters to entice players with payments to play for a school—which remains prohibited by the NCAA—under the guise of NIL payments. Another foreseeable problem is patchwork regulation. For example, New York Sen. Kevin Parker introduced a NIL bill, Senate Bill S06722B,[5] that would require New York colleges to share 15% of their annual athletics ticket sales revenue with student-athletes. This law undermines the NCAA's model of amateur intercollegiate athletics and threatens to turn student-athletes into employees. In response to these concerns, the NCAA seeks to engage Congress to make a federal NIL law that preempts all the mismatched state laws. Additionally, the working group recommended the NCAA seeks exemption from antitrust lawsuits that could spring up over the NIL changes.

Antitrust rules are designed to promote vigorous competition. Some critics have argued that the NCAA's system is not only unfair, but it is akin to price fixing,[6] putting it in potential violation of federal antitrust laws. As examples, the NCAA has rules that prevent players from securing legal representation, transferring to another school without penalties, and receiving compensation (e.g. for performance and NIL). The NCAA has long sought antitrust immunity based on its amateurism rules, but courts have ruled that amateurism alone does not justify unreasonable limits on competition. In *O'Bannon v. NCAA*, a former UCLA basketball star brought a class-action lawsuit against the NCAA alleging, *inter alia*, that its NIL policy violated the Sherman Act. Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade or commerce. A trial court ruled that the NCAA's ban on compensation for student-athletes is anticompetitive and offered less restrictive alternatives to promoting amateurism. The Ninth Circuit affirmed the NCAA regulations are subject to antitrust scrutiny, though limited the scope of its remedy. Although courts have confirmed in *O'Bannon* and other cases that the NCAA illegally price fixes player compensation, they continue to allow such price fixing for compensation that is not linked to educational costs.

Florida Sen. Marco Rubio recently introduced a bill setting out federal parameters for allowing student-athletes to hire an agent and profit from the use of their NIL. Not only would the Fairness in Collegiate Athletics Act allow student-athletes to retain their amateur status, but it would also override state legislation and protect the NCAA from potential legal matters over NIL. However, there may be some resistance on the antitrust-exemption front and further negotiation may be necessary. "If they want an antitrust exemption, there are going to be folks that want commitments from them," Connecticut Sen. Chris Murphy said,[7] "specifically and most likely on broader compensation for players and sharing the financial upside of the sport with the athletes."

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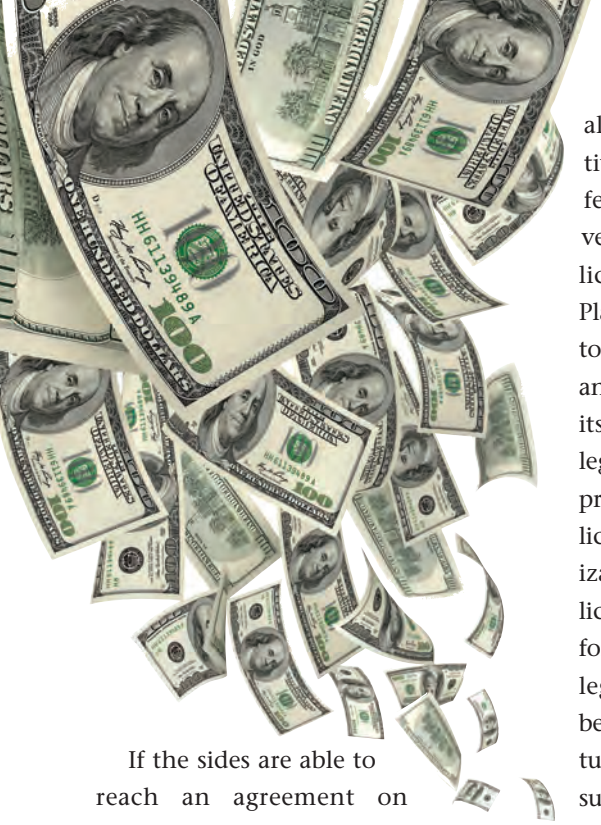

If the sides are able to reach an agreement on establishing a safe harbor for the NCAA from NIL lawsuits, the stage will be set for student-athletes to hire an agent, sign endorsement deals, make money from public appearances and social media, and sell their memorabilia and autographs. These activities must fall within the NCAA's guiding principles,[8] which emphasize that student-athletes are not employees and schools cannot arrange NIL activities nor use them as recruiting inducements. While a student can identify as a player for their team, they cannot use any team, conference, or NCAA marks or logos. Despite the limitations, the NCAA's about-face is a welcome change. It represents the modernization of rules and a good start to supporting the people behind the lucrative state of college sports. The NCAA's divisions are working to adopt specific NIL rules that will take effect at the start of the 2021–22 school year.

## Pressing Questions

### *Will the NCAA Adopt Group Licensing?*

Could the NCAA adopt a group licensing model like the National Football League? The group licensing model allows athletes to organize into a collective group and split revenue. At the professional level, player unions provide a vehicle to organize and negotiate group licenses. A National Football League Players Association license delivers rights to name, number, likeness, signature, and voice for all current players through its group licensing program. Many college-sports traditionalists are against this proposition for the NCAA because group licensing would lead to the professionalization of college athletes. A group licensing approach would not be viable for the modernization of NIL rules in college sports as currently constructed because the NCAA and its member institutions lack the proper legal structures, such as a player's association that serves as a bargaining unit and federal legislation granting the NCAA antitrust immunity related to sports marketing. While both propositions appear far-fetched, one of those structures falls within the realm of possibility: the NCAA is intent on working with Congress to grant it antitrust immunity for NIL rules. The association remains firm, however, that it will not permit a pay-for-play system and student-athletes are not employees, so they cannot unionize.

**Verdict**: While group licensing is not currently in the cards, it would be worthwhile for the NCAA to explore adopting group licensing in the future despite the significant legal impediments. Without group licensing, there can be no college football video games, trading cards, replica jerseys, etc. Those things would generate revenue for the players, teams, and NCAA. On the other hand, the NCAA would likely need to sacrifice its amateur status that it has clung onto for over 100 years.

### *Should Student-Athletes be Required to Hold Their Money in a Trust?*

Do not trust the NCAA to be willing to compensate student-athletes during their playing careers or even afterward via a trust fund. In *O'Bannon v. NCAA*, a district court ruled in 2014 that the NCAA's restrictions on athlete compensation unreasonably restrained trade by preventing players from sharing some of the revenue generated by their NILs. As part of the remedy, the court entered an injunction mandating that the NIL revenue from each student-athlete could be deposited in a deferred trust at no more than $5,000 for every year the student-athlete remained academically eligible. On appeal, the Ninth Circuit ruled that student-athletes, as amateurs, cannot receive compensation derived from their NIL usage by the NCAA or their schools.

Now that it is imminent that student-athletes will be able to profit off their NILs, should those profits be put in a trust fund? This may be desirable for those concerned about student-athletes recklessly splurging all their earnings. A trust could pass the money to college athletes in a structured way with rules, for example: setting an age the beneficiary must reach before he gains control over the money. Usually a person must reach the age of adulthood—18 in most states—before they can legally inherit any money or other assets from a trust. That is less of a concern here because most people are 18 or 19 when they enter college. A stronger case for a trust could be made for a star player under 18 than adults, who should be allowed to access their hard-earned cash. The whole point of modernizing NIL rules is to give student-athletes similar rights as all other students. Neither adult YouTubers nor social media influencers in college are mandated to put their earnings in a trust. Additionally, the authors of California's Fair Pay to Play Act said[9] the act's main purpose is to grant college athletes access to the free marketplace, just as all other Americans enjoy. All Americans are not required to put their money in a trust. However, California does have a

statute, California Business and Professions Code § 18897.2, which mandates that a trust fund must be established when an athlete agent receives the athlete's salary. Since the Fair Pay to Play Act will allow each student-athlete to hire an agent, the agent will have to abide by this statute and deposit the student-athlete's payments in a trust fund account.

**Verdict**: We do not recommend forcing student-athletes to hold their money in a trust as a general matter since most other adults are not bound to such restrictions. But since many student-athletes are still teenagers or barely adults, they should be encouraged to take classes on managing their finances or to hire a manager, agent, or other responsible adult who can help them. That way, student-athletes can make informed decisions about their earnings and will be empowered to save and make sound investments.

### *Should a Student-Athlete Hire an Agent Who is a Lawyer?*

States have different laws governing student-athlete representation. For example, California's SB 206 requires athlete agents to be licensed by the state and to comply with federal law (Sports Agent Responsibility and Trust Act) in their relationships with student-athletes. Legal representation of student-athletes must be by licensed attorneys. Student-athletes would be wise to kill two birds with one stone by hiring a lawyer to represent them. An agent's duties escalate significantly when dealing with college athletes because most are young, unsophisticated (at least compared to the companies sponsoring them), and not yet aware of what norms are and what to expect in the real world. They would benefit from hiring a lawyer who is a master of their practice and can explain things so they make sense to the student-athlete while negotiating at a high level with the opposing side. Student-athletes are impressionable and can be susceptible to trusting the wrong people who may take advantage of them. Unlike agents who are not lawyers, licensed lawyers are governed by state bars and ethics rules, making them less likely to take advantage of their clients. While lawyers are deterred by serious consequences—such as disbarment—agents who are not lawyers do not have those concerns.

**Verdict:** Student-athletes should hire an agent who is a lawyer. Lawyers are best suited to represent athletes ethically and with an eye toward litigation in case things go sideways.

### *How Much Money are Student-Athletes Going to Earn off their NILs?*

The simple answer is: as much money as they can convince people and companies to pay for their NIL. The rules will allow student-athletes to profit off their social media channels, personal businesses (such as teaching sports lessons, writing a book, making a music album, and hosting youth camps), and personal promotional activities (including local pizza deals, car dealership sponsorships, and autograph signings). Student-athletes will be able to earn money for third-party endorsements both related to and separate from athletics. However, the right of publicity does not apply to live broadcasts, rebroadcasts, news accounts, and many informational items and pictures. Therefore, student-athletes cannot profit off appearances in the news or in games. The NCAA expressly forbids such compensation because it would amount to a pay-for-play system that is repugnant to amateurism. The NIL payments will be limited to personal promotions and deals that are independent from the NCAA, conferences, and teams. As a result, the deals are not expected to generate significant cash, at least for the vast majority of student-athletes. Available data illustrates that payouts "aren't likely to be huge," according to[10] NCAA chief operating officer Donald Rem.

**Verdict:** It depends, but most student-athletes are not expected to earn a significant amount of money off their NIL during college.

"Show me the money" can be the new mantra for college athletes once they are allowed to benefit from this income. ⚖

## Endnotes


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**The United States players stand on the field during player introductions with their tops turned inside out as part of the team's equal pay campaign before the SheBelieves Cup match against Japan at Toyota Stadium on March 11, 2020 in Frisco, Texas. In March 2019, 28 players of the USWNT filed a federal lawsuit alleging USSF violated two federal laws: the Equal Pay Act and Title VII of the Civil Rights Act of 1964.** (Photo by Alika Jenner/Getty Images)

# THE FIGHT OFF THE FIELD

## Legal Issues Surrounding Compensation of Female Professional Athletes

**By Mari Bryn Dowdy and Mailise Marks**

"Let's not forget the fight off the field. It's time we pay our USWNT equally."

–Vice President Kamala Harris on Twitter, June 11, 2019

"To @USWNT: don't give up this fight. This is not over yet."

–President Joe Biden on Twitter, May 2, 2020

Every professional league and sports organization in the United States has its own structure of compensation and benefits. While the level of pay varies from sport to sport, a common reality has arguably existed since the advent of professional sports in society: female athletes consistently make less than men.

Generally, athletes sign a contract with a particular team consisting of a base salary and usually a signing bonus. The base salary is typically guaranteed money, even if the athlete is injured or later released from the team. Athletes may also receive performance bonuses based on their team's success, such as qualifying for tournaments or championships.[1] Athletes who are represented by labor unions (i.e. U.S. Women's National Soccer Team Players Association or Women's National Basketball Players Association) regularly engage in contract negotiations with their employers. Non-union athletes are typically represented by advocate organizations (i.e. National Women's Hockey League Players' Association or Commission for Equity in Women's Surfing). Unlike unions, these entities do not engage in collective bargaining.[2] Union athletes are able to use their collective bargaining agreements (CBA) to push for improvements in pay, benefits and working conditions. Athletes may also seek to challenge the league itself or even attempt to form new leagues when collective bargaining agreements result in gender inequality.

Gendered pay discrimination for professional athletes is not a novel issue and the fight for equality has continued to present day, even headlining some of the biggest labor disputes in recent sports history. From the basketball court, to the soccer pitch and even the hockey rink, women's fight for fair compensation in professional sports presents an amalgamation of legal issues. In recent years, female athletes have made great strides in bringing these issues to the public's attention. However, as illustrated below, these steps are just the beginning of making truly substantial changes toward equality for professional female athletes. These disputes, negotiations and agreements brought many of legal issues into the national spotlight.

### USWNT: The Long Battle

In March 2016, five U.S. Women's National Team soccer players—Carli Lloyd, Alex Morgan, Megan Rapinoe, Rebecca Sauerbrunn and Hope Solo—filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC) alleging wage discrimination. This was a necessary procedural step before a federal discrimination lawsuit could be filed against their employer, the United States Soccer Federation.[3] In April 2017, the two sides announced they had ratified a new five-year CBA, which included an increase to

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both base pay and bonuses. However, the new agreement still allegedly did not represent equal pay with the men's national team. Additionally, the agreement did not attempt to resolve the EEOC charge.

The EEOC officially ended its investigation in February 2019 and issued right to sue letters to the players, which established that the players had exhausted their obligation to seek resolution through the EEOC.[4] In March 2019, 28 players of the USWNT filed a federal lawsuit in the U.S. District Court for the Central District of California alleging USSF violated two federal laws: the Equal Pay Act and Title VII of the Civil Rights Act of 1964. The players alleged the USSF engaged in gender discrimination on the basis of pay and other conditions of employment, *e.g.* allegedly substandard training conditions and travel accommodations.

The Equal Pay Act prohibits employers from wage discrimination on the basis of sex but does not automatically obligate employers to pay men and women employees the same wages as the comparison of "work" is not always straightforward. Rather, the analysis involves a careful comparison of relevant job descriptions, including assessing whether the jobs require equal skill, effort and responsibility and are performed under similar working conditions. Ultimately, the employer must show that the difference is due to a nondiscriminatory reason(s). In other words, an employer must have lawful reasons for the pay disparity. The USSF denied the players' claims, arguing in a May 2019 court filing that the pay differential between the men and women players is "based on differences in aggregate revenue generated by the different teams and/or any other factor other than sex" and that the two teams are "physically and functionally separate organizations."

In May 2020, Judge Gary Klausner granted USSF's motion for summary judgment on the players' wage discrimination claims but preserved the working conditions claims based on alleged discrimination in air travel, hotel accommodations and medical and training support. In the 32-page ruling, Judge Klauser includes an extensive history of the CBA negotiations between USSF and the USWNTPA over the past decade. He held that that members of the women's team knowingly and willingly sacrificed potential earning power in their CBA negotiations in exchange for the security of guaranteed annual salaries from USSF. In other words, the women rejected a pay-to-play structure similar to the one in the men's agreement and instead accepted greater base salaries and benefits. "Plaintiffs cannot now retroactively deem their CBA worse than the MNT CBA by reference to what they would have made had they been paid under the MNT's pay-to-play structure when they themselves rejected such a structure," Klausner stated.

USWNT have flatly rejected this ruling and confirmed their intent to appeal the decision to the Ninth Circuit Court of Appeals. "The argument that women gave up a right to equal pay by accepting the best collective bargaining agreement possible in response to the federation's refusal to put equal pay on the table is not legit reason for continuing to discriminate against them," said Molly Levinson, USWNT spokesperson.

In December 2020, the USWNT and U.S. Soccer agreed to settle their claims of unequal working conditions before trial was scheduled to begin in January 2021 (Hays, 2020).[5] According to the proposed settlement, USSF agrees to provide an equal number of charter flights, as well as comparable hotel accommodations. USSF will also enact a new "Senior National Team Professional Support Policy" that seeks to ensure equality of staffing while allowing each national team flexibility for its specific needs. Each team will have between 18 and 21 "professional positions" for staff. Additionally, under a venue selection policy included as part of the settlement, the federation will "seek to provide equally acceptable venues and field playing surfaces" for the national teams.

In settling the issues related to working conditions, the path is now cleared for the team to appeal Judge Klausner's May ruling that rejected their equal pay claims. Levinson confirmed in December, "we now intend to file our appeal to the Court's decision which does not account for the central fact in this case that women players have been paid at lesser rates than men who do the same job."[6] While a ruling on the USWNT's remaining claims would become case precedent for future union-management disputes, the appeal process—between 15 to 32 months—could still complicate negotiations when the current CBA expires this year.[7]

### WNBA: The Recent Victory

After 23 seasons of subpar playing conditions the WNBA secured a progressive new collective bargaining agreement in January 2020, which had a record 90% player vote.[8] The new CBA raises the WNBA salary cap by 30% and boosts maximum annual salaries from $117,500 to $215,000. Players will also be able to earn up to $250,000 apiece from a $1.6 million pool the league is dedicating to marketing agreements and will gain free agency after five years (down from six). Teams will also provide housing with two bedrooms for athletes with children, individual hotel rooms on the road and flight upgrades. The groundbreaking provisions of the agreement though focus on players who are mothers or expecting parents. Under the old CBA, athletes who had children lost pay when they lost work time and had to cover their own childcare costs; now, players will receive their full salaries during leave and a $5,000 stipend for child-

**Nneke Ogwumike of the Los Angeles Sparks is the president of the WNBA Players Association. The WNBA players secured a progressive new collective bargaining agreement in January 2020. The new CBA raises the WNBA salary cap by 30% and boosts maximum annual salaries from $117,500 to $215,000.** (Photo by Douglas P. DeFelice/Getty Images)

care costs. Additionally, veteran players (those who have played at least one season) will receive up to $60,000 to cover costs related to adoption, surrogacy and IVF treatments. The new CBA even mandates players are given a private place for nursing.

Although the new WNBA calendar will make it harder to play overseas and stateside in the same year, the higher salaries will hopefully relieve the pressure athletes feel to travel overseas in the off-season to supplement their income. Additionally, the league agreed to prepare and promote players for coaching and others jobs in the offseason. As innovative as these new changes are, their total cost is about $1 million per WNBA team per year, which means the proportion of league revenues paid to players will rise only from approximately 20% to 30%, in contrast to most major sports which are at around 50%.[9] This may appear as WNBA players leaving considerable cash on the negotiating table but may also represent just how much further women must go before achieving equal compensation.

## NWHL and PWHPA: The New Fight

In 2017, the U.S. Women's National Hockey Team boycotted the world championships of the International Ice Hockey Federation after contract negotiations had broken down. Thirteen days after the boycott was announced, the team was able to secure a new deal that improved the team's annual compensation to roughly $70,000 per player, plus performance bonuses, and included travel and insurance provisions commensurate with what the men's national team received. USA Hockey also agreed to other player requests, such as establishing a committee to look into how the federation could improve its marketing, scheduling, public relations efforts and promotion of the women's game, plus fundraising and other efforts for girls' developmental teams.[10] However, unequal pay and working conditions continued to plague women's professional leagues and when the Canadian Women's Hockey League folded in 2019, North America players were left with only one women's hockey league in which to play: the National Women's Hockey League.

During the NWHL's inaugural season in 2015, player salaries ranged between $10,000 and $26,000. Players were stunned when the league announced in 2016 that it was cutting salaries in order to keep the league afloat.[11] However, without a CBA, players did not have much recourse unless they were willing to walk out. Ultimately, over 200 players decided they would not play in any professional North American leagues in 2019 unless working conditions improved, and they and formed the Professional Women's Hockey Players' Association.[12] The PWHPA then led a six-stop barnstorming Dream Gap Tour across the U.S. and Canada. The hope was that the Dream Gap Tour would fill a short, one-season void without professional women's hockey, but when no new, "sustainable" league was formed by the time the PWHPA finished its tour in March 2020, PWHPA was unsure of its future. The COVID-19 pandemic intensified that uncertainty.

Then, in October 2020, Secret announced its pledge of $1 million to the PWHPA, the largest financial commitment ever made to professional women's hockey in North America.[13] This contribution not only helped players return to the ice but also ensured the Dream Gap Tour would continue. PWHPA head and Hockey Hall of Famer Jayna Hefford confirmed the $1 million from Secret will be divided between operational costs, cash prizes for players on the 2021 Dream Gap Tour and lastly, media and marketing to ensure the PWHPA remains visible.[14]

Meanwhile, the NWHL has made improvements since 2016. In 2019, the

salary cap for each team increased from $100,000 to $150,000, and players started receiving 50% of revenue from league-level sponsorship and media deals, which included agreements with Dunkin Donuts and Twitch, a video streaming service used for game broadcasts.[15] In December 2020, NBCSN and the NWHL reached a deal to televise league playoff games for the COVID-abbreviated 2021 season.[16] Given that these developments still do not result in NWHL players earning a livable wage, the PWHPA continues to hold out for a league that can provide one. Ultimately, the future success of women's professional sports organizations in a post-pandemic era will rely not only on equitable compensation for its players but also large investments in the organizations themselves.

Since the creation of the Equal Pay Act and Title IX, female athletes in the United States have been fighting to compete on the same footing as men. Today, female professional athletes are building public support, organizations and partnerships in order to create a market that supports their skills and pays them what they are truly worth. Once sports reemerge from the freeze of the COVID pandemic, women's leagues and federations will no doubt continue to face evolving expectations and novel issues as they answer the fundamental question of how to fairly compensate their athletes in 2021. ⚖

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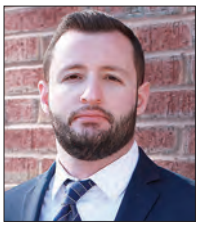
# Title IX and The Continuing Fight for Gender Equity in Athletics

**By Jan L. Bernstein and Gregory L. Grossman**



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**GREGORY L. GROSSMAN** *is an associate in the New Jersey Family Law Practice at Phillips Nizer, LLP.*

The right of every girl to have an equal opportunity to participate in sports—one of the many guarantees of Title IX of the Education Amendments of 1972—remains unfulfilled even as we enter 2021. The fight for this right has been taken up over the past decades by numerous brave individuals and social justice organizations. Yet the law's promise of equality remains out of reach for far too many talented and deserving girls, especially girls of color, including in New Jersey.

One of the first cases giving girls more opportunities in sports was *Nat'l Organization for Women v Little League Baseball, Inc*.[1] It held that girls, ages 8–12, must be permitted to play in Little League. Little League's arguments, including that it was reasonable for it to spend resources only on children who would use baseball skills later in life, were rejected as embedded in "stereotyped conceptions" as to the "needs, capabilities and aspirations for the female, child or woman." There was a gigantic backlash against the ruling—most Little League teams suspended play altogether and some disbanded.

This case occurred about the same time as Title IX was passed by the U.S. Congress. Title IX, a 37-word law which prohibits discrimination on the basis of sex in federally-funded programs, was passed in 1972 but did not become effective until later that decade. And those 37 words did not mention sports. It was not until 1975, when the Title IX regulations were issued, that the law was applied to sports. After lawsuits and public debates, the regulations became effective, requiring that opportunities to play sports, athletic scholarship dollars, and benefits and services afforded athletes be equitable for females and males.

We have come a long way since Title IX was passed almost 50 years ago; however, girls in sports are still not treated equally at either the interscholastic or the intercollegiate levels.[2] Girls of color, in particular, are provided fewer opportunities to participate in sports than white girls, white boys, and boys of color.[3] While the Department of Education's Office for Civil Rights enforces Title IX at the federal level, states have Title IX enforcement obligations, and numerous private lawsuits since the early 1980s have been brought to force schools to comply with the law, there is insufficient attention paid to and widespread non-compliance with the law.

Most lawsuits have focused on the intercollegiate level. But dedicated sports devotees and women social justice advocates, along with their respective organizations, are fighting hard to make fundamental changes at the high school level, starting in New Jersey. They are engaged in this fight because they know the fundamental, life-long skills that sports teach girls, such as hard work, self-confidence, and leadership, as well as the health and academic benefits that they provide. They form the core of a team seeking to bring about change at the middle and high school levels—a time when girls are especially impressionable.

**Maria Pepe pitched three games in Little League, until due to her gender, was kicked off her baseball team. The National Organization for Women (NOW) filed a civil rights complaint on her behalf, claiming sexual discrimination. The case went to New Jersey Superior Court, where it was ruled that Little League would allow both boys and girls to play.**

This team of (mostly) women lawyers who have played sports and have a passion for gender equity have embarked on a mission to make changes first in New Jersey. More specifically, they seek compliance with Title IX on a voluntary basis from certain high schools in New Jersey with large inequalities in participation opportunities for girls, school by school. The team is also encouraging the State of New Jersey to focus on enforcement of Title IX, with an emphasis on girls of color who "finish last" when it comes to sports opportunities. Focusing on the intersectionality of race and gender, they hope to apply their New Jersey accomplishments on a national scale.

The women and their respective organizations—a nonprofit organization, a global law firm, and a dedicated Fund—have accomplished so much already in New Jersey. One member of the team, Jan L. Bernstein, explains her first encounter with Title IX:

> My "relationship" with Title IX began at its inception in 1972. At that time, I was playing high school tennis on the boys' team at my public high school in New Jersey because there were no girls sports teams. Dissatisfied with this unequal treatment for the girls, the following year my parents started a campaign to demand equal opportunity for girls in athletics at the high school, citing the passage of Title IX

> and demanding the formation of girls' sports teams. There was significant opposition to the addition of athletic teams for girls. While speaking at a Board of Education meeting on behalf of girls' athletics, my father recalled opposition from one Board member, who informed my father that, "tennis balls are expensive." My father assured the Board member that tennis balls were equally expensive for boys as they were for girls. My parents succeeded, and the first ever girls' sports teams were created at my high school. I played on the first girls' tennis team. This was my introduction to advocating for equal opportunity for girls and women in athletics, which I continued in college and to this day. In honor of my parents' dedication to gender equality in athletics, a Fund was begun in their name at the National Women's Law Center to advocate for equal opportunity for New Jersey high school girls in athletics, focusing on girls of color and at-risk girls.

Another critical member of the team is the formidable National Women's Law Center, the premier nonprofit legal advocacy organization in the U.S. involved in Title IX compliance from the time Title IX was passed.[4] The NWLC has entered into many agreements with cities and schools and has litigated Title IX cases all the way to the U.S. Supreme Court. The NWLC team is led by Neena Chaudhry, General Counsel and Senior Advisor for Education, who has worked on Title IX compliance for over 20 years. Chaudhry recalls the genesis of her personal connection to Title IX:

> I didn't grow up in a particularly athletic family, but I did have strong female role models (a grandmother in India who defied gender norms to become a physician before marrying and made sure her daughter did too) and a feminist father. And thanks to Title IX, I had the opportunity to play basketball in middle and high school. That experience not only made me stronger physically, but it gave me a new kind of confidence and taught me about patience (I spent a good amount of time on the bench), how to lose but keep going, and teamwork. I didn't know about Title IX back then, but when I had the chance to help enforce the law at NWLC years later, I knew how important it was to make sure that all women and girls had equal opportunities to reap the many benefits of playing sports.

Just a few examples of the landmark work done by the NWLC on Title IX, led by its co-founders Marcia D. Greenberger and Nancy Duff Campbell (the trailblazing women who are among the "founding mothers" of the women's movement), include the following:

- In 1977, NWLC sued to force the government to enforce Title IX.[5]
- In 1980, the NWLC brought the first major Title IX case challenging an entire intercollegiate athletic program, *Haffer v. Temple University*,[6] leading to a precedent-setting court-ordered settlement expanding the entire women's sports program.
- In 1988, with the NWLC leading the Title IX coalition, Congress passed the Civil Rights Restoration Act, establishing that all parts of schools, including athletics, are covered by Title IX if any part receives federal funds.
- In 2010, the NWLC filed administrative complaints against multiple high school districts across the country to enforce Title IX, including the Chicago Public Schools and the New York City Department of Education.[7]

A summary of the above Title IX cases and other litigation and legislative work done by the NWLC is available online.[8]

The third important component of the team working to provide equal opportunity in sports for girls of color in New Jersey high schools is Simpson Thacher & Bartlett LLP, a leading global law firm with a strong pro bono program and a longstanding commitment to civil rights, which has taken the matter on *pro bono*. Significantly, Simpson Thacher has developed a deep commitment to seeking Title IX compliance at the interscholastic level. Its focus has mostly been in California where it, along with other key Title IX advocates, has reached numerous agreements with schools at the K-12 level. When schools do not agree to make changes voluntarily, the firm does not hesitate to sue under Title IX. Indeed, it has a pending case in federal court in Honolulu.[9] A key member of the Simpson Thacher team is Counsel Jayma Meyer. Like Bernstein, Meyer is especially motivated by her personal experience. As an elite athlete prior to the passage of Title IX, Meyer recalls:

> I am a former swimmer who was ranked in the top 10 in the world in the butterfly at a time when I had to train by myself because at my high school there was no girls' swim team and the boys' high school team refused to let me train with them. My only option was to swim alone at the YMCA, with my mother as my "lifeguard," at 5 a.m. every morning before the facility was open to the public. With periodic trips to Fort Lauderdale to train under an Olympic level coach, I had a shot at making the 1972 Olympics. But, not being one of the top two in the country in my event—the butterfly—at the Olympic Trials, I did not make the Olympic team, and found myself instead starting college at a school with the best collegiate team in the country, but with no women's team. Aiming for the 1976 Olympics was not a realistic option. Needless to say, I was greatly disappointed.

The importance of participation opportunities and access to athletic

activities for girls simply cannot be overstated. Girls are empowered when they play sports. Yet when opportunities and treatment are inequitable, girls feel degraded and marginalized. Expanding access to sports unquestionably is powerful and an effective form of social justice, for all girls and particularly for girls from disadvantaged backgrounds where much of our efforts are focused.

In New Jersey, the group's project started with an analysis of the Civil Rights Data Collection—publicly available data provided by schools and compiled by the U.S. Department of Education—that shows the number of boys and girls participating in sports per high school and also provides demographic information about each school. After analyzing these data and other publicly available data to determine whether there might be inequitable treatment and benefits on the basis of gender, the group sent letters seeking information from those schools that appeared to be most out of compliance. While not all schools were receptive to the group's efforts, there have been many New Jersey schools that as a result of the group's advocacy, have made voluntary changes, including entering into agreements to move toward Title IX compliance. For example, Union City High School now offers additional teams for girls, has made some of its formerly male-only facilities available to females, and provided additional equipment and locker room facilities for girls. It serves as a model, setting a positive example for other schools on how to improve opportunities for girls.

With varying backgrounds and reasons for engaging in the fight for equal opportunity in sports for women and girls, this team remains confident in the power of equality and will continue to unrelentingly push forward for the benefit of New Jersey girls. It is their big hope that the 50th anniversary of Title IX will be a watershed moment and girls in New Jersey and nationally finally will be treated equally as required under the law. ⚖

**Endnotes**

1. *Nat'l Organization for Women v Little League Baseball, Inc.*, 318, A. 2d 33 (N.J. Super. Ct. App. Div., 1874), *summarily aff'd without opinion*, 67 N.J. 320 (1974).
2. See NWLC Fact Sheets at nwlc.org/wp-content/uploads/2015/08/Battle-for-GE-in-Elementary-and-Secondary-Schools.pdf and nwlc.org/wp-content/uploads/2015/08/Battle-for-GE-in-Colleges-and-Universities.pdf
3. "Finishing Last—Girls of Color and School Sports Opportunities"—A 2015 Report co-authored by the National Women's Law Center reveals the more significant opportunity gaps for girls of color in athletics. nwlc.org/wp-content/uploads/2015/08/final_nwlc_girlsfinishinglast_report.pdf
4. See NWLC Education and Title IX resources at nwlc.org/issue/education-title-ix/
5. See WEAL v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990), required timely government enforcement of Title IX.
6. *Haffer v. Temple University*, 688 F.2d 14 (3d Cir. 1982).
7. See nwlc.org/press-releases/center-files-title-ix-complaints-against-12-school-districts/
8. See dev.devurl.info/nwlc2.org/about/history/
9. *A.B., et al v. Hawaii State Dep't of Ed. and Oahu Interscholastic Assoc.*, Civ. No. 18-00477 (District of Hawaii)

# New Jersey Fair Play Act Creates an Uneven Playing Field for Lawyers

## Athlete Agents for College Students Held to Different Standard

**By William P. Deni, Jr.**

**WILLIAM P. DENI, JR.** *is a Director at Gibbons P.C. in Newark. One of only two attorneys in the country to be selected to the* Super Lawyers Rising Stars *list in Entertainment & Sports Law for six consecutive years. Deni's wide-ranging practice encompasses counseling sports and entertainment clients, including a MLB Cy Young Award winner.*

The New Jersey Fair Play Act may be a home run for student-athletes at New Jersey institutions, but is it a foul ball for the New Jersey lawyers who represent them? Gov. Phil Murphy signed the Fair Play Act into law on Sept. 14, 2020, to allow "collegiate student-athletes to earn compensation for use of name, image, or likeness" without affecting scholarship eligibility.[1] The new law sensibly allows athletes attending four-year colleges or universities in New Jersey to obtain "professional representation in relation to contracts or legal matters including, but not limited to, representation provided by athlete agents or legal representation provided by attorneys."[2]

Unfortunately, the Fair Play Act provides no licensing uniformity for attorneys and athlete agents who provide representation to student-athletes. For attorneys, it mandates that "legal representation obtained by the student-athlete shall be from attorneys licensed by the State."[3] An attorney is listed as a licensed person by statute in New Jersey.[4] An athlete agent is not.[5] Thus, the Fair Play Act has no state-mandated

license requirement for athlete agents and they need only comply with "the federal 'Sports Agent Responsibility and Trust Act' (15 U.S.C. s.7801 et seq.) [SPARTA] in their relationship with student-athletes."[6]

Having a law license means that certain underlying requirements have been met, such as a background check by the New Jersey Board of Bar Examiners, passing the New Jersey bar exam and paying an annual registration fee. Once licensed, an attorney must fulfill continuing legal education requirements and adhere to the New Jersey Rules of Professional Conduct. Malpractice insurance is also required. Failure to comply with any of these requirements could result in disciplinary action and even revocation of the law license. Athlete agents are not obligated by these or any other requirements under the Fair Play Act. There is no athlete agent registration requirement. There is no malpractice insurance requirement. There is nothing except compliance with SPARTA. An athlete agent is defined under SPARTA as "an individual who enters into an agency contract with a student athlete, or directly or indirectly recruits or solicits a student athlete to enter into an agency contract, and does not include a spouse, parent, sibling, grandparent, or guardian of such student athlete, any legal counsel for purposes other than that of representative agency, or an individual acting solely on behalf of a professional sports team or a professional sports organization."[7] SPARTA allows anyone to work as an athlete agent, regardless of their education, experience or training. The regulatory vacuum for athlete agents creates a significantly higher tolerance for athlete agent incompetence and misconduct than it does for attorneys representing student-athletes.

The problem is best illustrated by an example. Under the Fair Play Act, an attorney licensed to practice in California for 20 years cannot represent a Rutgers student-athlete without either obtaining their New Jersey law license or retaining New Jersey co-counsel. Yet, an inexperienced college student with a high school diploma and some college credits who has declared themself a sports agent in compliance with the Fair Play Act can represent that same Rutgers student-athlete. Essentially, the Fair Play Act authorizes anyone to call themself a sports agent and represent a student-athlete at a New Jersey institution with little to no regard for education, competence, or ethical standards, and with no oversight or enforcement.

There are thousands of people who call themselves sports agents. Many of them are competent, ethical and skilled at counseling their athlete clients on professional sports contracts and endorsement deals. They may not have attended law school, though many have. Some have undergraduate degrees in business, accounting and marketing. Many successful agents trained under or utilized an established agent's knowledge and experience to navigate the professional sports landscape. Almost all sports agents are required by statute to be licensed in their home state and the states where they recruit and represent players under the Uniform Athlete Agents Act or the Revised Uniform Athlete Agents Act. Not so in New Jersey, where the Fair Play Act disregards licensing conformity and student-athlete protection against unqualified athlete agents.

## Uniform Athlete Agents Act and the Revised Uniform Athlete Agents Act

The UAAA and the RUAAA require anyone who wants to represent a student-athlete as an agent to register with the state where they represent or recruit athletes. For example, "New York State law defines an Athlete Agent as any person who enters into an agency contract with a student-athlete or, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract."[8] When a person recruits a student-athlete in New York, they are required under Article 39-E of the General Business Law to register as an athlete agent with the New York Department of State. Registration serves as a gatekeeping mechanism and ensures compliance with New York law. New Jersey is one of only a handful of states that does not require registration under the UAAA or RUAAA.[9]

Registration comes with a cost, ranging from $50 in California, to $100 in New York, to $650 in Florida. Other states, like Pennsylvania and Texas, require that the individual agent be bonded in addition to paying the registration fee. The bond offers protection to the athlete if they need to bring a malpractice action against the athlete agent. In almost every state, individual (not organization) registration is required. Generally, registration is conducted and recorded by the Secretary of State. An application must be completed, references provided and fees paid to complete the registration process. Nearly every state conducts a background check and some require fingerprinting as part of the registration process. Once registered, an athlete agent is subject to civil, and sometimes criminal, enforcement of state statutes.

Because New Jersey has not adopted the UAAA and the RUAAA, it has no statutory or regulatory framework to regulate athlete agents. It also has no measures in place to protect student-athletes from unscrupulous athlete agents. Other states, like Alabama, may criminally charge an athlete agent with a felony for an intentional failure to register with the Secretary of State and civil penalties can reach $50,0000. In New Jersey, an aggrieved student-athlete is left with only common law claims, such as breach of the duty of care and the duty of loyalty, against an athlete agent.

### The Sports Agent Responsibility and Trust Act

Unlike a licensed New Jersey attorney who is supervised and subject to discipline by the Office of Attorney Ethics, no enforcement body exists for a sports agent doing business in the state. The Fair Play Act references SPARTA, which Congress passed to protect student-athletes by prohibiting an athlete agent from: (1) providing false or misleading information, or making false or misleading promises or representations; (2) providing anything of value, such as cash or gifts, to the student-athlete or anyone associated with the student-athlete; (3) failing to provide a written disclosure to the student-athlete that they may lose NCAA eligibility after signing a contract with an athlete agent; or (4) predating or postdating contracts. SPARTA does not mirror the standards a New Jersey attorney is required to follow to be granted and maintain a law license.

The prohibitions in SPARTA are enforced by either federal or state action. The Federal Trade Commission regulates athlete agents under SPARTA. The FTC has enforcement power over athlete agents who misrepresent or provide gifts to a student-athlete to enter into a representation contract under the Federal Trade Commission Act.[10] Congress passed the FTCA to protect consumers and businesses from unfair or deceptive acts in the conduct of business. If an athlete agent is engaging in deceptive or misleading practices in enticing a student-athlete to sign a representation agreement, the athlete agent would be subject to an FTC enforcement action. Under the FTCA, an athlete agent could receive up to an $11,000 fine if found to have committed an unfair or deceptive act or practice. That fine could easily pale in comparison to the potential fee earned by an athlete agent negotiating a contract involving an athlete's name, image and likeness. SPARTA is often criticized for lacking a true deterrent effect in favor of lucrative gain.

SPARTA also allows a state, through its attorney general or public university, to bring an enforcement action against an athlete agent under SPARTA.[11] If, however, the FTC pursues an action against the athlete agent, SPARTA prohibits parallel state enforcement against that athlete agent.[12] There is no direct right of action under SPARTA by a student-athlete against an athlete agent. When the attorney general or public university does not take action against an athlete agent, the aggrieved student-athlete has no other recourse. The uneven playing field for attorneys acting as agents under the Fair Play Act is apparent in SPARTA's enforcement mechanisms. An aggrieved student-athlete in New Jersey can file a direct enforcement action against an attorney with the Office of Attorney Ethics. Yet, no parallel private right of action exists for a student-athlete against an athlete agent under SPARTA. Four major U.S. sports do not have this regulatory inconsistency. Athlete agents and attorneys are required to be licensed and are subject to uniform requirements and regulations set by each players' union in the National Football League, Major League Baseball, the National Basketball Association and the National Hockey League.

### Athlete Agent Requirements and Regulations in the NFL, MLB, NBA and NHL

In addition to SPARTA, the UAAA and the RUAAA, athlete agents in the four major professional sports leagues are regulated by each league's professional players association, which are led by a president elected by the players. The rules and regulations for athlete agents in each sport are set by the respective players' associations. The sports leagues do not regulate athlete agents as they are separate entities controlled by team owners and led by a commissioner. The operative document governing the relationship between the respective players' associations and professional sports leagues is a collective bargaining agreement (CBA). Competent and successful athlete agents are fluent in the CBA of a particular sport because it covers the player-team relationship, including player contracts and injury rights and protection. The CBA generally also addresses, in part, a player's ability to sign an endorsement contract for their name, image and likeness. Each of the

Unlike a licensed New Jersey attorney who is supervised and subject to discipline by the Office of Attorney Ethics, no enforcement body exists for a sports agent doing business in the state.

four major sports requires a baseline level of knowledge, education and competency for an athlete agent to represent a player. Each sport also has a set of uniform rules and regulations for everyone representing an athlete.

***NFL***

The National Football League Players Association adheres to the most stringent requirements for those representing professional football players. Prospective athlete agents must submit an application to be accepted to attend a two-day seminar held once per year to learn the relevant sections of the NFL CBA. At the conclusion of the seminar, prospective agents take an exam on the CBA and the NFLPA regulations governing contract advisers, which is the term used by the NFLPA for athlete agents. Once receiving a passing grade, a contract adviser can represent players in contract negotiations with NFL teams. Athlete agents are required to pass a background check, pay a minimum annual fee of at least $1,500 to the NFL Players Association and secure an insurance policy in their name to cover any potential malpractice.

There is a continued compliance requirement where NFL agents must attend a yearly seminar to stay informed on new developments related to player representation and the CBA. The more difficult compliance requirement, for most of the 900 or so NFL agents, is to have negotiated at least one player contract within a three-year period. If an agent fails to negotiate a NFL contract within three years, they must reapply and retake the agent exam. Once certified, the agent is subject to the discipline by the NFLPA. This could include a fine, suspension and revocation of the NFLPA certification. Unlike the Fair Play Act, NFLPA regulations governing contract advisers hold athlete agents and attorneys to identical requirements and standards.

***MLB***

The Major League Baseball Players Association also requires an athlete agent to submit an application and pay a $2,000 fee, sit for an exam held once per year and pass a background investigation. The exam focuses on the MLB CBA and the MLBPA Regulations Governing Player Agents. Once the agent passes the exam, they can be designated as the agent of a Major League Baseball player. This certification is not required for athlete agents who represent baseball players in the development system. A certification is required only to represent a player for a Major League Baseball contract. The MLBPA compliance requirement is similar to the NFLPA requirement of negotiating a MLB contract within three years as well as paying an annual fee. Note that unlike the NFL, a MLB agent cannot be certified until they represent a player who has a MLB contract.

Once certified, the agent is subject to discipline by the MLBPA. This could include a fine, suspension and revocation of the MLBPA certification. Attorneys and athlete agents are subject to the same rules and standards under MLBPA regulations. Unlike the Fair Play Act, everyone has the same requirements, rules and regulations to represent a Major League Baseball player.

***NBA***

The National Basketball Players Association requires an athlete agent to submit an application and pay a $250 nonrefundable application fee plus a $1,250 refundable fee covering prorated agent dues. A prospective NBA agent must submit an application to the NBPA, pass a background investigation and sit for an exam held once per year. Similar to football, there is a continued compliance requirement where NBA agents must attend an annual seminar to stay informed of new developments related to player representation, the NBA CBA and NBPA regulations governing player agents.

An agent must also negotiate and execute at least one player contract within a five-year period. Once certified, the agent is subject to discipline by the NBPA, which could include a fine, suspension and revocation of the NBPA certification. NBA agents, whether a licensed attorney or athlete agent, are equally subject to the NBPA regulations.

***NHL***

The National Hockey League Players Association does not require an exam. NHLPA Agent Regulations require a $500 application fee to submit with the application and supporting documents that detail a prospective agent's education, background, previous business dealings and current business and personal relationships. The application undergoes a thorough review process by NHLPA staff, which could include an investigation into prior conduct. There is an annual fee in excess of $2,000 as well as a requirement to represent a NHL player under contract to a NHL club or a player having had a contract with a NHL club who has become a free agent. Once certified, the agent is subject to discipline by the NHLPA. This could include a fine, suspension and revocation of the NHLPA certification. Once again, and consistent with the other sports, there is no deviation between requirements and regulations for attorneys and athlete agents. All are subject to the uniform set of NHLPA rules and regulations.

## Application, Practice and Enforcement

Each of the four sports has a heightened level of compliance required to represent athletes. There is an application requirement, a compliance requirement and an enforcement mechanism to regulate anyone representing an athlete, whether it is an attorney or an athlete agent. New Jersey's Fair Play Act

lacks these three important prongs for athlete agents. There is no application required to be an athlete agent. There is no compliance requirement for an athlete agent. There is no uniform enforcement procedure for an athlete agent. There is also no insurance requirement to safeguard a student-athlete's recovery of damages if an enforcement action is taken against an athlete agent in New Jersey.

Yet these three prongs exist for attorneys licensed to practice in New Jersey. The Fair Play Act specifically states that an attorney must be licensed to practice in New Jersey thereby mandating an application requirement, compliance requirement, and enforcement mechanism with an insurance requirement. The Fair Play Act's lack of uniformity to regulate athlete agents and attorneys is harmful to the New Jersey college athletes who must choose representation without a uniform set of standards and protections. ⚖

**Endnotes**

1. S-971/A/2106 (2020)
2. *Id.*
3. *Id.*
4. N.J.S.A. 2A §53A-26
5. *Id.*
6. S-971/A/2106 (2020)
7. 15 U.S.C. §7801
8. dos.ny.gov/licensing/athleteagent/athleteagent.html
9. Lens, Josh, Application of the UAAA, RUAAA, and State Athlete-Agent Laws to Corruption in Men's College Basketball and Revisions Necessitated by NCAA Rule Changes (May 27, 2019). 30 Marq. Sports L. Rev. 47, 49-50 (2019).
10. 15 U.S.C. §7803
11. 15 U.S.C. §7804
12. *Id.*

# What Does it Mean to Work in Sports Law?

## Practitioners Need Versatility in Navigating Financial, Media, Safety and Rights Issues

**Andrew Bondarowicz** is the former chair of the NJSBA Entertainment and Sports Law Section. The solo practitioner, based in Newark, represents athletics-focused organizations from the amateur to the professional levels as part of his practice. He is also an adjunct professor teaching sports law at Rutgers Law School in Newark and the Global Sports Business program in New Brunswick. A former athlete-agent, he is also the New Jersey Outreach Captain for the Sports Lawyers Association. Bondarowicz spoke recently about what exactly is sports law, the big trends and issues facing the field, and his journey to being a sports law expert. Some responses have been lightly edited for clarity.

**What is sports law?**

Sports law is a very wide-ranging field that covers multiple practice areas. At the most basic level, having a client who is in some way involved in sports industry means you are in the "sports law" realm as it will have some unique wrinkles to it. Antitrust and labor and employment law are at the forefront. When we think of sports law, we first think of collective bargaining and player contracts. But exploiting intellectual property including trademarks and rights of publicity are also the basis of sponsorship and marketing deals. Advertising law comes into play with promotions and endorsements. Media law becomes very important in broadcasting deals and there are plenty of corporate governance and tax issues to wrestle with, particularly when dealing with nonprofit organizations. Representing high schools and colleges also requires some familiarity with Title IX, NCAA bylaws, and other education laws and regulations. This year, insurance and health care issues and concepts such as "force majeure" have become hot issues.

But, sports issues can filter into almost every practice area—particularly when representing professional athletes. Pro players are often high net worth individuals, so knowledge of the economic structure of sports is also important in areas such as family law where players face divorce settlement and child support issues. In fact, one of my first NFL clients had become very active in real estate since leaving the game, so to deal with some of the unique underwriting aspects and to continue to service his needs, we needed to extend our practice in real estate and it created a whole new practice area for us.

So, the best way to think of sports law is to think of law as it relates to the sports industry.

**How does practicing sports law vary from helping amateur and recreational leagues to collegiate issues to the pros?**

When you look at sports in general you really can put it into separate buckets professional, college, youth and amateur sports. Each one has some distinct aspects and issues can

manifest themselves differently.

In major professional leagues in the United States, each one of them has antitrust considerations and collective bargaining agreements between their players and management. That means that every issue for leagues has to be viewed through that antitrust lens first and how the implications will factor into collective bargaining. Some unique CBA issues in sports include free agency, salary arbitration, player discipline and fines, among their 300-plus pages. CBAs become the single most important document in each league.

College functions very differently because it is driven by the NCAA and its legislative process. This NCAA is a private organization, so it does not have actual legal and investigative authority outside of what its members agree to through its legislative process. Those very bylaws are now coming under so much fire now both in court and in government regulation. In fact, a 1984 Supreme Court decision in *Board of Regents v. NCAA* has already transformed college athletics and another one coming in the *Alston* case next year will further determine the future of college sports. As the dollars have increased in college sports in the last 40 years, it has brought it more scrutiny as it has looked and acted more and more like the pro leagues.

When you get into amateur sports it is much more loosely aligned and driven by small, usually nonprofit organizations. There are some state laws pertaining specifically to youth sports, such as in New Jersey, where there something known as the "Little League law" that offers limited protections and immunity for volunteer managers and coaches in certain circumstances. It is one of the few places where you have statutory law coming into the sports law picture. In the past couple of years, in response to the USA Gymnastics sexual assault scandal with Larry Nassar, a new federal law known as the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017 was passed to protect youth participants and led to the creation of the U.S. Center for SafeSport. That is now the epicenter for reporting and investigating claims of sexual assault in youth and amateur sport. But generally, when you look at the youth sports world it is very fractionalized, yet it is the biggest part of the industry because it is really the grassroots building block of sports. When your kid signs up at 4 or 5 to do something—like gymnastics, swimming or soccer—they enter the sports industry and whatever governance structure applies to that activity. Any of the sports governed by the United States Olympic and Paralympic Committee have larger governing bodies. Others, such as football and baseball, operate outside the Olympic framework and are very decentralized. Basketball is kind of a hybrid.

**Which of those has the largest financial stake?**

Amateur athletics actually controls the most dollars in the industry. It is a fallacy to think of your local soccer or baseball league as just a small volunteer organization—many of them have six- or even seven-figure budgets. Yet, their governance practices and oversight are often not up to the standards that you would expect for a business controlling these dollar amounts. When you take a step back and look at youth sports on a national level it probably has more economic impact than all of the professional leagues combined. The pro leagues get their money from broadcasting and sponsorship. On youth level, the majority comes from participation fees and donations. Every time you sign your kid up there is registration, insurance, training, uniforms, equipment and increasing travel. You can see how broadly that mushrooms out. When you multiply the dollars exponentially across the country, you see you have a pretty significant industry.

**How did you get into the field?**

I entered law school as a night student with a professional career already after having worked in government relations and later regulatory consulting. I developed a broad skill set with background in public relations and marketing working on legislative issues in Trenton, and had prior sales experience in the financial industry. I liked elements of all of them and wanted to find a practice area that would allow me to do all of those different things. I looked to the law for an industry that would allow me to be versatile and dynamic and utilize my skills in unique ways. So, through a mutual friend, I was asked by a professional comedian/actor in New York City to serve as his business manager and eventually crossed into sports.

**Where did you start?**

Since I had more natural exposure in sports, working for a pro team or league is highly competitive, so I looked for a point of entry where I could control my own destiny. I saw that, at the time, there were low barriers to entry in football and a very streamlined pathway to the NFL. If you pass the NFL Players Association test you can be certified by the union to represent players as an "agent" (really a "contract adviser"). Then, it is up to you to find a client and you are then "in the business!" It is a very competitive business: There are over 1,000 NFL-certified agents nationally, but only about 3,500 players—80% of those players are handled by only a small subset of the agents. I knew how to recruit and develop business, so I developed my own unique value proposition and pitch and set out to find clients. My first recruiting class yielded three clients and I slowly built from there. Unless you know a first-round draft pick, you are not going to hit a home run in the first year. You have to build and strategize. You are mostly dealing with 22-year-old kids and trust is a huge factor. It is a very cutthroat field,

but I managed to represent about 75 players over an eight-year period that I was certified by the NFLPA. The football representation business, though, has huge ethical challenges with very little legitimate oversight, so it eventually got to the point where I felt I had to move on and instead moved into other aspects of the sports industry and consulting. But, it definitely gave me my start.

**What are some of the big issues facing the field?**

There are many issues and trends in sports law right now and it makes my classes at Rutgers very dynamic. Some of the current hot topics include:

***COVID-19***

Right now, first and foremost everyone is wrestling with COVID-19 and what that means for their sports. For professional sports, COVID protocols had to be collectively bargained. They needed the players to come together to set their rules and operations with each league having a different model. In the NCAA, there are over 1,000 schools that are members so that has been difficult to manage from a top-down approach so the NCAA essentially ceded responsibility to the conferences. That is why you see such a disparity in how it is being handled from one conference to another. In the end, the players want to play and there are big dollars at stake too, so the challenge becomes how do you do it safely and minimize risk?

Those issues are also playing out in the youth level where they are subject to state guidelines—including New Jersey where Governor Murphy issued executive orders directly pertaining to about youth sports activities. This summer we successfully helped organize a number of youth sports organizations to approach the Governor's Office with "return to play" plans and protocols so that it can be done safely to mitigate risks—and the data from the fall proves that. Every sport presents unique risks and opportunities. Indoor sports are much harder, and the governor has tried to paint them with a broad brush. But, a sport like swimming, where you can enforce social distancing easily and train in highly chlorinated water and otherwise mitigate risks, they have been lumped in with other sports such as basketball and wrestling which are much harder to make safe on a grassroots level. From a policy standpoint it is hard to make rules across a broad base because of the risks and uniqueness of every sport.

***Gender equity***

When it comes to gender issues, most people are familiar with Title IX, which was originally an education law, but [it] has had and continues to have ramifications on sports for women, and conversely men's sports other than football and basketball.

***Transgender rights***

For the most part, policymakers have leaned toward allowing an athlete [to] compete in sports [in accordance with their gender identity]. However, there have been some major international cases before the Court of Arbitration in Sport and even here in the United States that present some unique challenges.

***Sexual assault***

In general, sports mirrors what is happening in society. Sexual violence didn't originate in sports, but it has been prevalent and very visible when it happens—particularly in the NCAA or pro leagues. We really didn't understand or try hard enough to understand how pervasive it could be in areas such as youth organizations where you have vulnerable populations at risk with haphazard oversight. SafeSport has emerged as a response, and most of the larger national organizations are on board with its protocols. You have mandatory trainings now for volunteers and coaches, but it is still an evolving area.

***Esports***

The question surrounding esports is whether it is a sport to begin with. The question of what is a sport has been banging around for several decades. You have cases like the Quinnipiac University Title IX case that had to, among other questions, address whether competitive cheerleading was a legitimate sport. Today, the emergence of esports falls into that same category now, and the implications have a bearing on a variety of other decisions. Colleges are offering esports scholarships, but whether it affects Title IX is dependent on the answer. There is a lot of gambling revenue in esports, but is it considered sports gambling or does it fall under other regulations? Esports is organizing into "leagues" too, and you have a recent case where an esports team is trying to sign an 8-year-old to an employment contract and the legality of it presents some very unique questions. There are a host of employment law issues arising in esports in general.

***Players rights***

In pro leagues, free speech questions and social justice movements have been big newsmakers this past year. The pro leagues have mostly made adjustments in their stances on player speech, but this is more of a business decision than a legal issue. In the NCAA, giving players the ability to capitalize on their name, likeness and image rights is a very hotly-contested issue too and will radically transform college sports in the coming years. The Supreme Court has agreed to hear the *Alston v. NCAA* case in 2021 which will also lead to more upheaval. For players, this will be a whole new world of opportunity for them, but it will bring a host of legal issues with them. 2021 will be a year of major upheaval in college sports. ⚖

*—Compiled by Kate Coscarelli, NJSBA*

# Has the Supreme Court's Sports Gambling Decision Opened the Door for Corruption in eSports?

The United States Supreme Court's recent decision on sports betting in *Murphy v. National Collegiate Athletic Association*, is monumental.[1] It allows states to regulate gambling within their borders, setting the stage for cataclysmic changes to many of the most popular gambling outlets including sports, particularly popular professional sports such as the National Football League, the National Basketball Association, Major League Baseball, the National Hockey League, as well as many others. However, the decision will not just impact traditional sports leagues, it is also poised to revolutionize one of the fastest growing forms of professional competition across the globe: eSports gaming leagues.

While the decision by the Court liberates gambling proponents of all shapes and sizes, it also could create an environment where corruption and manipulation run rampant, given the unique structure of eSports gaming and competition. Perceived cheating in one jurisdiction may not be so in another jurisdiction, and punishment may be nearly impossible to enforce with the amount and forms of money that could change hands. Sufficed to say, the Court's decision and reactions thereto have implications on both national and international levels of eSports competition. eSports themselves are probably not as well-understood by the general public as traditional sports, so to properly assess Murphy's impact on eSports, it is necessary to first under-stand eSports.

## History of eSports

A common misconception about eSports and their competitions is that they are entirely a 21st century concept, derived from the Internet, increased data processing speeds, cloud computing, and other recent technological advances. The reality however, is that the roots of eSports tournaments date back to the first video game experiences of the 1970s when students at Stamford University organized a competition on the video game, *Spacewar*.[2] Nearly a decade later, a *Space Invaders* video game tournament garnered main-stream media attention in bringing together more than 10,000 competitors for the video game challenge.[3] While not yet virtual interaction, early video game experiences set the stage for the monetization of video game tournaments, which were ready to cascade onto the scene with the strike of a technological match.

So, let's get to that match that changed eSports—and the world—forever: the internet. In the 1990s, as world came online, internet PC games exploded in popularity and Nintendo fostered video game tournaments of epic proportions.[4] One of the first eSports tournaments was the 1997 Red Annihilation tournament, drawing nearly 2,000 competitors.[5] A few weeks after that tournament, eSports made history again: the first major gaming league, the Cyberathlete Professional League was formed and soon held its first tournament.[6] Staunched in their belief that video games can be sport requiring training and skill, the league made a point to include "athlete" in its official CPL name. Even more importantly, other leagues popped up as well, and prize money began to reach the tens of thousands of dollars.[7]

The leagues continued to grow across the globe: from South Korea's Global StarCraft 2 League, to France's Electronic Sports World Cup, to the powerful Major League Gaming league established in North America in 2002. The latter even has its own global streaming platform: MLG.tv.[8]

With the leagues came the money. Last year, the total eSports prize money awarded amounted to approximately $110.6 million from a total of 3,765 worldwide tournaments.[9] That number has already more than quadrupled for 2018.[10] The largest prize pool from a single tournament in 2017 was $24.6 million at The International 2017.[11] eSports revenue is projected to hit $1.5 billion by 2020.[12]

Furthermore, what might have been thought to be unfathomable in the past, eSports arenas are now becoming as popular as traditional sports arenas. For example, for more than four decades, Key Arena in Seattle, Washington, housed the famed Seattle Supersonics NBA basketball team. What was once a premiere championship-winning NBA franchise that sold out games with ease in their early days, struggled to fill seats in the early 2000s. More seats were empty than filled on numerous occasions and the city soon sold the team. However, the old venue recently hosted the $24-million 2017 "Dota 2" International eSport gaming tournament, selling out every one of the more than 10,000 seats in less than 30 minutes for hundreds of dollars on average per seat.[13] How times have changed.

Fans of these eSports leagues are paying hundreds of dollars, much more than many traditional sporting events, to sit in a sold-out arenas and watch competitors play video games hundreds of yards away. Arenas for eSports, like eSports themselves, are a global trend taking over the sports world whether fans like it or not. Significantly, eSports popularity to gambling enthusiasts and gambling manipulators is just as prevalent and cannot be ignored in this new era that the Supreme Court has ushered in of deregulated sports gambling.

Gambling and sport set us apart as a species. Our intellectual capabilities require us to effectuate order to stymy the inherent manipulation that comes with both gambling and sport. Order is not always easy, but order in many ways has successfully wrangled the marriage of gambling and sport producing billions of regulated tax dollars, while failing miserably in other aspects. The internet has changed the dynamic between gambling and sport, and so has the advent of eSports. If you don't believe eSports are taking over the world, you may be living in a false reality akin to the virtual ones eSports has placed in the venues all around you. Simply put, eSports are popular and here to stay, making the Supreme Court's decision in *Murphy v. NCAA*, with-out more, exceptionally concerning. First however, we must understand the pitfalls of gambling and sports gambling's troubled past.

## Gambling and its American Regulation

### *(A) Our Early Days*

Gambling is in human's DNA, literally. We unknowingly play with chance in

**Gambling dates back to at least the Paleolithic period, before written history.[14] Our ancestors would roll figurative dice on hunting for food and avoiding diseases and then sit by fire and roll actual six-sided dice, at least as early as 3,000 B.C.**

evolution, survival, and reproduction. It makes sense that we would extract from our very lucky and very chancy DNA games of chance. We've been doing it for millennia in fact. Gambling dates back to at least the Paleolithic period, before written history.[14] Our ancestors would roll figurative dice on hunting for food and avoiding diseases and then sit by fire and roll actual six-sided dice, at least as early as 3,000 B.C.

China takes a lot of credit for "inventing" gambling, as it should. Records show gambling houses were widespread in the first millennium B.C.[15] Animal fights, lottery number types games, and versions of dominoes were the gam-bling pleasures that the Chinese grew to love and perfect in ancient times. Playing cards eventually joined the Chinese gambling floors as far back as the Fourteenth century.

Not to be outdone, and with the advent of expansive trade and the silk road, Europe and Africa claimed their own cultural stake to gambling. Playing cards arrived in Europe from Mamluk, Egypt, in the Fourteenth Century, while Persia popularized versions of card games such as poker in the Seventeenth century.[16] The four-suited playing cards popular in most table gambling games are likely derived from the Mamluk suits of cups, coins, swords, and polo-sticks.[17] The suits were later replaced as cards spread into Germanic countries. The first known casino, the Ridotta, opened in Venice, Italy in 1638. Gambling and the games associated therewith had drug-like affects, and its lures spread like wildfire.

Colonial America could not escape the gambling gene either. To raise revenue in the new colonies, authorities instituted lotteries to raise funds, which eventually funded many universities.[18] The Continental Army survived many a cold winter from jackets provided in part from gambling revenue.[19] In fact, prior to American independence, Britain implemented a lottery regulatory scheme in 1769, another line item entry on the long list of grievances that eventually led to the Revolutionary War. With the advent of Ameri-can independence and loosened gambling restrictions came a new gambling frontier where newer city centers on the American frontier emblazoned with freedom, fear, wonder, and curiosity such as New Orleans, Louisiana became some the prime locations for American gambling.[20] Dogs, pigs, horses, roosters, cards, dice, the list of gambling activities of the era was only limited by the now antiquated reserved colonial mind.

However, cultural norms reverted to the conservative days of old, as gambling became overpowering to many communities and regulations from all levels of government became increasingly prevalent. The gamblers headed for the riverboats and railroads.[21] With the rise of lotteries and riverboat casinos came corruption, fraud, and cronyism. For example, contractors hired to use gambling revenue from national lottery efforts, in order to beautify Washing-ton D.C. ran off with the funds before the eventual lottery winner was ever paid.[22] Those new to gambling were taken advantage of by seasoned gambling veterans who knew how to alter the odds in their favor and collect immense sums of money.[23] Gambling remained detested by many for these and other reasons.

Gamblers were eventually chased west, so far west that San Francisco became a new gambling hotbed.[24] It only made sense. The folks settling in the Bay Area were children of the Gold Rush. They were dreamers, eternal optimists that the dice would always land on seven for them. But even dreamers must wake up. California initiated regulations that essentially crippled mainstream gambling and sent it hurling into the confines of private life and underground. Even racetrack betting was banned until a state constitutional amendment legalized it again in 1933.[25] Indian reservations and the accompanying recognized independence of course paved the way for what many recognize today as some of the most well-known of gambling locales.

When the stock market crashed in 1929 and the Great Depression settled in, people lost all morale left over from the end of World War I. The only parties more desperate than the citizens were the states, which were wiped clean of any money and in need of revenue ideas. Nevada not only had the Great

Depression to deal with, it also had one of President Roosevelt's iconic dreams resting in the balance: the Hoover Dam. Nevada's once-lucrative mining business had lost its luster.[26] Desperate and with public opinion on its side, Nevada's legislature legalized casinos with the Wide-Open Gambling Act of 1931.[27] Liberal states quickly followed suit and betting, especially sports betting on racetracks, began to flourish.[28]

At the federal level, Congress organized a committee to investigate fraud, money laundering, and the mob's influence on gambling revenue and casinos.[29] Unsurprisingly, Congress discovered that the mob's control over gambling revenue led the mob to withhold tax dollars as profit.[30] As the mob rigged the games, they cooked the books. Focused on ulterior solutions to the gambling problem (other than an absolute prohibition), Congress allowed gambling to continue as the revenue was still too juicy to simply let the mob shut it down. With no outright prohibition, a few states joined the casino and gambling arms race. Oregon, Delaware, and Montana opened sports lotteries allowing players to legally bet on sports, while Nevada expanded to include licensed sports pools.[31] But, sports betting was not new to the country. Sports wagering has been going on as long as Americans have had sports to wager on. Simply put the money is there to be had, as well as hard lessons to be learned.

### *(B) The Lure of Sports Gambling in Recent Centuries and the Painful Lessons eSports Must Learn from the Past*

What if nearly $3 billion in sports wagering occurred annually in the United States? What if that represented less than 1% of all sports betting in the world? Not only is that the case, but those estimates may be conservative.[32] There is simply more consumer money dedicated to gambling than anybody really knows what to do with. Additionally, one of the more upsetting conclusions from the above figures is that almost every gambling transaction is unregulated, untaxed, or subject to a broken international gambling system full of corruption.

Meanwhile, money continues to pour into sports as well. The highest paid public employee in 39 of the 50 states is the head football or basketball coach for the local college sports team.[33] The Governor of Texas, Greg Abbott, made $150,000 last year.[34] Tom Herman, the head football coach at the University of Texas made more than 36 times that figure: $5.5 million.[35] No public employee in Texas earned a higher salary.[36]

In professional sports, the number of multibillion-dollar sports franchises grows by the year.[37] The Los Angeles Lakers are purported to be worth $3.3 billion.[38] That's more than the total annual gross domestic product (GDP) for the countries of Belize, Micronesia, and Samoa…*combined*. The Lakers are worth more than the annual GDP of Greenland and around 30 other countries.[39] The Lakers are not even the most valuable sports team.[40] They're not even in the Top 5.[41] They're not even the most valuable NBA team![42]

The money is there because sports have in many ways become the backbone of popular competition and consumer discretionary spending in the United States. Disney, a longtime economic king of consumer discretionary eco-nomics even owns the "worldwide leader in sports": ESPN. The money is there, both in gambling and in sports. How-ever, history has shown that mixing the two together creates a powerful cocktail of unprecedented proportions, a potentially dangerous yet unbelievably lucrative revenue stream.

Players and gambling organizations alike can easily change or unduly influence the outcomes of games if the price is right. Some student-athletes, typically broke and without salaries, along with their coaches and executives, have notoriously fixed games for financial profit, from coast to coast. In 1950s New York, 32 players from seven schools in the state were caught in a scheme to fix the outcomes of more than 85 games.[43] In the 1970s, members of the Boston College basketball team were caught shaving points in nine games depending on the gambling spread, resulting in one individual receiving a multiyear prison sentence.[44] In 1985, five players from Tulane University allegedly split $18,000 for point-shaving games, with the coach in on the plot as well.[45] College sports gambling scandals continued well into the 1990s with similar schemes at Northwestern University and Arizona State University.[46]

Professional sports have suffered from the vices of gambling as well. Consider baseball, where money schemes have existed since at least 1877 when players of the Louisville Grays accepted money to throw games.[47] The infamous 1919 Black Sox scandal, also known as the "Big Fix" saw 8 Black Sox players intentionally sabotage their team's appearance and chance at winning the 1919 World Series in exchange for money from a gambling syndicate led by Jewish mob boss, Arnold Rothstein.[48]

In March of 1989, Pete Rose, MLB's all-time hits leader and manager of the Cincinnati Reds at the time, was caught betting on MLB games, including Reds games he was coaching. The results of the ensuing investigation, called the "Dowd Report," revealed that Rose bet on 52 Reds games in 1987, at a minimum of $10,000 per day.[49] One of the most prolific baseball players of all time, Rose has since been banned for life from the sport, including from the Baseball Hall of Fame.

Basketball provides us a chilling example from relatively recently. In 2007, the FBI investigated NBA referee Tim Donaghy for betting on games. The

FBI concluded that Donaghy not only had bet on games during the 2005-06 and 2006-07 NBA seasons, but he did so in games he was refereeing.[50] He was sentenced to 15 months in prison.

Safe to say, gambling and sports have a vicious relationship with one another. The terrifying reality is that the aspects of sport traditionally manipulated in gambling controversies—the environment; the players; the stats; the effort; the controlling pieces—are much more subject to manipulation in the virtual worlds of eSports where so much of the sport is dependent on microchips, connectivity, and computer code among other things. How might wagering crooks manipulate gambling? In the early 1990s, Congress was forced to ask itself a that question for traditional sports.

### *(C) Modern Times Under the PASPA*

In 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA, or also known as the "Bradley Act") in an attempt to define a consistent understandable legal status for sports betting throughout the United States.[51] As its name suggests, the act sought to, among other things, protect the integrity of sports, and did so by outlawing sports betting nationwide, with the exceptions of the sports lotteries conducted in Oregon, Delaware, and Montana, and the sports betting established in Nevada. Interestingly enough, the legislation provided a one-year window for New Jersey, which operated licensed casino gaming during the previous ten-year period, to pass laws permitting sports wagering, but New Jersey did not do so and was effectively included in the list of banned states.

For 20 years, certain excluded states realized they were missing out on filling their coffers with sports gambling revenue. In 2012, with growing and overwhelming support to legalize sports betting in New Jersey, New Jersey passed a law to legalize gambling in the state in licensed locations. The Department of Justice, the major American sports leagues, and the NCAA, all generally longtime opponents of gambling, argued the law violated PASPA. New Jersey didn't disagree in the manner one might think. New Jersey took the position that regardless of its new law's legality, PASPA was the problem as it violated the Tenth Amendment of the United States Constitution and its protection from anti-commandeering federal laws. New Jersey essentially told the court it's not OK to tell the states they cannot pass laws. The Court found for the sports leagues, reasoning that New Jersey's law violated the federal PASPA. New Jersey appealed to the Third Circuit, which also found for the sports leagues on preemption grounds.[52] However, the Court held that New Jersey could possibly repeal any existing state law prohibiting gambling and potentially legalize licensed sports gambling in that vein.[53] In the meantime, New Jersey was enjoined from enacting the gambling legalization law.[54]

New Jersey went back and took to heart every word of the court's opinion. Based on the Third Circuit's comment that New Jersey may be able to get away with reverse engineering legalized sports gambling by lifting its own ban and nothing else, New Jersey passed a law in 2014 repealing New Jersey's now-former ban on sports gambling, hoping to backdoor the system PASPA put in place based on suggested instructions from the Third Circuit. The sports leagues again filed suit and again won, in the District Court and the Third Circuit, for the same reason that the law violated PASPA.[55]The court emphasized in its ruling that the second attempt is not really deregulation, but rather a law contradictory to PASPA veiled as something else. This time, New Jersey appealed to the United States Supreme Court, requesting the Court examine PASPA as a clear violation of the anti-commandeering provisions of the Tenth Amendment. The stage was set for the *Murphy* decision.

### *(D) Gambling Regulations Hit Critical Mass in America Just in Time for the Explosion of eSports Popularity and the Murphy Decision*

Ultimately, as New Jersey fought the federal government over its rights to legalize sports wagering, eSports were simultaneously beginning to be taken seriously, earning players and gamblers alike substantial sums of unregulated cash. The sports garnering gamblers' attention were changing faster than gambling could be regulated. As the nation stumbled over itself to get the law right, the Supreme Court finally stepped in. But was it enough?

## ***Murphy v. NCAA*: The Decision**

6 to 3. That was the Supreme Court's majority split in ruling that PASPA violates the Tenth Amendment.[56] Justice Alito writing for the majority, explained that the Court need not decide whether New Jersey's wagering law violates PASPA, because PASPA's provision prohibiting state authorization of sports gambling schemes violates the Tenth Amendment's anti-commandeering rule. Justice Alito focused on the national policy towards gambling and spent a lot of time on the fact that gambling for 200 years in the United States has been a hotly debated policy, mostly a state-level experience, with little federal intervention besides PASPA.[57]

Morally, the Court ensured that it is not taking any position regarding whether gambling is good or bad, right or wrong. The key in the case truly was the issue of Congress regulating versus commandeering, and whether PASPA veered into the realm of commandeering, which is constitutionally prohibited. Three policy reasons underlie the Tenth Amendment's anti-commandeering doctrine and ultimately underlie Justice Alito's majority opinion.

First, the anti-commandeering doctrine ensures the continued fundamental balance between state and federal power that the Framers believed was crucial to the success of the nation. Sports betting has almost always been left to the states, so why have Congress suddenly tell the states otherwise?

Second, anti-commandeering promotes political accountability. When Congress regulates, voters blame Congress, but if a state imposes regulations because Congress told it to do so, responsibilities suddenly becomes blurred. Who does a voter blame when Congress passes PASPA, but tells the voter's state the state cannot allow sports gambling for the voter? The Tenth Amendment's anti-commandeering clause keeps these lines of accountability clean.

Third, anti-commandeering prohibits Congress from shifting regulatory costs to the states, which would contradict the edicts of federalism altogether. Sports gambling can exist in a regulatory framework–it just has to be the proper constitutional framework.

In making its ruling, it is probably safe to say the Court was not expressly thinking about eSport gambling. The Court surely did not address those unique digital precepts in the slightest. The Court brings up the Black Sox scandal, and the 1950s basketball points shaving scandal,[58] but does not address the potential of similar travesties occurring in virtual realities where tangible money is at stake and chance can be even more easily manipulated than in traditional sports. The Court largely did not address eSports.

In fulfilling its duties however, the Court really didn't have to. Its interpretation of the Constitution and subsequent ruling sufficiently placed the ball (or shall we say the controller) in the hands of the states. The Court was Player 1 in sports gambling regulation for the Twenty-First century and Player 2 has now entered the game, along with Player 2's 49 other companions united by statehood. Like any great online multiplayer game, hundreds of other players, each with a different national flag, also lurk across our nation's borders as well. What could possibly go wrong in this new world *Murphy* has created? eSports remain left for dead.

## Why *Murphy*, Without More, Can Lead to eSports Gambling Scandals

### *(A) eSports Exists in a Virtual Medium*

Most obviously, eSports are not real… at least not in the classic sense of a sport. Sure, video game competitors in eSports leagues could be paid off to throw games just like in basketball or baseball, but those individuals might not be the target for gambling criminals. Instead, the real concern is that the games may be subject to covert hacking threats.

If for example, a hacker subtly commandeers a player on the screen in a massive multimillion-dollar eSports tournament, or alternatively, commandeers the environment around the player on the screen, there is a substantial chance that nobody would even know the hack is occurring. It would be like a bank heist where the crook is invisible and walks through the bank walls to retrieve the money without anybody realizing the crime until it is too late.

In many aspects, eSports threats are similar to the threats that plague cryptocurrencies. The criminal could be anywhere in the world controlling what's on the screen in real-time, and money would be long lost before it is ever found to have been stolen in the first place.

As such, how can a state that has legalized sports betting after *Murphy*, confidently protect its eSports gambling consumers if the state legislation avoids expressly addressing eSports altogether, as prior legislation and court decisions have? Theoretically, a law legalizing "sports betting and wagering in licensed locations in state X" might very well include eSports. Not to be cynical, but good luck trying to find a legislator who not only is conscious enough to add eSports to such a law, but who can also properly define eSports to correctly apply it to legislation. The fact that there might not be very many such legislators that can define eSports is troubling, considering states are starting to pass sports betting legislation in response.[59] Nevertheless, many states are being quite proactive about sports wagering.

Take, for example, West Virginia. The following definitions, which come from West Virginia's recent Lottery Sports Wagering Act of 2018, may be troubling to eSports and eSports wagering:

> "Professional sport or athletic event" means an event at which two or more persons participate in sports or athletic events and receive compensation in excess of actual expenses for their participation in such event.
>
> "Sports event" or "sporting event" means any professional sport or athletic event, any collegiate sport or athletic event, motor race event, or any other special event authorized by the commission under this article.[60]

Theoretically, eSports might be covered by these definitions, but maybe not. The law may not apply to manipulation and cheating in virtual arenas at all. Also, the definition of "sports" can differ by individual. The concern here for eSports gambling must not be ignored. Consider another excerpt from the same law:

> (b) A person is guilty of a felony when: (2) A person changes or alters the normal outcome of any game played on a mobile or other digital platform, including any interactive gaming system used to monitor the same, or the way in which the outcome is reported to any participant in the game;[61]

Digital and interactive gaming kind of sounds like eSports. However, reading the law in totality reveals these terms probably mean something else. Parsing the law reveals "digital," an undefined term, appears to relate more to the digital mediums used to wager and watch the sports and digital programs licensed by state; not necessarily the digital arenas where the eSports actually occur and are wagered on. At best, this probably means: don't hack the electronic machines, like the horse racing machines, located on site.

It might be a stretch for a court to later claim this includes virtual eSports arenas, but then again maybe not. It is tough to say, and therein lies the problem: the ambiguity may result in problematic outcomes for eSports, which may or may not be covered and which may or may not fall within the jurisdictional reach of state laws prohibiting tampering within the state. Consider this final example from the same law:

> § 29-22D-18. Law enforcement; inspection and seizure
>
> Notwithstanding any provision of this code to the contrary, the commission shall, by contract or cooperative agreement with the West Virginia State Police, arrange for those law-enforcement services uniquely related to gaming as such occurs at facilities of the type authorized by this article, that are necessary to enforce the provisions of this article and are not subject to federal jurisdiction: *Provided*, That the State Police shall only have exclusive jurisdiction over offenses committed on the grounds of a licensed gaming facility that are offenses relating to gaming.[62]

It is tough to say what exactly this would cover in an eSports context. If eSports wagering is covered in the state but the hacker is in China, and collects his, her, or its undue gambling reward through U.S. dollars or even, Bitcoin, is there any jurisdictional reach whatsoever? Would this even be cheating in another jurisdiction? Even if it was, punishment would be nearly impossible to enforce.

To be fair, after the passage of the Act, West Virginia enacted a set of rules for "successful implementation, administration, and enforcement of the West Virginia Sports Wagering Act" in which the legislature makes clear: "'Prohibited sporting event' does not include eSports in which participants are at least 18 years old."[63] West Virginia's inclusion of eSports should be applauded for recognizing the changes nature of sports wagering. However, without addressing the nuances of eSports and eSports wagering in greater detail, much is left to be desired of the law, which is still largely structured around traditional athletic event wagering.

Ultimately though, states like West Virginia are smart to regulate and cash in on the deregulated sports wagering landscape left by *Murphy*, but many questions remain for the vulnerable but rapidly expanding eSports gambling community. Local eSports teams and American eSports gamblers should be worried. International eSports teams and wagering communities should be worried too. How international eSports teams fit into the regulatory framework is another immense consideration with more questions than answers.

### *(B) Effect of Decision on International eSports Teams*

The Overwatch League ("OWL") is a professional eSports league dedicated entirely to the videogame, Overwatch.[64] Founded in November of 2016, the league has twenty city-based teams.[65] The best part? Nine of the 20 teams are not from the United States.[66] The league has four Chinese teams, two Canadian teams, one South Korean team, one French team, and one team from London (the current champions).[67]

OWL's season plays out eerily similar to most North American professional sports leagues, in which there is a regular season and playoffs.[68] Events are played typically in various locations and the prizes easily surpass $1 million.[69]

One can only imagine the hypothetical scenarios these teams might face in a virtual eSports world semi-regulated by some states after *Murphy* and not much at all by the federal government. The same can be said for those that wager on OWL. This article doesn't posit the doomsday scenario but the possibilities to cheat across international online gaming arenas are endless. At this juncture, the potential effects on international eSports teams can only be said to be one with fewer grounds for recourse than domestic eSports teams and wagering parties. Manipulation will surely run evermore rampant in international eSports circles.

We could very easily see complete chaos as hacking scandals penetrate eSports from all edges of the map. Protecting teams and individuals may become exceptionally difficult as invisible criminals adjust to the new mechanisms and technology by which to commandeer eSports arenas and the money associated therewith. If the international teams can be easily hacked, or cheating is widespread, what's stop-ping criminals from bankrupting organized eSports leagues and eSports wagering institutions? While not purely an American responsibility, the United States will surely struggle to patrol these virtual worlds that can be easily created, destroyed, expanded, augmented, and hidden in. Questions of interstate commerce may also arise. *Murphy*, while positive in many ways, leaves the states and the world with still much work to do.

### *(C) Building Blocks for the Future*

Congress may be unlikely to step in and address eSports gambling at this point. The Court has now spoken and

made clear that Congress has done enough with enacting the now-unconstitutional law known as PASPA. For better or worse, states are now left to their own devices, their own laboratories of democracy, as James Madison had envisioned them in Colonial times.

While no be-all end-all solution exists, some practices may be helpful. First, states must educate themselves. The advent of eSports is complicated and like Bitcoin, block-chain, or cellphone data, the legislatures of old will need to learn the ways of new and react accordingly. The eSports movement is the future, meaning legislation must reflect what is yet to inevitably come.

States must also learn from each other and the rest of the modern world. Nevada, a state with much more evolved gambling regulations, has already enacted forms of eSports wagering that may hold key clues to future eSports regulatory frameworks.[70] In Europe, where sports betting is second-nature, authorities are partnering with important eSports bodies to properly learn the business of eSports first, so as to effectively regulate the industry. For example, the UK Gambling Commission has signed an information sharing Memorandum of Understanding with the ESports Integrity Coalition to better eradicate corruption in eSports.[71] Work is needed but all hope is not lost for proper regulation of eSports and eSports wagering.

## Conclusion

The United States Supreme Court's *Murphy* decision changed sports gambling as America has known it. The decision will surely send ripple effects throughout the sports world and into the eSports world and leagues far and wide. Moreover, while eSports leagues present a rather contemporary and lucrative monetization opportunity for the ambitious gambling enthusiast and the budding gambling enterprise, it also represents a new target for corruption and controversy. eSports are virtual, and their elements can be commandeered and manipulated by even a single person, with little reliable oversight.

What can go wrong surely will go wrong, so said the famous Murphy's Law. Gambling is one of man's earliest cheat codes, a prehistoric concept hellbent on challenging the efficacy of meritocratic order and oligarchic tendencies. But now, with *Murphy*, the first cheat code meets man's virtual world made entirely of cheat codes: video games and eSports. eSports and wagering on eSports are an exciting new frontier, but work must be done. If eSports gambling corruption is not addressed and cheating is not mitigated in this new gambling reality that *Murphy* has established, *Murphy* and Murphy's Law may quickly become one. ⚖

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# Structure and Steadfastness

## A Look at Athletes-Turned-Lawyers

**Compiled by Kate Coscarelli, NJSBA**

Sports and law share many similarities. Athletes and lawyers both have to play by the rules; they thrive on competition and at the end of the day both learn lessons from winning and losing.

It is no wonder that many athletes find a professional home as attorneys. That is certainly true of the New Jersey State Bar Association, which counts among its members a great many athletes, coaches, referees and managers. Over the years, several of them have shared their thoughts about the intersection of sports and the law in the *Bar Report,* the Association's weekly publication. Here are some of the insights they have shared about life in court and on the court.


**Ashley Higginson is an elite steeplechase runner who qualified for the Olympic Marathon Trials in 2019. The Rutgers Law School graduate practices law in Michigan.** (Photo by BEN STANSALL/AFP/GettyImages)

### Pursuing Two Dreams

**Ashley Higginson** missed the 2012 Olympics by one place; she came in fourth in the 3,000-meter steeplechase and only the top three finishers made the team. Rather than step away from the sport and start a new chapter of her life as a law student, Higginson decided to pursue two dreams at once: A career in the law and a chance to run in the Olympics. Though she did not qualify for the 2016 games, in 2019 she did qualify for the Olympic Marathon Trials. After graduating from Rutgers Law School, she practiced at Riker Danzig and today practices in Lansing, Mich.

***How did you get started on the road to the Olympics?***

I was a high school athlete (at Colts Neck High) and had the opportunity to run in college (Princeton University). I ran three times as an all-American, but in my senior year I got injured. I was sort of unsatisfied. I never really envisioned running professionally and thought I would go straight to law school. But I felt like I had some unfinished business with track. So after I graduated in 2011, I deferred law school for a year and started training with Frank Gagliano. He is larger than life, and I fell in love with the team. That first year, I PR'd (set a personal record) in every race.

***Why did you pick the steeplechase?***

The steeplechase is a 3,000-meter race during which you have to clear 28 barriers, which look more like a beam in gymnastics than a track hurdle, and after five of them there is a water jump, which really breaks your stride. I tried it in high school at the nationals and it wasn't until 2008 that it was an Olympic sport for women. I liked it because it took a level of athletics and grit that went beyond running.

***How did law school fit into this?***

It was always sort of there. In high school I was in an honors program that was focused on the humanities, and we did some pre-law work. I became a politics major at Princeton and I envisioned moving in the direction of policy and government. I thought law school would also fit with my personality. I wanted to be a better writer and researcher. It was the right decision.

***How did you balance training for elite races and law school?***

I had to miss a lot of team practices my first year. It was hard at certain points. It was all about planning and

saying no to some of the social stuff. You know you can't go to McGovern's bar after class if you have a 10-mile run scheduled in the morning. Upon getting to law school, I met so many people who had such crazy experiences and things going on in their lives. I really admired so many of my fellow classmates. In an average week, I was running 65 to 80 miles per week.

### From Crease to Court

With a dad who played in the National Hockey League, **Tyler A. Sims**, an associate at Littler Mendelson in Newark, grew up on the ice.

"I tell people sometimes skating is easier than walking for me," which helps explain his career as a standout hockey goalie, including four years at Providence College and three years in the minor leagues.

***Are there lessons you learned from your hockey career that have helped you as an attorney?***

Absolutely, I recommend to every kid I talk to to play organized sports. It doesn't have to be hockey. You get competitiveness but you also get a structure. You have to be dedicated; there are lots of things you have to do to be able to play at a high level. It's the commitment, it's being on time for things, it's holding yourself accountable, having other people hold you accountable.

***How was the transition from athlete to advocate?***

I tell people the first 25 years of my life were all about playing hockey, and I'd become a seasoned veteran. Hockey was something that I knew so well, and all of a sudden I came into this new profession when I was 26, 27, and I'm learning something completely new. It's definitely nerve-wracking. I've argued in front of judges and I tell people that was the most nervous I've ever been, including any hockey game I've played in.

### Strategic Pursuits

**Peter J. Torcicollo** is co-chair of the commercial and criminal litigation department at Gibbons P.C. in Newark. That's a natural fit, since he put himself through college by working in construction. Torcicollo is also a recreational rock climber, a not-so-natural fit, since he's afraid of heights. Torcicollo has served as president of USA Climbing, the sport of competition rock climbing's national governing body.

***When did you start climbing?***

In 1979, when I was in high school in Westfield. I went to the cliffs in Watchung with a group of guys from high school. Someone owned a rope. It was a fun thing to do after class, and I was interested enough to buy climbing gear. Eventually I fell away from it, though. Then I kind of got sucked back into it when my son got into rock climbing. I'm not the kind of dad who could sit and read a newspaper, when he was climbing. I have a little bit too much nervous energy to do that.

***How does your fear of heights figure into all this?***

Climbing forces me to go outside my comfort zone, which is one of the things I like about it. Going outside your comfort zone is something everyone should do. It'll help you become a better and more complete person.

***Is there any similarity between climbing and being a lawyer?***

In climbing you really have to think very, very carefully about what you're doing. People die rock climbing, and that's no joke. If you're a guy who's afraid of heights, as I am, you have to pay unbelievable attention to detail and make absolutely sure your strategic approach is bombproof. It's no different in the law. When you're formulating strategy in a case, you have to look at it from every conceivable angle. ⚖

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## Special Editors

*Continued from page 7*

he is the man that created free agency in Major League Baseball. But after you read David's article, you might agree with him that is not the correct answer. David follows Flood's history as a center fielder with the Cardinals and his lawsuit against Commissioner Bowie Kuhn and Major League Baseball in 1970 alleging violation of federal antitrust laws. This article provides the backdrop of the MLB uniform player contracts and the exemption from antitrust coverage affirmed by the United States Supreme Court that stated, "when drafting Anti-Trust Legislation, Congress had no intention of including the business of baseball within the scope of the federal Anti-Trust laws." Who would have thought that the leisure and enjoyment of watching sports would have such an impact on legal rights.

We have also included two Question-and-Answer features about what it means to work in sports law and how a few athletes have translated their sports experiences into legal work.

We'd like to thank Mindy Drexel, our editor at the New Jersey State Bar Association and Kate Coscarelli of the NJSBA for their help with this issue. In addition, we especially appreciate the efforts and knowledge imparted by each of the authors for staying on target for print and for their knowledge and experiences shared in their articles.


Curt Flood
Cardinals
21

# The Catalyst for Change in Baseball Labor Agreements

## A Legal Look at Curt Flood's Impact on Free Agency

**By David P. Pepe**

There are certain things that society gets technically wrong many times. For example, if you ask a person for a definition of a spiral staircase, they use will their hands to describe it. (That is an illustration, not a definition). If you ask a waiter for a bowl of Jell-O, they will invariably bring you gelatin. If you ask a baseball fan or anyone mildly interested in baseball for that matter, who created free agency in Major League Baseball, they will tell you Curt Flood. That is an incorrect answer. While Curt Flood is part of the correct answer, the truth is a little more interesting and nuanced.

From a technical legal sense, the statement that "Curt Flood created free agency" in MLB is inaccurate. This makes him no less an American hero; this makes him no less a trail blazer; this makes him no less a principled man; it just makes the answer incorrect. To truly understand the advent of free agency in MLB, you need to have context, and history gives us that context.

Since its infancy, MLB teams could sign players out of the amateur ranks. These players would sign a uniform contract. These uniform player contracts (UPCs) gave the signing club the exclusive and continuous right to a player's services for the entirety of his playing career, through what has been commonly referred to as the "reserve clause" as contained in paragraph 10a of the UPC. The perpetual rights were at one time so oppressive, that they could destroy careers. Of course, a player could always quit. However, short of giving up their professional playing career, there was no mechanism for a player to extract himself from that first contract, exclusive of the club releasing him or trading him, which right rested solely within

**Curt Flood was a center fielder who played 15 seasons in the major leagues. He was a three-time All-Star, a Gold Glove winner for seven consecutive seasons, and batted over .300 in six seasons. In January 1970, Flood filed a lawsuit against Commissioner Bowie Kuhn and Major League Baseball, alleging violation of federal antitrust laws.**

**DAVID P. PEPE** *is a shareholder of Wilentz, Goldman & Spitzer, P.A., concentrating his practice in sports law and personal injury litigation. He is a certified baseball agent by the Major League Baseball Players Association, has represented numerous professional baseball players and is the managing agent of Pro Agents, Inc. that has a client roster of over 30 professional athletes. Pepe negotiated, among many other professional contracts, the largest guaranteed contract for any closer in MLB history at that time (2008).*

the club. MLB was allowed to do this through its enjoyment of an anti-trust exemption provided to them and affirmed by the United States Supreme Court that stated, "when crafting Anti-Trust Legislation, Congress had no intention of including the business of baseball within the scope of the federal Anti-Trust Laws."[1]

As incredulous as that anti-trust exemption may seem, it was the understood rule for nearly 30 years until a New York Yankees minor league player came along. In 1953, the reserve clause was challenged by George Toolson, a player in the Yankees' minor league system who felt he was blocked in his path to the major leagues by the depth of talent on the Yankees' major league roster. In an attempt to further his career, Toolson sued his employer and challenged the reserve clause. His case was ultimately heard by the Supreme Court and the *Toolson* Court affirmed the precedent set by Justice Oliver Wendell Holmes in the *Federal Baseball* case, that MLB and the business of baseball, was not subject to anti-trust laws, and if that were to change, it must be accomplished by legislation of Congress. In a per curium opinion, the Court held "we think that, if there are evils in this field, which now warrant application to it of the Anti-Trust Laws, it should be by Legislation of Congress."[2] The anti-trust exemption as affirmed in *Toolson* is enjoyed to this day by MLB. Toolson, by the way, never played a day in the Major Leagues. Toolson's fate was sealed as was the fate of every other major league player from 1953 until the early 1970s. So what changed?

Unbeknownst to many, the reserve clause still exists, but in a much more limited fashion due to the efforts of the MLB Players Association, the players' union. The MLBPA accomplished through collective bargaining an erosion of the reserve clause's most restrictive components.

## The Union

In 1966, Marvin Miller, a former steel workers union economist, became executive director of MLBPA. Miller, who was raised in Brooklyn and was posthumously inducted into the National Baseball Hall of Fame in 2020, believed that the oppressive reserve clause was an inequity that needed to be addressed. The reserve clause was in Miller's crosshairs for many years, and it was his intention to address its change. The mechanism to change the reserve clause rested, in Miller's view, in collective bargaining. But then in the fall of 1969 he received a call from a recently-traded ball player named Curt Flood.

Flood, who had listened carefully in the prior spring training union meetings to Miller's discussion of a challenge to the reserve clause, indicated to Miller that he did not want to accept the recent trade of his services from the St. Louis Cardinals to the Philadelphia Phillies, and that he had consulted his personal counsel and wished to file a lawsuit against MLB. The phone call from Flood piqued Miller's interest enough to invite Flood and his attorney to a meeting in New York.

Following the meeting a few weeks later, wherein Miller and MLBPA General Counsel Dick Moss explained to Flood and and his lawyer, Alan Zerman, that they believed Flood had no real chance of winning an anti-trust lawsuit against MLB.[3]

Miller further informed Flood that he would have to sit out and not play during the 1970 championship season or risk rendering his lawsuit moot. As such, suing baseball could effectively end Flood's playing career. Miller and Moss made Flood aware of the length of time it might take for the lawsuit to reach its conclusion and that such a layoff would make it very difficult if not impossible for Flood to resume his playing career. Additionally, Miller and Moss informed Flood that the prospect of money damages was remote.

Flood thought about the ramifications, both personally and professionally and called Miller back and said he wanted to move forward with the lawsuit.[4]

To understand Curt Flood's decision to leap into the breach, it is important to understand Curt Flood.

## Beginnings

Flood's mother and her entire family had fled the Jim Crow south after an altercation with a wealthy white woman wherein she slapped the wealthy woman and feared being lynched. A single mother with five children, Laura Flood moved the young family to the more racially tolerant Oakland, California. Although Curt Flood was raised in a largely musical family, he gravitated toward athletic pursuits. When he was a senior in high school, he signed his first professional contract with the Cincinnati Reds to play baseball in their minor league system. His early professional career subjected Flood and all Black players of that era to deeply segregated parts of Florida (for spring training) and southern minor league cities where Black players had to use different hotels, Black-only restaurants and could not even intermingle their dirty uniforms with those of white players. This begs the question of what impact these events might have on Flood's later decision-making. Nonetheless, he excelled through the minor league system and reached the major leagues. After only having four plate appearances in the major leagues over the 1956 and 1957 seasons, Flood was traded to the St. Louis Cardinals. It was in St. Louis that he would become a star, winning seven gold gloves, making three All-Star game appearances and winning two world championships from 1958 through 1969.

It was also while Flood was playing

for St. Louis that he would lease an off-season residence in his hometown of Oakland, California, and when he and his family attempted to move into the home were prevented at gunpoint from doing so by the landlord. The landlord was not aware that he had leased his house to a Black family. Flood would take legal action to gain possession of the home, and this experience would lead him to becoming involved with the NAACP through his association with his childhood hero, baseball trailblazer Jackie Robinson.

Flood would also build a life in St. Louis outside of baseball. He was a painter of portraits and opened an art studio in the city. He later divorced and enjoyed the celebrity that came with being a St. Louis bachelor on the best team in all of baseball.

### Trouble Brewing

Despite having a crescendo of success, the undercurrent of his life was starting to become turbulent. Flood had a brother that was often in trouble with the law and would cause some level of embarrassment for the Cardinals. During the 1968 World Series, Flood misplayed a ball in centerfield off the bat of the Detroit Tigers' Jim Northrup. This miscue occurred late in Game 7 and led to the Tigers winning the world championship. Added to this was Flood's poor management of his finances, which led to increasing pressure to earn more money.

Without any mechanism to become a free agent, player salary negotiation was typically a one-sided affair wherein a player could threaten to hold out for more money, but was ultimately powerless to do much more, and, generally, was at the mercy of the owner of the club.

The St. Louis Cardinals owner at that time was August "Gussie" Busch. While Flood and Busch,the owner of Anheuser-Busch brewing company, enjoyed a friendly and close relationship, the recent play of Flood in the 1968 World Series and a subpar 1969 Cardinals playing season, together with Flood's off-the-field issues and his demands for increased pay, led to Flood falling out of favor with Busch. This culminated in a November 1969 trade of Flood, catcher Tim McCarver, Byron Browne and Joe Hoerner to the Philadelphia Phillies for Richie Allen, Cookie Rojas and Jerry Johnson.[5] It was that trade that led to Flood's initial call to Marvin Miller and his desire to challenge the reserve clause.

### The Legal Fight

Flood began his legal challenge by sending the following letter to Baseball Commissioner Bowie Kuhn.

> Dear Mr. Kuhn,
>
> After 12 years in the major leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system that produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and several states.
>
> It is my desire to play baseball in 1970 and I am capable of playing. I have received a contract from the Philadelphia club, but I believe I have the right to consider offers from other clubs before making any decision. I therefore, request that you make known to all major league clubs my feelings in this matter, and advise them of my availability for the 1970 season.
>
> Curt Flood [6]

It is obvious from the language used by Flood in this letter that he viewed this case, first and foremost, as a civil rights case. This is not surprising given Flood's life experience and involvement in racial issues with the NAACP.

From a practical point, the MLBPA, who agreed to pay for Flood's legal expenses, viewed this case as a labor law case and guided Flood to hire former Supreme Court Justice Arthur Goldberg, a personal friend of Miller's, as his council.

Largely, out of fear of retribution by baseball ownership, Flood proceeded without the solidarity of his fellow players. As pitching great, Hall-of-Famer, and Flood's Cardinals teammate Bob Gibson once said, "We were behind Curt, but we were 20 feet behind him so we didn't get hit with any shrapnel."

The first step in Flood's legal challenge was a trial in Manhattan before federal Judge Irving Ben Cooper. It was a long and tedious trial that featured testimony on behalf of the plaintiff by Hall-of-Famer Hank Greenberg and Flood's childhood hero Jackie Robinson. However, there was no testimony from any then-current Major League players, nor did any show up for any portion of the trial. Further, Flood was a lackluster witness who was described by MLB lawyer Louis Hoynes as having been "marginalized" in his testimony.

Following a six-week bench trial, Judge Cooper ruled for then-MLB commissioner Bowie Kuhn, the lead defendant. In his ruling, Judge Cooper highlighted the general acceptance of the necessity of the reserve clause by Flood's own witnesses as a basis to fail to rule in plaintiff's favor and thus declined to rule for nullifying the reserve clause.[7]

Flood's appeal to the Second Circuit was also swiftly and roundly rejected.

However, in a surprisingly short time, the Supreme Court agreed to hear the *Flood v. Kuhn* case and did so the following year.

On March 20, 1972, Arthur Goldberg, the former Supreme Court Justice returned to the Court to argue the case on behalf of Flood.

### Personal Backdrop

In the background of the continued litigation, Flood attempted to resume his playing career.

The Phillies, knowing Flood would

not report, traded Flood to the Washington Senators in early 1971. With serious financial issues mounting daily, Flood explored the impact of reporting to the Senators for spring training on his legal fight, in consultation with Miller. An agreement from MLB to not raise Flood's resumption of his playing career as part of their defense was made, and Flood attempted to continue his career.

The Senators manager was the great Hall-of-Famer Ted Williams, who continued to be supportive of Flood as he tried to recover from a year of inactivity.

However, Flood, who had begun to drink heavily, simply could not return to his elite level of play. In late April 1971 Flood sent a telegram to the Senators and, citing his inability to shake off the rust that had accumulated in the one-year hiatus from the game and his mounting financial problems, told the team he was retiring.

Flood then vanished. Without telling most friends or family, he took off for Majorca, Spain. In Spain, Flood continued to pursue his painting. He worked in a bar and by all accounts degenerated into alcoholism and depression.

## The Decision

On June 19, 1972, the Supreme Court rendered their decision in *Flood v. Kuhn*. In a 5–3 vote (Justice Powell recused himself because he owned stock in Anheuser-Busch), the Court ruled in favor of defendant Kuhn.

In a majority opinion written by Justice Harry Blackmun, the Court recognized that baseball was in fact interstate commerce, that the anti-trust exemption was an aberration of law "confined" to baseball, and even given both these factors, the Court would not upset the prior rulings and would rely on *stare decisis* in upholding the prior anti-trust challenges to MLB.[8]

This decision has been generally criticized by legal scholars since its publication, yet to this day it remains the law of the baseball land.

The 5–3 loss in *Kuhn* was viewed as a narrow loss and in the eye of Miller, raised public awareness to the restrictive nature of the reserve clause.

## The Aftermath

Through the early stages of his legal challenge, Flood was the subject of the emerging sports television and media explosion and was often reported about, granted interviews and discussed by pundits and fans alike.

Using this new-found awareness and public support, and the narrow victory and deleterious language in the Flood case, Miller proceeded to take his attack on the reserve clause to the bargaining table. During the subsequent round of bargaining, Miller injected the ability of players to arbitrate disputes.

The belief of Miller was that given the plain language of the reserve clause, the clubs' right to renew a player's contract only existed for one year if the player did not agree to it by signing the contract. As such, in 1975, unable to come to terms on a contract (given the Los Angeles Dodgers' rejection of a no-trade clause which was requested by the player), New Jersey-born Andy Messersmith played the 1975 season for the Dodgers without having signed his UPC.

Following the 1975 season, Messersmith and Orioles pitcher Dave McNally, who also refused to sign his 1975 UPC, arbitrated their dispute with MLB. An independent arbitrator named Peter Seitz decided the dispute in favor of Messersmith and McNally, thereby establishing MLB's first free agents. Messersmith would sign a three-year contract with the Atlanta Braves beginning in the 1976 playing season, while McNally retired before exercising his free agent rights.

## The End

Flood would ultimately go into recovery for his alcoholism, reconnect with an old flame, actress Judy Pace, and begin to put his life back together.

Slowly, he would garner recognition as an American sports hero for his failed attempt at breaking the reserve clause. Having been diagnosed with cancer, Flood died in January 1997, at the age of 59.

Following his death, the Flood legacy grew and morphed into the common misconception that he created free agency in Major League Baseball.

It is a wonderfully inaccurate legacy for a man who risked everything he had to help others. Incorrect in its common understanding. In the end, however, the message is the same: his impact on the game, although profound, is as misunderstood as Curt Flood the man. ⚖

## Endnotes

1. See *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1923).
2. *Toolson v. New York Yankees*, 346 U.S. 135 (1953).
3. This was despite the then-recent specific rulings by the Supreme Court that other sports such as football, hockey and boxing were covered by anti-trust laws.
4. Pepe, Phil. *Talkin' Baseball: An Oral History of Baseball in the 1970s* (p.11). Ballantine Books (1998).
5. *Baseball Almanac*. baseball-almanac.com/players/trades.php?p=floodcu01. Transactionally, when Flood refused to report to the Phillies, the Cardinals sent Willie Montanez and Jim Browning to the Phillies to complete the trade.
6. Helyar, John. *The Lords of the Realm: The Real History of Baseball* (p. 109). Ballantine Books (1995).
7. See *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y 1097).
8. *Flood v. Kuhn* 407 U.S. (1972).


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