

PROTECTING YOUR POSSIBILITIES PODCAST WITH LUKE FEDLAM

Episode 61: NIL deals: When things go wrong | Dec. 15, 2021

The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.

Luke: I'm sports attorney Luke Fedlam, and welcome to the Protecting Your Possibilities podcast. Each conversation we focus on sharing information and having conversations around how athletes can best educate and protect themselves or their life outside of their sports.

Thank you so much for tuning into the Protecting Your Possibilities podcast. I'm your host, Luke Fedlam, and I am excited for another episode because I am going back to one of my favorite topics to discuss with you all. And that's name, image and likeness. I know I've spoken about NIL, numerous times over the past – really over the past number of months, and it's been a little while since I've talked about it. And I wanted to address it because I think at this point, we are maybe what, six months in to NIL by July through where we are now. And so we've seen quite a bit of engagement in all different types of ways.

And one of the question that really does come up pretty frequently from people is, what about the athletes who sign a big deal, but then don't have a good season? Or don't perform the way people think they're going to perform? Now, this is an interesting kind of question to answer. Because the answer that I will always give, especially as a lawyer is – it depends. But like I tell people and tell clients when I'm talking with them, whenever I say it depends, I'm gonna tell you what it depends on. So that's what this episode is going to really focus on these contracts with well-known student athletes across the country where they haven't performed necessarily at the level that people would expect and kind of what does that mean or what are some factors to consider when thinking about the impact of NIL and the contracts that these athletes are signing?

So one of the more kind of well-known athletes that has had some struggles over this past season was Oklahoma quarterback Spencer Rattler. Now, Spencer Rattler was a Heisman hopeful at the beginning of the season. He was the person right at Oklahoma. The plan was for him to carry them on to the promised land of the college football playoff and beyond. So he had a lot of attention from a national level; did two different car deals I believe, and some other sponsorship deals. I think Raising Canes was one of them and some others that ultimately were significant in nature in terms of the amount. And it's interesting here because for Spencer Rattler, we kind of watched what happened throughout the season, right, which ultimately was that he ended up being benched in the middle of a game, and really lost out on the starting spot to Caleb Williams. Caleb Williams, a true freshman who really kind of ignited and captured the country's attention in his comeback victory in the game that he was put in. And then, you know, his performance throughout the rest of the season.

So the question then becomes, okay, well, if Spencer Rattler or any student athlete is kind of sidelined or benched, and they have opportunities, or contracts in place, what happens? Like what happens to them? Well, here's the thing. With name, image and likeness contracts cannot

be tied to performance. So you know, whether they're signing a deal with a football player, let's say, it can't be that they get paid so much based on the number of touchdown passes that they throw or the number of yards that they that they rush or percentage of time on the field or whatever it may be. Those kind of performance metrics are not allowed to be used in college NIL deals.

So really, what we have is a situation where you have a someone who has a significant following on social media. And, you know, with him having a celebrity status, there is value even when being benched. There's still value to the brands. Now, that value may diminish as the potential kind of celebrity stardom of an athlete wanes in the background as they sit on the bench. But they still have requirements set forth in these contracts. And the requirements will be things like social media influencing, possibly making an appearance somewhere, those types of requirements because again, don't forget in a contract for name, image and likeness, the student athlete can't just be receiving money and that's it. They have to also provide a service. That's the mutual obligations required as part of a contract. So he has to provide some services in order to be paid. Otherwise, it would just be him receiving money and that will be an impermissible benefit that's still prohibited by NCAA regulations.

So ultimately, in these situations, there will be the individual who actually conducts the services. Now, the brand, the company may potentially adjust what that looks like. Alright, so if, if it's an agreement that says, hey, after each game, you're going to make a social media post that says I love XYZ brand. But yet that was a player that ends up, let's say, getting benched during the middle of a game, you know, to go out and post something right after the game like, "Hey, I like this particular apparel brand or food brand or what have you," that causes the brand to potentially receive kind of unwanted negative attention, really, because you can already imagine on social media, that the comments that would follow saying, "You know, you should focus more on football; you should focus more on your sport, as opposed to these deals and things along those lines."

You know, saying that it reminds me. I've gotten so many questions from people, both involved in sports, and those who are not involved were just casual fans, asking if name, image and likeness is distracting to certain players, right? Because obviously, they pick a certain handful of players that have had struggles during the season. And they point to those as examples of how NIL can be too distracting for student athletes. But I disagree. I disagree, because I know firsthand that there are brands who are working closely with the student athlete to make it as minimal of distraction and as minimal of a time commitment as possible. Alright. National brands that will fly a film crew to the same city as that student athlete so that they can show up at a hotel and do some quick filming and be done. Or show up on a location locally and just be done. And it takes just a couple hours of time not flying all across the country doing photo shoots and video shoots and things along those lines. They understand. Brands, I think, are understanding as they're growing in this NIL space around the time requirements and the focus requirements of student athletes. So I do not think that NIL is a distraction to athletes. I think that the we're talking about young 18 to 22 year old athletes who sometimes just struggle. Right? There are athletes who have struggled before NIL, and there will continue to be athletes who struggle in different ways, after NIL. So that's why I think it's important to just understand all that goes into this.

Now, if a student athlete were to, let's say, get benched or were to be in a position where they weren't able to be out on the field or on the court or performing in their sport, then there really is a question of what happens as a relates to kind of the relationship between the athlete and the brand. What I always share with athletes is communication is key. Communication is key. If

there's a moment where, hey, you know, I'm not getting the playing time that I thought that was going to have, or I'm not getting the attention and opportunities on the court or on the field that I thought I was going to have, then having a conversation with the brand to help them understand. So that potentially you could modify the agreement. And there depending on what the requirements of the agreement are, potentially modify the agreement to be able to make sure that it could fit within the kind of situation that the student athlete finds themselves. Alright?

So maybe that means if it's a player that's not getting as much playing time, then possibly not putting out a social media post right before or right after a game, but rather kind of, a few days later when there's a break in the action, if you will, because don't forget, these athletes, even if they are not performing at the level they should be performing or that people want them to perform, they still have a celebrity following. They still have numerous followers on social media, which again, can still allow brands to achieve the return that they're looking for. Right, because let's be clear. Brands aren't just throwing money out for student athletes to just have some money to do nothing that did or to do something that makes a negligible impact to the brand. Brands are looking for a return on their investment. So they are investing in college student athletes in this name, image and likeness space. And they ultimately want to get a return on that investment, which could include a deeper market penetration into a particular demographic that they're looking for. It could be again getting additional kind of earned media or free media based on various social media posts of a student athlete about the particular brand. So the brand is looking for a return and if a student athlete, let's say, does get benched, there's no language in any contract that I've seen so far that would allow for a brand to terminate the contract if the only kind of a situation that happened was a coach deciding that the player wasn't going to be playing. Right?

Now, there is language in contracts that does allow for termination upon, you know, like morals clause type of language. So if a player is arrested or if a player is charged with something, or if they do something that brings kind of embarrassment or moral turpitude to the company or brand, right, absolutely. Those are ways in which brands can terminate. But you can't put into a contract with a college student athlete that if they get benched or don't have a certain amount of playing time, that the contract can be terminated. So that's one of those, again, one of those performance issues that we talked about that that are not allowed in these types of agreements.

So the next thing to think about really is, you know, an example of Quinn Ewers. And I bring up Quinn because, you know, I'm here in Columbus, Ohio. So there's been a lot of talk about the situation. Quinn was a five star quarterback out of Texas who graduated a year early. Finished his high school year early, so that he could enroll in school. He enrolled at Ohio State and he signed what's been reported as a \$1.4 million deal. Over three years, I believe. And so with that, it was with some local companies. And I think one of the issues that, that people ask about that as well, what happens if a student athlete transfers and here in this instance, when you entered the transfer portal, and will likely transfer somewhere else? And so then the question is, well, if they're local brands that engage with a student athlete, and that student athlete then departs and goes to another school, what happens? And again, my answer, the typical lawyer, answer is, it depends.

But what it depends on is, what is the language within the contract? Is there a language that states that the student athlete must be enrolled at that particular institution, and if they were to transfer or drop out of that particular institution, then that would be grounds for terminating the contract. And just paying the player for whatever services up until that point they've provided, that's one way to look at it. Another is that a lot of contracts that we see are just silent on the transfer piece, right. And so if you're a national brand, and a player transfers from a school on,

let's say, the East Coast to a school on the West Coast, if you're a national brand, that doesn't really make that much of an impact, right? Especially if your geographic footprint is nationwide. But if you're a smaller company, a local company, so say, if it's a local car dealership, a local restaurant chain, or what have you, that could create some significant issues. Because if the athlete is now transferred, and we know how fans can be, right? Fans, once somebody transfers, it's kind of like, alright, I don't want to hear about you anymore, I'm focused on the team that we have. You left our team, etc. So that kind of creates a situation where if you're a local company, and you want to keep, you want to enforce your contract, and hold that athlete to continue to perform, the services, social media influencing, etc., the question then becomes, is that going to help your brand or hurt your brand? And that's what the company is going to ultimately have to decide. And that is, so situation specific based on, you know, the contract, how it was written, that particular player, the terms under which they left the school and transferred somewhere else.

So another thing that people will talk about really is, you know, other situations that come up where an athlete hasn't performed to the level that people think they should perform. And we have seen that across the country, especially with some athletes who have done some significant national deals, but ultimately, it comes down to the brand and that player agreeing on what makes the most sense for both of them. In some instances, it may make the most sense for an athlete not to promote on social media, that particular brand, if they're going through a challenging time. But don't forget, they still have to perform some services, because that's why they're engaged in that agreement. That's what makes it a contract is the mutual obligations. The company and brand has obligation to pay and the student athlete has an obligation to provide services. If they're not providing services that's an issue that still is not allowed by the NCAA.

So ultimately, just some different things to think about when it comes to name, image and likeness. I thought it was important to share and have a little conversation there. This is why it is so important when you're an athlete to understand any endorsement deal that you sign that you understand what's required of you, and what are ways in which either you or the brand can terminate the agreement. Because ultimately, when things do go wrong, you want to make sure that you understand how is that going to affect the money that you're making through that contract.

All right, again, thank you so much for tuning into the Protecting Your Possibilities podcast. If you have any questions. If you have any topics that you want to hear us discuss, please don't hesitate to reach out. Let us know you can find me on social media at Luke Fedlam. You can go into the show notes and get in touch with me. But again, thank you all so much for tuning in. Thank you for sharing this with your network. And I look forward to talking to you again real soon. Until then, have a great day.

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