

## PROTECTING YOUR POSSIBILITIES PODCAST WITH LUKE FEDLAM

### Episode 64: NIL collectives – Are we in the wild, wild west? | Feb. 2, 2022

*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 am your host, Luke Fedlam. And I'll tell you what, in 2021, we had a lot of conversations on the Protecting Your Possibilities podcast about name, image and likeness. And it's been a while since we've talked about NIL. And it really does seem like things are constantly changing. So I thought we'd have a conversation around one particular area of name, image and likeness that is most definitely catching the attention of a lot of people. The attention of fans, donors, coaches, athletic directors, and just the media and industry as a whole. And that is the idea of NIL collectives, NIL collectives.

So you may have heard about these collectives, and you may be either heard of them generically, or referred to as a collective. Or you may have heard about their specific name, depending on the institution itself. And I think it's important for us to dive into what exactly is a collective? How does it work? What are some thoughts around risks or opportunities? And why are so many donors and alumni and other friends of institutions establishing these NIL collectives around their favorite institution.

So let's just dive right into it. First and foremost, it's important to think about what actually is an NIL collective. And when you think about it, collective doesn't have necessarily like a legal name or anything, or legal meaning. It's really about this idea of a group of people coming together. So when we think about what exactly is a collective, it really is a fund that is established by donors, alumni, fans of a particular university. And it's established for the purpose of creating name, image and likeness opportunities for the current student athletes of that particular institution, and honestly, as a way to help recruit future student athletes at that particular institution. And so it must be made clear that these collectives aren't something that is a part of the school. They aren't run by the school. They don't have any oversight by the athletic department of that school. But there are collectives that are being established that are related to schools all across the country.

One of the first ones is the Gator Collective, which is based on the University of Florida. And, you know, it was an alumni, a former student athlete, who's now in the financial services industry, who really started the Gator Collective. And, you know, we have seen at West Virginia University, the Country Roads Trust, which was created by their former athletic director Oliver Luck. Again, to focus on West Virginia, and their student athletes there in the name, image and likeness opportunities. We've seen the Clark Field Collective at the University of Texas, and the list kind of goes on and on. And you can start to look at all these different schools that are

having collectives become established. Now, the schools, like I said before, the schools aren't actually the ones starting these collectives. But as you can see, these collectives, most definitely can help the school. They can help coaches. They can help the institutions themselves as they try to recruit and also retain talent. Because in his name, image and likeness space, it's not just about recruiting great talent, but it's ensuring that you actually keep great talent. And the fact that also in 2021, we saw the transfer portal allow now for student athletes to be able to have a one-time transfer exemption where they don't have to sit out for a season and can actually transfer and start playing immediately at a new institution. So understanding that that is now the reality, it's important for schools to focus not just on recruiting outstanding talent, but also retaining the talent that they have at their institutions. And so name, image and likeness, as I've talked about before, and as you all know, is one of those ways in which schools are looking to recruit and retain great athletic talent.

So these collectives, as they're popping up, are one of the ways in which those who are friends, alumni, donors and fans of a particular institution can help play a role in recruiting talent and making sure that current student athletes at those institutions have name, image and likeness opportunities.

So how does it really work? Right, what really is the foundation kind of what does this look like? How is it structured? Obviously, I've got to put the lawyer hat on, let's dig into kind of the legal structure here. Because collective and the term, you know, name, image and likeness collective, as I said earlier, it's not it doesn't have any legal impact, it's just kind of the name that has popped up to reflect what these kind of funds, right, or organizations really are all about. The way in which they operate is a bit different.

But let's talk about the structure for a second. So these are usually structured either as a for profit entity or an arm of a for profit entity, or they can be structured as a nonprofit. The key in all of this comes back to: is the student athlete providing a service? Right? I mean, that really is the differentiator, when we think about where the NCAA is, in particular on name, image and likeness, they are really staying out of the fray. The only thing that really they can say is that if a student athlete is not performing a service, and is getting compensated, right, basically paid for not doing anything or not having to do anything, then that still falls under the restrictions and prohibition on impermissible benefits. So that still is under the purview of the NCAA, and their enforcement team. So as long as the student athlete is actually providing a service, then these collectives can operate in a way to pay the student athlete for their time for their appearances.

So let's break down how would that actually look? What would that look like? How would that actually work? When we think about how these name, image and likeness, collectives have been structured, it's interesting. The one, the Gator Collective, down at the University of Florida, or related to the University of Florida will say, that one is an interesting one where it's a subscription model, where people can make donations, but it's also you can have people make subscriptions, and their subscription costs can range anything from, I believe it's \$5.99, five, \$5.99 a month, all the way up to \$9,999.99. So basically, \$10,000 a month. I mean, think about that, that's now \$120,000 going into this Gator Collective, or this NIL collective for someone that's paying \$10,000 a month. But when you think about that, I mean, that can obviously be a staggering number. But when you think about the amount of money that donors donate, and give to institutions, and more specifically, the athletic departments of various institutions, then, you know, \$120,000, while a significant number in the grand scheme of things isn't a jaw dropping type of number. So for that, for that subscription fee, those who participate in this Gator Collective in particular, they receive different things, right, it's been reported that they'll receive, you know, maybe access to a private interview or discussion with a student athlete or a

student athlete could make an appearance or potentially reach out to a fan on their birthday. So all of these different opportunities are the student athletes providing a service and appearance autographs, showing up and having, you know, a discussion with folks, right, they're providing that service. And for that service, they're getting paid, and they're getting paid out of that collective.

So there's one that's interesting as it relates to the NIL collective that's around the University of Texas. Because in this one, it's interesting because there's been discussion about just paying the Texas Longhorns offensive linemen \$50,000 each. Alright, that's the Clark Field Collective. Now, here's the thing. They could do that. However, the student athlete still has to provide a service. Because when we look at all of this, here's the challenge and the NCAA has this, this challenge, and that is, you know, what is fair market value, right? So, so the NCAA can't step in and say, Oh, you're paying that student athlete too much, right? Because that really goes back to the *NCAA vs. Alston* case, where the Supreme Court unanimously ruled that the NCAA does not have this antitrust protection that they thought that they had. And so any restraint, as Justice Kavanaugh so clearly articulated in the concurring opinion to the *Alston* decision, any restriction on compensation that the NCAA might have would fall under the scrutiny that the court provided in the opinion on *NCAA vs. Alston*. So, so to that end, there really are no limitations here. So when people talk about it, being the Wild, Wild West, it most definitely is just a whole new world where student athletes can get paid a lot of money for providing various services.

But let's think about this for a second. Right? It really is hard to say, I mean, I'm someone that's in this space where I work with professional athletes who are doing endorsement deals all the time, have worked with athletes for a number of years, there really is no true, fair market value of an appearance because it's all predicated upon who that athlete is and what sport they play and what they're providing. And what fair market value is all goes back to what the market is willing to pay, right. And if the market is willing to pay \$50,000, to an offensive lineman to show up, make some appearances, sign some autographs, you know, that kind of thing, then that's what fair market value is. All right. So in this in this kind of brave new world of, of name, image and likeness, we're going to see a lot of different kind of surprising numbers as it relates to student athletes being compensated.

So when we go back to the structure conversation and think about the structure of these name, image and likeness collectives, I mentioned that that some are being set up as nonprofit organizations. Now, here's where there's another wrinkle, that gets added. And the wrinkle that gets added is you can't really establish a nonprofit organization whose sole focus is on paying student athletes. That's not a charitable purpose, just the payments of student athletes. There would have to be something more to that. But you know, you could very easily create a scenario where a nonprofit is established to provide a particular charitable service to the community. And in doing so, have student athletes be the ones who are actually doing that work. And whether it's tutoring young kids, mentorship, if it's reading to the youth, whatever it may be, youth empowerment, etc. Whatever that charitable purpose is, if student athletes that are providing the service to go and actually execute that then just like a nonprofit organization currently can pay its staff or pay folks who are ambassadors of the nonprofit, you know, celebrities who are lending their name, image and likeness, to the nonprofit to raise awareness, then you could see a scenario where in a name, image and likeness collective setup as a nonprofit that is actually out providing a charitable purpose and a charitable service, then you could see student athletes be compensated for their time in helping to do that. It's an interesting kind of tightrope to walk. And, but we're going to see it continue to play out, we're going to see kind of how this starts to evolve.

I have to tell you, I really believe that that's what is, for me in the work that I do, one of the most exciting things around name, image and likeness. Is that every day, it is changing and evolving. And one school sees what another school does, and then wants to keep up or surpass what that other competitive school is doing, and so they come up with something even more creative as a way to provide name, image and likeness or create name, image and likeness opportunities for student athletes at a particular institution. Every single day, it is something different. And here's the thing, a lot of people say, well, this is the wild, wild west, there needs to be some restraint on this. Otherwise, we're in this place where you're really just paying student athletes to perform. Well, a couple things to say about that.

Number one, any agreement with a student athlete can't be based on performance. The NCAA has said that explicitly. And so you can't have a deal where a student athlete is getting compensated based on the number of snaps that they're on the field for or the number of points scored, or the number of touchdowns thrown. Those kind of triggers that we are used to seeing in professional sports aren't allowed at the college level. But also number two, looking at name, image and likeness and how to kind of think about this from a performance perspective as well. There are really only two organizations that can restrain name, image and likeness and create a national standard. One organization is the NCAA and as I've talked about already on this episode, and definitely I've talked about quite a bit in the past the NCAA, because of the *NCAA vs. Alston* decision, the NCAA is not in a position to be able to do that they cannot put in kind of guardrails, on name, image and likeness and any limitations or restrictions on name, image and likeness. So then the only other entity that could do that then would be the federal government. From a federal government perspective, you know, Congress could create a name, image and likeness law and have various parameters set forth so that we have a national standard. But nobody thinks that that's going to happen anytime soon.

I mean, when you look at Congress today, they're dealing with, you know, infrastructure with, you know, voting rights dealing with Russia and, and things happening in Europe. So there's so much that Congress is dealing with that the payment of student athletes does not rise to the top of the legislative agenda. So that being said, we're left in a place where schools are really creating just their own policies. And it is a race to see who can be more creative and who can come up with something that attracts talent, that attracts prospective student athletes to want to attend that institution.

You know, you might be thinking to yourself, Well, what about state law? Couldn't state law come in and put a restraint on name, image and likeness? Yes, they absolutely could. But that is most definitely not going to happen. In fact, we have some states that are looking to repeal the name, image and likeness laws that they passed, because they've come to realize that there's no need for a name, image and likeness law if it is now authorized and allowed by the NCAA. Right. So what we saw when July 1st hit last year, the NCAA said, hey, if you're a school that's in a state that does not have a name, image and likeness law in place, then you just need to come up with your own policy. And so states that early last year, were racing to try to come up with legislation to allow for it to happen at schools within their state, now, some are looking to say, well, we're actually at a disadvantage because we put in too many restraints in our name, image and likeness law that was passed. So you know, perfect example is the state of Alabama has voted, at least I believe in just the house. I don't believe it's been voted on by the Senate yet. But they voted in their house like 97-1 to repeal the name, image and likeness law that they just passed last year. Right, so that they can have more freedoms in their schools. You know, I think there's a couple big schools in the state of Alabama, that that definitely are supportive. I mean, Auburn and Alabama, have been on the record as being supportive of repealing the name, image and likeness law. So state laws, states could create laws to limit name, image and

likeness, but because of the competition and the desire to retain the best talent and win championships and perform at the highest level, states are not going to be getting involved to in any way limit schools' abilities to attract the best talent to their institutions.

So we're really in this place where it is the Wild, Wild West. We are going to continue to see evolution and growth and this name, image and likeness, world evolve. But the one final thing that I have to say is that this can't be to the detriment of the student athlete. I preach this all the time, I've done podcast episodes on this and the ethical imperative that education is for our athletes, we have got to make sure that even if an athlete does a deal through a collective, right and has an opportunity to do a deal through a collective, they still even though that collective may be made up of donors and alumni and friends of a university, they still have to make sure that they understand things like money, right?

So okay, I'm getting paid, I need to create a budget, I need to understand taxes, etc. Or they need to also understand contracts, what am I actually signing? What am I giving up in terms of my intellectual property rights? How are they going to use my name, image and likeness, what types of restrictions are in place, etc. So understanding the contract, understanding decisions and how they're going to, you know, decide to either be involved or how they're going to be involved. So, this education is critical. And even though name, image and likeness collectives can seem like a very friendly way, for a student athlete to engage in name, image and likeness, they are still signing their name to contracts, where they are agreeing to provide a service and in return receive a benefit from an organization or an entity. And they've got to make sure that they understand what it is that they're actually agreeing to.

So we'll continue to follow this throughout the year, obviously, you know that there'll be more conversations that will have on name, image and likeness. But for now, just wanted to spend some time thinking about these NIL collectives the impact that they're having, and going to have in college sports, as schools, institutions, donors, alumni and fans all try to figure out how do we navigate name, image and likeness to our benefit so we can recruit, as well as retain the best talent out there.

So hopefully you found today's episode, informative and interesting and hopefully a little entertaining as well. Definitely feel free to share this with your community, with your network. You know, the Protecting Your Possibilities podcast is really possible because of the ideas and the opportunities that that you all share around topics that you want to hear so again thanks for tuning in. Have a great day. We'll talk again soon.

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