SPORTS LITIGATION ALERT

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Cases

Fight Over A's Stadium Funding Continues into the Later Innings

By Robert J. Romano, JD LLM, St. John's University, and Jacob Somerville, 3L, Quinnipiac University School of Law

In 2023, the state of Nevada's Legislature, during its 35th Special Legislative Session, passed Senate Bill No. 1 (S.B.1) authorizing the *Clark County Stadium Authority* to secure $380 million in public funds to build a Major League Baseball stadium for the benefit and eventual use of the Oakland A's franchise.[1] Subsequently, an assemblage of teachers and educators, not pleased with public funds being used to finance a stadium for an MLB team whose principle

1 S.B. 1., 35th Special Session Ch. 1 (2023).

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owner is a billionaire,[2] created a political action committee, *Schools Over Stadiums (SOS)* and filed a petition to place a referendum on the November 2024 general election ballot asking Nevada voters to strike the state's commitment to finance the stadium. *SOS*'s position being that the people of Nevada themselves should have a say in whether their tax dollars finance such a project before it becomes law.

In response to *SOS*'s petition, two lobbyists with alleged ties to the Oakland A's organization, Danny Thompson and Thomas Morley, on September 26, 2023, filed a lawsuit against *SOS* claiming multiple legal flaws with its petition to place the stadium referendum on the November ballot. The lobbyists' complaint alleged that *SOS* violated the "full-text requirement" mandated by the Nevada Constitution and that its petition's description of S.B.1's effects was legally inadequate and misleading since it didn't include the full text of the law by only including 7 of its 46 sections. In addition, the lobbyists asserted that the ballot petition did not specify where the funding would be coming from and left out an important detail that a portion of the funds were to be generated from within the sports and entertainment improvement districts, not through existing state funds.[3]

After a series of hearings on the matter, both the District Court and Nevada Supreme Court ruled in favor of the lobbyists, finding that *SOS*'s ballot petition was misleading to readers and, because of the narrow scope of its description, did not meet the "full-text requirement" which is necessary to ensure that signers of the petition are fully informed about the measures in which they are supporting or opposing. But like most sport litigation matters, the story doesn't end there, and this matter will be going into extra innings. On February 5, 2024, a second political action committee, *Strong Public Schools Nevada (SPS)*, filed a complaint for Declaratory and Injunctive Relief with the First Judicial District Court of Nevada, Carson City requesting, again, that the courts halt the use of public funds being used for the private benefit of building a baseball stadium.

Strong Public Schools Nevada alleges in its complaint that the passing of S.B.1 violates the Nevada Constitution, specifically Article 5, Section 18 which states that "Any legislation that creates, generates, or increases public revenue in any form is subject to a two-thirds legislative supermajority threshold for passage."[4] Meaning that a bill must be supported by two-thirds of the members of the Nevada State Legislature for it to be law.[5] And, since S.B.1 was enacted during a Special Legislative Session and contains a provision that creates, generates or increases public revenue, it did not receive support from more than two-thirds of the members of the Nevada State Senate and the Nevada State Assembly prior to being signed into law and therefore was enacted unconstitutionally.

But maybe this isn't a state constitutional issue at all but that of a commonsense issue. The city of Las Vegas, whose NFL's Allegiant Stadium was supported by $750 million in public monies in 2016 to lure the Raiders from Oakland, is again being asked to "ante up" another $380 million for a baseball field. Any public money used to support this stadium, like the previous NFL project, would divert away monies that could be spent on public education (along with other social welfare concerns) within the state, a detail that is alarming since the state of Nevada currently ranks 48th in per-pupil education funding and 50th in student-to-teacher

2 John Joseph Fisher is reported to be worth $3.2 billion.

3 Schools Over Stadiums v. Thompson, No. 87613, 2024, Nev. Unpub. LEXIS 393 at 1 (May 13, 2024).

4 Strong Public Schools Nevada v. Nevada, Complaint, First Judicial District Court of Nevada (Feb. 5, 2024), at 6 https://www.nsea-nv.org/sites/nsea/files/2024-02/strong-public-schools-complaint.pdf.

5 The reasoning behind this provision is to "protect taxpayers from new and increased taxes and fees" by allowing citizens to see how their congresspeople voted so they can hold their legislators accountable.

ratio. But then again both the Raiders and A's owners wouldn't be affected by these statistics since they likely send their child(ren) to private school – they can afford it.6 And since money isn't an issue, it is time for these billionaire sport franchise owners to stop bilking local taxpayers for millions upon millions of dollars for stadium development and to start using their own money to build these facilities for themselves.

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Court Hands Partial Defeat to Community College in Discrimination Case

By Jeff Birren, Senior Writer

There was a time when school athletic directors could hire and fire with impunity. Today schools must expect courts to second-guess those decisions. This recently happened to Northwest Mississippi Community College. A decision to terminate the women's basketball coach triggered claims for both age and racial discrimination. NWMCC filed an unsuccessful motion for summary judgment, but the Opinion virtually promised victory on one claim (Howell v. Nw. Miss. Cmty. Coll., 2024 U.S. Dist. LEXIS 68035, Case No. 3:23CV33-MP-DAS, U.S. D.C. N.D, Miss. Oxford Div. (4-15-24)).

What

NWMCC is in Senatobia, Mississippi. Enrollment is approximately 7,000 students, including 4,000 students who attend online. According to the school's website it is known for athletics. It fields teams in nine sports, including women's "Basketball, Cheerleading, Golf, Rodeo, Soccer, Softball, Tennis and Volleyball", the "Lady Rangers." Howell was hired in 2011 as an assistant women's coach. He later became the head coach, "NWMCC's first African American head coach of any sport." After the 2021-2022 season Howell was told "told that his employment contract would not be renewed for the following season." Howell was not a happy ex-Ranger.

He filed "a charge of Discrimination with the EEOC, claiming that the non-renewal of his employment contract was rooted in age and race discrimination." The EEOC "issued a Notice of Right to Sue." Howell did just that on February 24, 2023. The Complaint asserted claims for "race discrimination in violation of Title VII and 42 U.S.C. § 1981 and age discrimination in violation of the Age Discrimination in Employment Act." (He is currently the" Varsity Girls" basketball coach at Tunica Academy.)

6 Las Vegas Raiders owner Mark Davis is reported to be worth $2.3 billion.

Legal Standards For Separating Wheat From Chaff

Judge Mills stated that summary judgment will be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(a)." All inferences must be drawn in favor of the nonmoving party and the court may not make "credibility determinations or weigh the evidence."

The "ADEA makes it unlawful for an employer 'to fail or refuse or hire or discharge any individual or otherwise discriminate against any individual with respect to [the individual's] compensation, terms, conditions or employment because of such individual's age.' 29 U.S.C. §623(a)(1)." Title VII makes it unlawful" to discriminate against any individual based on race, sex, 42 U.S.C. §2000e2(a)1, and also forbids discrimination based on race, color, religion, sex or national origin in admission to, or employment in, any program established to provide apprenticeship or other training, §2000e-2(d)."

Employment discrimination claims "typically rely on circumstantial evidence". The Fifth Circuit uses a "burden-shifting framework" (Goudeau v. National Oilwell Varco, L.P., 793 F. 3d 470 (5th Cir. 2015)). The plaintiff must demonstrate a "prima facie case of age discrimination by showing that (1) he was discharged; (2) he qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, iii) otherwise discharged because of his age." Once accomplished, the defendant must produce "evidence of a legitimate, nondiscriminatory reason for the adverse employment action." If that occurs, "the plaintiff must come forward with evidence that the legitimate reasons proffered were not the true reasons but instead a pretext for discrimination."

Possible Wheat: Age Discrimination Claim

In the second sentence Judge Mills held that "triable issues of fact exist" and the "this court need go no further than a sworn affidavit" submitted by Howell. In the affidavit, a parent of one of the players asserted that a "relevant decisionmaker", interim athletic director Mathew Domas, "specifically told him that NWMCC was firing Howell because it was 'going in a different direction' and was going to hire 'a younger coach.'"

This was "direct evidence of age discrimination." It "admits that Domas wanted Coach Howell fired to replace him with a younger coach." If this was "found credible by jurors "it "constitutes direct evidence of age discrimination" and as such "it is sufficient to at least allow a jury to consider" the claim. "[I]n an unusual step for a discrimination case of this nature, defendant elected not to submit a reply brief addressing plaintiff's thorough briefing." The arguments were "largely unrebutted."

In its motion NWMCC argued that this claim was based "on one comment allegedly made" by Domas, who "denied" making the statement. It also asserted the declaration was "inadmissible hearsay." This "is simply incorrect." Mississippi's Evidence Code §801(d), A(2)(D) states that such a declaration is not hearsay if it is offered against an opposing party and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." There was "no question that Dr. Domas made his alleged statement while he was acting as NWMCC 'agent or employee'" while in the course and scope of his duties. Other employees may not have been aware of the statements but that did not mean he did not say it. Furthermore, a jury could just as easily disbelieve NWMCC's employees as it could the player's parent.

Howell stated the school president asked him how old he was. Howell replied and the president said: "Wow, I didn't know you were that old!" This seemed "less helpful" "because it involves plaintiff's own self-serving testimony" and was "less directly tied to the decision to fire him." If accepted by the jury, it "may well make them more likely to conclude that his age figured prominently in the minds of defendant's decisionmakers when they decided to fire him."

The affidavit constituted "direct evidence of discrimination", and as Howell was replaced by a much younger man, he was able to make a prima facie case of age discrimination. The burden of proof shifted to NWMCC "to provide a nondiscriminatory reason for terminating him." NWMCC gave reasons for the termination in the motion brief. Howell countered that the first one was "astonishingly pretextual" and in the second example, Howell was "not disciplined" and "only when he was fired did NWMCC reference this

past act." NWMCC did not reply, and there was "sufficient direct evidence of age discrimination" to send the claim to a jury.

Possible Chaff: Race Discrimination Claim

Howell alleged "that his African American race was also a factor in his termination." This requires "a somewhat lessened burden of proof" because "the plain language of Title VII permits a plaintiff to obtain at least some recovery (such as attorneys' fees) in case where is he able to prove that race discrimination was at least one 'motivating factor' behind his termination. See 42 U.S.C. §2000e-2(m)." This was fortunate for Howell because "this court believes that he needs such a forgiving burden, since he concedes in his brief that: 'NWMCC hired LaTaryl Williams to replace Howell. Williams is in his thirties. Williams is African American. Howell was fifty-nine when he was terminated.'" Thus, his age discrimination claim is "considerably stronger" than his race discrimination claim.

Howell argued that NWMCC's cited cases "were not supported by the controlling authority in this circuit." In Nieto v. L&H Packing Co., 108 F. 3d 621, 624 n.7 (5th Cir. 1997), the Circuit held that an employer cannot immunize itself by hiring a replacement of the same race if the terminated employee was discriminated against. NWMCC "could, and should, have addressed" this "in a rebuttal brief" but failed to file ta reply. The Court "conducted its own review" and found that "none of the helpful authority" cited by Howell has "been overruled by the Fifth Circuit." Furthermore, as the Supreme Court has "repeatedly pointed out, no single formulation of the prima facie evidence test may fairly be expected to capture the many guises in which discrimination may appear. Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978)." Howell "thus appears correct in his assertion" that NWMCC "is not necessarily entitled to a dismissal of the race discrimination claim based solely in the fact that it hired another African American to replace him." Nevertheless, "this fact is quite unhelpful" and "clearly raises the bar for him to produce other evidence suggesting that race was at least a motivating factor in his firing."

Domas allegedly berated coaches and although he apologized to the white coaches, he never apologized to Howell, and always took the "white person's side" in any argument. Judge Mills thought his best allegation was that the school president told him "that he was being fired because he did not 'talk' and 'act' like the other coaches." The Court did "not dismiss these allegations of favoritism shown to white coaches" but "they may be regarded by jurors as quite subjective allegations rather than hard proof of discrimination." At this stage a court must "view the facts in the light most favorable to the plaintiff as the non-moving party" and cannot state that Howell was "lying". If the jury believed the president's "alleged concerns about how" Howell spoke, "it is possible that this evidence could support a race discrimination claim."

Howell pointed to an incident, captured on video, wherein two white campus officers stopped an African American player on campus. Howell used colorful language to describe the incident, but Judge Mills "carefully reviewed the video" and the officer's comment "simply reflected his annoyance over a basketball coach attempting to tell him how to do his job." The player was driving 35mph in a 20mph zone. Howell "was clearly not in a position to know whether" there was good cause to stop the student and the officer "demonstrated considerable leniency to the student, such as by choosing not to cite her for an expired license and by allowing her to address the speeding citation with campus traffic authorities, thereby preventing her insurances rates from being adversely affected." The video was "more helpful" to NWMCC than Howell.

Howell argued that "NWMCC conceded Coach Howell's interaction with campus police motivated his termination." NWMCC and Judge Mills had the same reaction to the video. Howell had "interjected himself into police activities." The Court could not "speak to the other instances" but "given that it was videotaped, the traffic stop discussed above seems certain to play an outsized role at trial in the jurors' perception of plaintiff's interactions with campus police."

Howell "should seriously consider whether he wished to go to trial solely on his age discrimination claim if he wishes to portray the traffic stop in question as evidence of racism." That Howell was "fired for opposing racism on campus seems much better suited for a retaliation claim" but "plaintiff did not assert such a retaliation claim either before the EEOC or this court, and it would be far too late" to do so now. Although the evidence on the claim was slight, considering that a "trial will be required regardless", the court would

"wait until the directed verdict stage of the trial to decide whether to submit the race discrimination claim to the jury." Then, "this court will seriously consider granting directed verdict on plaintiff's race discrimination claims. It is "quite easy for Fifth Circuit (or this court on JNOV) to simply strike jury findings" unsupported by the evidence.

If it was not yet clear, the Court "reiterates its belief that plaintiff, and his counsel, should take a hard look at the video evidence in this case, as well as the fact that he was replaced by another African American, and ask whether they wish to spend their credibility before jurors in arguing that he was fired on the basis of his race." Judge Mills stated again that it might dismiss the claim "at the directed verdict stage."

Comment

Parties filing summary judgment motions generally file reply briefs. NWMCC did not, and Howell escaped summary adjudication on his race discrimination claim by a whisker. It is perhaps unique to see a judge wave the directed verdict flag three times in half a page. Howell got the message. The parties settled and avoided an ugly public. Judge Mills dismissed the case without prejudice (Order (5-8-2024)). Those who hire and fire staff should keep silent about any preferences to hire "younger" replacements, or they may also end up in court, and not be as fortunate as NWMCC.

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Federal Court Grants, in Part, Motion to Exclude Expert Witnesses in Title IX Lawsuit Between SMU and Former Member of Women's Rowing Team

By Lauren Rosh

On March 4, 2024, the United States District Court for the Northern District of Texas granted in part and denied in part a series of motions filed by Southern Methodist University (SMU) related to expert testimony.

In 2018, eight women who were former student athlete rowers at SMU filed a Title IX lawsuit against the Dallas, Texas, university alleging it did not provide equal participation opportunities. The initial complaint alleged that SMU provided inequitable funding to women's teams, specifically to the women's rowing team. The complaint further alleged that the university provided inequitable funding to women's teams, failed to provide equitable quality coaching, the rowers had "unreasonable training and practice regimens," and that the rowers were provided "substandard second-class athletic training and medical attention."

In Feb. 2024, the court granted SMU's motion for summary judgment on all claims brought by the plaintiffs. However, for plaintiff Kelly McGowan, the court just dismissed her claims for pain and suffering, emotional and psychological harm and loss of quality of life under Title IX. However, the court allowed McGown's claim for compensatory damages for medical expenses for physical injuries and loss of educational opportunities and benefits, as well as her negligence claim against the university to survive.

In March, the court delivered its order on a series of motions. SMU moved to "strike portions of the expert report and exclude some testimony of Plaintiff's expert witness, Dr. Volker Nolte, and exclude the expert testimony of Plaintiff's expert witness, Dr. Donna Lopiano." McGown moved to "strike the expert report and exclude the testimony of SMU's expert witness, Tim O'Brien."

Factual background, initial complaint

In 2018, eight former members of the SMU women's rowing team filed a Title IX lawsuit against SMU. The named plaintiffs in the case at the time they filed the complaint are Kelly McGowan, Jessica Clouse, Lindsay Heyman, Meghan Klein, Sydney Severson and Rebekah Tate.

The plaintiffs alleged that SMU provided inequitable funding to women's teams, did not provide equitable quality coaching, the female rowers had "unreasonable training and practice regimens," and that the rowers were provided "substandard second-class athletic training and medical attention."

The plaintiffs rooted their argument regarding inequitable funding in the fact that SMU's Equity in Athletics Disclosure Act (EADA) report from 2015-16 which reflects, according to the initial complaint, "recruiting expenses of $1,129,090 for men's teams and only $253,697 for women's team." The EADA requires postsecondary educational institutions that house an

intercollegiate athletics program and participate in Title IV to prepare annual reports to the U.S. Department of Education regarding athletic participation and other relevant details.

Coaching, another factor to which Title IX applies to, the plaintiffs also allege is inequitable. The complaint alleges that coaches of male athletes have more experience. The plaintiffs allege they were subjected to the coach's "own unique rowing form" that differed from the two predominate rowing forms. The plaintiffs allege this rowing technique, along with "unreasonable training and practice regimens" led them to be more susceptible to injuries, including hip injuries.

According to the initial complaint, the plaintiffs were informed that the around 2012, the university commissioned the Carrell Clinic, orthopedic and sports medicine specialists, "to audit the SMU rowing program to determine what was causing the unusually and disproportionally high amount of hip injuries in the rowing program." The complaint alleges after reviewing the rowing, the Carrell Clinic gave SMU recommendations with how to prevent these injuries in the future, but that SMU did not implement the modifications.

The complaint alleged that not only were the rowers dealing with these injuries, but they were "subjected to heavy pressure by the coaching staff to return to regular training and practice, even while still engaging in treatment and recovery for their injuries" while also allegedly receiving substandard medical attention. The complaint provided an example that if a male athlete was in the training room at the same time as one of the female rowers, the men would receive the prioritized treatment.

About six years after these plaintiffs filed the complaint, the United States District Court of the Northern District of Texas granted SMU's motion for summary judgment on all the claims brought by the plaintiffs with the exception of Kelly McGowan. Although the court dismissed McGowan's claims for pain and suffering, emotional and psychological harm and loss of quality of life under Title IX, the court allowed her claim for compensatory damages for medical expenses for physical injuries and loss of educational opportunities and benefits, as well as her negligence claim against the university to move on.

According to the complaint, McGowan first noticed her hip injury during the fall of 2015 and told the trainer who informed her to stop rowing. McGowan did physical therapy for about seven weeks. Despite the trainer's advice, her coach allegedly told her she "just needed to 'stretch it out'" and made comments pressuring her to return quickly. When she did return, according to the complaint, the coaches had her complete a 2,000 meter on the ergometer and competed in the last two races of the season even though she was experiencing pain and the SMU sports medicine doctor who she visited "merely provided her anti-inflammatories."

The next season she was still experiencing pain, underwent more physically therapy and requested the trainer order an MRI and X-ray however, the school did not do so and McGowan's mother, according to the complaint, contacted SMU to insist her daughter receive an X-ray and only then, did she receive one.

She met with the doctor who informed her she should medically disqualified from rowing rendering her ineligible to receive scholarship increases.

Motion to strike and exclude expert testimony

SMU sought to strike portions of the expert report and exclude some testimony of the plaintiff's expert witness, Dr. Volker Nolte. The university also sought to exclude the expert testimony of Plaintiff's expert witness, Dr. Donna Lopiano. The plaintiff, McGowan, sought to strike the expert report and exclude the testimony of Tim O'Brien, SMU's expert witness.

According to the court's opinion, the plaintiff's retained Dr. Nolte as a witness to testify about "rowing, including the biomechanics of the sport and effect on the human body, training and coaching of collegiate rowers and the risk and occurrence of injuries. Specifically, . . . to provide opinions related to the incidence of hip injuries suffered by [SMU's] rowers." SMU alleged that Dr. Nolte's testimony should be excluded because "1) Nolte is unqualified to provide expert testimony regarding medical causation and assessment, the standard of care for strength and conditioning coaching, athletic training, and women's rowing coaching at United States universities, respectively; and (2) Nolte's opinions with respect to the factors that allegedly led to a high frequency of hip injuries on the SMU rowing team, and that the frequency evidenced a 'systemic problem' are unreliable."

The court granted the motion in part, striking and excluding testimony from him about the "cause of the plaintiff's specific injury, medical opinions, or the standard of care for athletic trainers." However, the court denied the motion otherwise, therefore, Dr. Nolte may still testify about rowing and strength coaching given his experience in rowing, coaching and educating other rowing coaches.

According to the court's opinion, the plaintiffs retained Dr. Lopiano to testify about "SMU's provision of athletic opportunities to male and female athletes." SMU alleged that Dr. Lopiano's testimony should be excluded because "(1) they are not relevant, (2) they are unreliable, and (3) they will not assist the jury." The court granted the motion in part stating that the testimony must be limited to discussion of Title IX treatment in the areas of "coaching, equipment, and access to medical facilities and personnel," since those are topics relevant to the plaintiff's claim.

Lastly, according to the court's opinion, SMU retained O'Brien as a witness to "opine on Title IX matters and assess Dr. Lopiano's expert reports by providing opinions on her analysis, her discussion of the various issues contained therein, and the findings she reached." The plaintiff requested the court excluded the testimony because "(1) it consists of improper legal conclusions, (2) it will not assist the jury, and (3) it's irrelevant and unreliable." The court granted the motion to strike and exclude the testimony "to the extent it explains legal requirements or contains impermissible legal conclusions" but otherwise denied the motion.

Next steps

This case is set to go to trial on Dec. 2, 2024, nearly seven years after McGowan and the other original plaintiffs filed this case.

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Court Provides Relief to High School Athlete in Case Involving Knee Injury

A federal judge from the Western District of Oklahoma has given new life to a lawsuit brought by the mother of a high school athlete, who claimed his coaches, the defendants, put him in a football game before his knee had healed, causing him to re-injure his knee.

By way of background, the high school athlete (D.W.) sustained an injury to his right knee while playing for the Shawnee High School football team in 2020. The injury required surgery and months of physical therapy. On September 13, 2021, D.W. had completed physical therapy, but was not medically cleared to resume playing football. In addition, Plaintiff had not signed a form granting parental consent for him to play. Nevertheless, defendants Tyler Harrison and Darrin Dean, Shawnee High School football coaches, put D.W. in to play in a junior varsity game, allegedly "in violation of school policies." In the course of that game, D.W.'s right knee was re-injured, resulting in another surgery.

The mother of D.W., the plaintiff, sued Harrison and Dean, as well as defendant Shawnee Public Schools in state court, alleging three causes of action: (1) negligence; (2) deprivation of constitutional rights in violation of 42 U.S.C. § 1983; and (3) violation of rights under the Oklahoma Constitution. The case was removed to federal court because of the § 1983 claim, where the defendants filed their motion to dismiss, pursuant to Fed. R. Civ. P. 12(b), or failure to state a claim.

In response, the plaintiff attached evidence that was not part of the complaint.

The court noted that a document central to the plaintiff's claim and referred to in the complaint may be considered in resolving a motion to dismiss, at least where the document's authenticity is not in dispute. The evidence—plans and policies governing school sports promulgated by Shawnee Public Schools and the Oklahoma Secondary Schools Activities Association—are referenced in the complaint and central to at least the plaintiff's negligence claim. Neither party disputed the authenticity of these documents, thus the court considered whether they were relevant.

Section 1983 provides that any person acting under color of law who deprives a United States citizen of "any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law."

To hold an entity or person accountable, a plaintiff generally must show that the alleged violative actions were "representative of an official policy or custom" or "taken by an official with final policy-making

authority." Liability may also attach in circumstances where "a state actor affirmatively acts to create, or increases a plaintiff's vulnerability to, or danger from private violence." To state a prima facie case for "danger creation" in violation of substantive due process rights, a plaintiff must show that:

"(1) state actors created the danger or increased the plaintiff's vulnerability to the danger in some way, (2) the plaintiff was a member of a limited and specifically definable group, (3) the defendants' conduct put the plaintiff at substantial risk of serious, immediate, and proximate harm, (4) the risk was obvious or known, (5) the defendant acted recklessly in conscious disregard of that risk, and (6) the conduct, when viewed in total, shocks the conscience." Robbins v. Oklahoma, 519 F.3d 1242, 1251 (10th Cir. 2008)

The plaintiff's complaint alleges that the defendants deprived D.W. of "his right to a safe school environment and right to an education free from physical harm," as well as a general "deprivation of constitutional rights under the 14th Amendment." Notably, the plaintiff relied almost exclusively on a danger creation theory.

The defendants raised two primary challenges to the plaintiff's danger creation claim. First, they say that the plaintiff "has failed to allege any affirmative action on the defendants' part, a necessary precondition for the theory to apply at all. In the defendants' framing, Harrison and Dean's disregard of the defendant school district's policies in deciding to play D.W. in the football game was merely negligent. Second, the defendants argue that the alleged conduct falls short of shocking the conscience. Surveying other cases involving athlete injuries, the defendants conclude that playing a medically ineligible student in a football game is not so "egregious, outrageous or fraught with unreasonable risk" as to clear the high bar of conscience shocking. Ruiz v. McDonnell, 299 F.3d 1173, 1184 (10th Cir. 2002)

Of course, the plaintiff viewed "things differently," according to the court. "From her perspective, the defendants made the decision to play D.W. in the game, with full knowledge that he was not eligible under the applicable policies. That decision, she says, was an affirmative action sufficient to bring the danger creation doctrine into play. As for shocking the conscience, the plaintiff simply restates some of her factual allegations and concludes that the element is satisfied. The plaintiff cites no case law to support her contention, nor does she attempt to distinguish or contextualize the precedents cited by the defendants.

"Accepting the alleged facts as true, and taking all reasonable inferences in favor of the plaintiff, the court finds that, for defendants Harrison and Dean, the plaintiff has pleaded an affirmative action leading to private violence, satisfying the preconditions to consider the danger creation elements." The court acknowledged "the line of cases cited by the defendants that hold that a failure to act or mere negligence is not enough. But here, the plaintiff does not merely allege that the defendants Harrison and Dean made the decision to play D.W. while negligently failing to check his eligibility. Rather, she alleges that they made that decision with full knowledge that he was ineligible under the school policies. At this early stage, that alleged reckless disregard is enough. As for the defendant school district, the court finds no allegation of affirmative conduct that could open the door for danger creation liability.

"Turning then to the danger creation elements, the court finds that the conduct alleged, viewed as a whole, does not shock the conscience. The Tenth Circuit, and other courts to apply the standard, have made clear that shocking the conscience of a federal judge is no mean feat. Indeed, it applies only in "exceptional circumstances." Ruiz, 299 F.3d at 1184. "[A] plaintiff 'must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.'" Conduct must be "egregious, outrageous, or fraught with unreasonable risk," something "more than an ordinary tort."

The alleged conduct of defendants Harrison and Dean "simply does not rise to a level of outrageousness that shocks the conscience," according to the court. "D.W. was a former student athlete who had recently completed physical therapy for his prior injury. Even accepting as true that D.W. had not been attending practice, and that Harrison and Dean knew that he was not medically cleared to play and that Plaintiff had not consented to him participating, their decision to put him into the game was not so egregious as to violate the Constitution. Especially in the area of school sports, where there exists an accepted baseline risk of injury, conduct must be truly heinous, greatly increasing the

magnitude of potential harm, before it will shock the conscience."

The plaintiff "has failed to plausibly allege a § 1983 claim on a state-created danger basis," the court continued. "She has alleged no affirmative action proximately resulting in injury on the part of the defendant school district, and the conduct alleged on the part of defendants Harrison and Dean does not rise to the level of shocking the conscience."

However, "for the first time" in her response, the plaintiff argued that she herself suffered due process injuries, in that she was deprived of her constitutional right as a parent to direct the care, upbringing, and education of her child. "This argument is wholly divorced" from the complaint, "which alleges constitutional injuries only on the part of D.W."

The plaintiff, thus, asked the court for leave to amend her complaint.

"Although the Court has its doubts, it cannot say for certain that any such amendment would be futile." Thus, it granted leave to amend the complaint with the due process argument.

Monica Williams, individually and as parent and next friend of D.W., a minor v. Shawnee Public Schools, Tyler Harrison, and Darrin Dean; W.D. Ok.; Case No. CIV-23-123-PRW; 3/25/24

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California State Court Judge Dismisses Los Angeles County from Lawsuit Brought by Intoxicated NFL Fan

Inglewood Superior Court Judge Ronald F. Frank has dismissed Los Angeles County from a lawsuit brought by a fan, who claimed deputies outside SoFi Stadium during the 2022 NFC championship game should have put him in a form of protective custody.

Luna encountered the deputies after he was denied entrance to the stadium for not having a ticket. It was at that point, Luna's attorneys argued, that the deputies should have placed him in a "sobering cell or a similar room or an automobile" so he would not be a danger to himself or others.

Instead, the attorneys for Daniel Luna claimed the deputies placed him "near groups of competing fans who were consuming large amounts of alcohol during a rivalry game."

Ultimately, Luna got into a fight with Bryan Alexis Cifuentes, who dropped Luna, who was wearing a 49ers jersey, with one punch. Later, a security guard found him in the parking lot. Luna was then taken to Harbor-UCLA Medical Center, where he was placed in a medically induced coma.

Judge Frank wrote that "the Sheriff's Department did not create the peril in which plaintiff found himself. (Luna) alleges that he was already inebriated when he was detained initially. The sheriffs took no affirmative action which contributed to, increased, or changed the risk which would have otherwise existed."

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Articles

Considerations for College Athletics Stakeholders Implementing Recent NCAA Rule Changes in Light of Historic Settlement

By Traci Bransford and Lexi Trumble, or Parker Poe

The ever-evolving collegiate athletics landscape experienced back-to-back seismic shifts in April and May 2024 when the NCAA Division I Board of Directors ratified two rule change proposals from the Division I Council, and news of the long-awaited *House* settlement broke. Recently-adopted NCAA rule changes grant student-athletes two massive wins: increased flexibility to transfer schools and retain immediate eligibility and, second, access to additional institutional support and assistance with name, image, and likeness (NIL) activities. With NIL monetization at its core, the

House settlement provides for payment of $2.8 billion in back damages to former student-athletes and permits prospective revenue-sharing of up to approximately 22% of the average Power Five school's revenues, which is anticipated to begin in the fall of 2025.

These changes come in the wake of significant litigation battles, targeted legislative efforts, and passionate national discourse surrounding the current and future state of college sports. The NCAA rule changes (effective upon adoption) and the *House* settlement's terms (currently being negotiated) require careful consideration by student-athletes, athletics administrators, and third parties alike to avoid potentially catastrophic legal pitfalls.

Institutional NIL Support: A Play by Play

Much like a dominant offense's shots on goal, NIL developments just keep coming following the implementation of the NCAA's interim policy in July 2021. Perhaps foreshadowing the landmark *House* settlement which would come just one month later, the April adoption of new NIL rules permits institutions to increase NIL-related support for student-athletes, including by identifying NIL opportunities and facilitating deals between student-athletes and third parties.

To receive that school support for their NIL activities, however, student-athletes are required to disclose to their school information related to NIL activities equal to or exceeding $600 in value no later than 30 days after entering or signing the NIL agreement. Student-athletes' receipt of this increased institutional support is contingent upon their disclosure of information regarding their NIL activities, including applicable parties' contact information, services rendered, term length, compensation, and payment structure. Prospective student-athletes will be required to disclose the same information for pre-enrollment NIL activity within 30 days of enrollment to accept school assistance in NIL activities after becoming a student-athlete. The NCAA clarified that student-athletes are not obligated to accept assistance from the school and that they must maintain authority over the terms in their own NIL agreements.

Important guardrails still surround NIL activity, although they're toppling quickly. When announcing the rule changes, the NCAA stated explicitly that existing prohibitions against outright pay-for-play and schools compensating student-athletes directly for use of their NIL would remain in place. Usurped by news of the *House* settlement, however, that ban on direct compensation flowing from schools to student-athletes may prove all but extinct. As competing authority from the NCAA, federal courts, and state legislatures continues to emerge, the ways in which boosters, collectives, conferences, and institutions alike render NIL assistance to current and future student-athletes must evolve with flexibility and dexterity.

Compliance with federal statutes, including Title IX, remains paramount as schools adjust to recent developments. Title IX of the Education Amendments of 1972 is a federal law that prohibits sex discrimination in any federally funded education program or activity and requires gender equity in 13 different athletics program areas. Institutional support for or facilitation of NIL activities may implicate at least two of those Title IX program areas — athletic financial assistance and publicity.

With respect to athletic financial assistance, the U.S. Department of Education's Office for Civil Rights (OCR) has declared in guidance documents related to athletic scholarships and cost of attendance that "athletic financial assistance includes any financial assistance expenditures through the institution's athletics program and any other aid that is connected to a student's athletic participation." Direct compensation of student-athletes for NIL activities flowing from an education institution may effectively double schools' budgets for such NIL payments: Title IX may require the school to make equivalent benefits proportionately available to male and female athletes. Alternatively, categorization of *House*-permitted NIL payments flowing from a school, a conference, or even a collective may be deemed purely market-driven, and the payments themselves may fall outside of Title IX's ambit. The mechanisms by which the revenue-sharing payments are made will continue to foster discussion and debate until the terms of the settlement are fully negotiated.

The requirement to equitably provide male and female student-athletes with publicity resources, however, is absolutely triggered when institutions exercise greater control over NIL activities. Schools are required to expend equitable efforts to publicize male and female athletes, and neither news of the market-driven

House settlement nor the permission to offer increased "assistance in supporting [NIL] activities" granted by the NCAA in May relieves institutions of their obligations that gender equity mandate.

Institutions should engage experienced legal counsel to advise coaches, athletics administrators, compliance staff, and other athletics stakeholders on the complex (and evolving) regulatory and statutory schemes governing NIL activities. As the NCAA and state legislatures continue to move the chains with respect to "permissible" NIL activities, Title IX remains a pivotal piece of civil rights law and requires schools to promote aggregate gender equity.

Transfer Athletes' Eligibility: Out of the Penalty Box

Also, effective as of the date of adoption, Division I student-athletes who transfer will be immediately eligible to play at their next school, regardless of whether they transferred previously — as long as they meet certain academic eligibility requirements. Under the new guidelines, transfers must have left their previous school in good standing (not subject to disciplinary suspension or dismissal) while academically eligible and will have to meet progress-toward-degree requirements at their new school in order to receive immediate eligibility. Student-athletes are expected to enter the transfer portal within their sport's notification-of-transfer windows (except in the case of the departure of a head coach or discontinuation of a sport), and athletes are not able to transfer mid-year and play for a new school in the same athletic season. Division II leadership passed similar legislation eliminating year-in-residence requirements and implementing new academic standards for immediate eligibility.

The revision of the transfer eligibility rules intersects with changes to permissible NIL activities in that schools must now contend with NIL discussions related not only to attendance at a particular institution but also to student-athlete retention. As student-athletes consider significantly expanded enrollment options for their collegiate athletics career, schools should remain mindful of rules restricting (or permitting) NIL opportunities related to recruitment and retention. Coupled with terms of the *House* settlement foreshadowing the elimination of NCAA scholarship limits and revision of roster caps, increased transfer flexibility will require compliance staff and athletics administrators to carefully monitor numerical trends and proportions relevant to Title IX's requirements to provide equitable athletics participation opportunities and financial assistance to male and female student-athletes.

Conclusion: Reviewing Recent Game Film

Recent rule changes and litigation outcomes represent the continuation of shifting attitudes toward and regulation of collegiate athletics nationwide. Consultation with experienced legal counsel is critical as colleges and universities grapple with implementing recent developments and avoid potentially costly legal landmines.

Traci Bransford is a partner in Parker Poe's Atlanta office and leads the firm's Sports & Entertainment Industry Team. She can be reached at tracibransford@parkerpoe.com.

Lexi Trumble is an associate attorney in Atlanta and focuses her practice on advising colleges and universities on a range of complex compliance issues, with a particular focus on Title IX gender equity and college athletics. She can be reached at lexitrumble@parkerpoe.com.

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Game, Set(tle), Match: The Impact of the Proposed Settlement of *House vs. NCAA* on College Athletics

By Paia LaPalombara

In the ongoing saga of the House vs. NCAA class-action lawsuit, a pivotal moment has emerged with the announcement of a proposed settlement agreement. This agreement, if approved, promises to reshape the landscape of college athletics and address long-standing issues surrounding athlete compensation and the structure and future viability of amateurism. With significant implications for student-athletes, universities, and the NCAA, the proposed settlement marks a crucial turning point in the evolution of collegiate sports.

At the heart of the House vs. NCAA case, which also resolves Carter v. NCAA and Hubbard v. NCAA, is to what extent former, current, and future student-athletes will gain access to a myriad of financial resources and revenues coursing through college athletics. These

financial pipelines include whether student-athletes should receive a share of the athletically-related revenue they generate, whether former student-athletes within the statute of limitations should qualify for Alston backpay, and whether student-athletes should be compensated for the lost potential of name, image, and likeness (NIL) revenue. The comprehensive settlement aims to provide litigation relief for the NCAA, although other legal challenges remain. Once the preliminary settlement agreement is submitted to the court for approval, and if Judge Claudia Wilken preliminarily approves the terms, the appropriate classes would be notified of their opportunity to either opt out or object to the terms of the agreement. That's followed by a final approval hearing at which point, if approved by Judge Wilken, the settlement agreement goes into effect.

Key Settlement Details

The proposed settlement includes key terms that are not overly prescriptive, but rather provide institutions with the discretion to provide more benefits to student-athletes:

- **Back-Pay Damages:** The NCAA will pay over $2.75 billion in back-pay damages to former Division I athletes over a 10-year period. This figure, if contested at trial, could have had financially devastating implications for the NCAA.
- **Funding Breakdown:** The NCAA will cover roughly $1.2 billion (42%). The remaining 58% will be distributed among the Division I conferences based on their NCAA distributions over the past nine years, with Power Five conferences contributing 24%, FCS conferences contributing 13%, and non-football conferences contributing 12%. Lower-resourced Division I programs expressed concerns about the disproportionate financial burden this model imposes on them.
- **Revenue Sharing:** Beginning in 2025-26, 22% of the average revenues of Power Five programs will be allocated for revenue sharing, translating to over $20 million per school per year. This percentage is expected to increase over time. The model is optional, allowing schools to decide which athletes in which sports will receive payments. This revenue sharing is in addition to scholarships, NIL payments, healthcare, and other benefits.
- **Scholarship Caps:** The settlement will eliminate NCAA scholarship limits, replacing them with roster limits per sport. The specifics of this new system are yet to be detailed but are expected to offer flexibility in scholarship distribution.

Broader Impact and Unresolved Issues

The proposed settlement raises numerous questions and concerns for institutions, conferences, and student-athletes, including:

- **Revenue Distribution:** The 22% revenue share is significantly lower than what professional athletes receive, potentially fueling continued unionization efforts and debates about student-athletes' employment status.
- **Fontenot vs. NCAA:** This anti-trust case, filed in Colorado, seeks damages for the restrictions on student-athlete compensation beyond NIL. There was a motion to transfer this case to California, which was denied. As such, this case currently exists outside of the House vs. NCAA proposed settlement structure and is a reminder that the NCAA is still not immune to anti-trust litigation. This also raises general questions about whether this proposed settlement itself provides long-term stability for the NCAA.
- **Financial Strain on Programs:** New financial obligations may lead to schools cutting or financially tiering varsity sports, reclassifying varsity sports to club level, cutting athlete resources, or reducing administrative positions. The proposed settlement could also widen the gap between high-revenue and lower-revenue programs, possibly accelerating the creation of super conferences or a super league in high-revenue football programs. If institutions consider cutting sport programs, resources, and personnel, Title IX compliance should be at the forefront of those conversations.
- **Title IX Compliance**: It is unclear whether the revenue-sharing model and settlement distribution formula must comply with Title IX, and no guidance has yet been provided by the Department of Education. The debate centers around whether the distribution of revenue-sharing dollars is considered "athletic financial assistance" or a "treatment

area" under Title IX, which could necessitate proportional payments to male and female student-athletes, potentially sparking further litigation.

- **Congressional Involvement:** The NCAA will seek federal and state support to codify the settlement provisions, believing the settlement framework provides sufficient anti-trust protections and advantages. The Protect the Ball Act has been introduced that would provide the NCAA, conferences, and member schools federal protection from specific legal challenges.
- **NIL Collectives:** The impact on third-party NIL collectives, which currently operate outside athletic departments, is uncertain. With increased institutional involvement soon being permitted through NCAA legislation, this may lead to further integration of NIL collectives into the university fabric. This entanglement of third-party organizations with institutions can open additional risks of Title IX compliance.

The proposed settlement agreement in the House vs. NCAA case represents a significant step towards reforming college athletics and addressing long-standing issues surrounding student-athlete compensation and treatment. If approved, the settlement has the potential to usher in a new era of transparency in college sports, empowering student-athletes to receive fair compensation from their universities for their contributions. However, the proposed reforms are not without their challenges and controversies, and the ultimate impact of the settlement remains to be seen.

LaPalombara is a partner at Church, Church, Hittle and Antrim. She has extensive experience working at a Power 5 University as well as the NCAA National Office. Her comprehensive expertise includes NCAA investigations, student-athlete eligibility matters, and NCAA compliance reviews.

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NIL and Immigration: Exploring Opportunities and Challenges

By Arit Dilip Butani and Jocelyn Campanaro

In 2021, the landscape of collegiate athletics in the United States underwent a significant shift with the introduction of Name, Image, and Likeness (NIL) regulations. These regulations allow student-athletes to profit from their name, image, and likeness, departing from the traditional model where athletes could not earn income while in college. Sports and marketing have been NIL's focus. However, its intersection with immigration presents unique challenges for student-athletes in the U.S. on student visas.

What are the challenges faced by Immigrant Student-Athletes?

Visa Restrictions: International students are granted F-1 visas/status so that they may live and attend school in the United States. The F-1 status has strict employment and income regulations that often prohibit international students from working. Engaging in NIL activities could potentially violate these visa terms, leading to complications such as visa revocation or deportation.

Is NIL considered active or passive income? According to the Department of Homeland Security, F-1 students can earn active income in the following ways:

1. F-1 students are generally allowed to work on-campus part-time (up to 20 hours per week) during the academic year and full-time during breaks and holidays.
2. F-1 students may be eligible for Curricular Practical Training (CPT) or Optional Practical Training (OPT), which allows them to work off-campus in jobs related to their field of study either during school or after graduation.

If the NIL compensation requires minimal or no ongoing effort from the student-athlete, this could be considered passive income, which may be permissible under immigration law. However, if a student receives NIL compensation for services from the student-athlete, this would be considered active income, though would not be covered by one of the abovementioned exceptions.

Given the gray area, whether NIL income is active or passive, what visa options are available for student-athletes to earn income without violating their immigration status?

P-1 Visa:

The P-1 visa is for athletes and entertainers with internationally recognized talent and achievements. It offers a means for athletes to compete in professional sports leagues, tournaments, or events in the United States. To qualify for a P-1 visa, a student-athlete must be part of a recognized sports league or team or have achieved significant international recognition in their sport.

Requirements for the P-1 Visa:

- Evidence of Achievement: Athletes applying for a P-1 visa must provide documentation demonstrating their significant achievements in their sport. This may include awards, rankings, records, media coverage, and endorsements that attest to their exceptional skill and recognition within their field.
- Contract or Invitation: An essential requirement for the P-1 visa is a contract or written agreement with a U.S.-based sports team, league, or organization. Alternatively, student-athletes may provide evidence of an invitation to participate in a specific sporting event or competition in the U.S.
- Supporting Documentation: In addition to the contract or invitation, student-athletes must submit a written consultation from a governing association or organization stating no objection to their sponsorship along with substantial supporting documentation, such as letters of recommendation from coaches or sports officials, professional references, and evidence of past performances, to strengthen their visa application.

Extraordinary Ability Visa (O-1 Visa):

For athletes who possess exceptional talent and achievements in their sport, the Extraordinary Ability visa, or O-1 visa, offers an alternative to the P-1, which may be prohibitive based on a lack of team affiliation or the nature of the field of excellence. Individuals who qualify for an O-1 visa must demonstrate extraordinary ability or sustained acclaim in their field, whether sports, arts, sciences, or business.

Requirements for the O-1 Visa:

- Extraordinary Ability: To qualify for an O-1 visa, student-athletes must provide evidence of their extraordinary ability or achievement in their sport. This may include accolades such as Olympic medals, world championship titles, national team appearances, or recognition from authoritative sports organizations. If someone does not have a record of such acclaim, they may still qualify if they can provide documentation establishing their extraordinary ability by meeting 3 of 10 listed criteria.
- Expert Consultation: Student-athletes applying for an O-1 visa must obtain an advisory opinion from a recognized expert or industry peer attesting to their extraordinary ability and contributions to their sport.
- National or International Acclaim: To establish extraordinary ability, student-athletes must show that they have garnered sustained national or international acclaim in their sport, as evidenced by media coverage, rankings, endorsements, and other indicators of prominence.

Employment-based preference ("EB-1") category set aside for "extraordinary ability"

This category requires athletes to demonstrate sustained national or international acclaim and achievements recognized in the field. The U.S. Citizenship and Immigration Services ("USCIS"), the Homeland Security division overseeing immigration, defines "extraordinary ability" as a "level of expertise indicating that the individual is one of those few who have risen to the top of the field of endeavor." The criteria for an EB-1 extraordinary ability green card is similar to that for an O-1 visa, however, the standard of review is much higher.

Requirements for the EB-1 category:

- Extraordinary Ability: The EB-1 classification requires petitioners to demonstrate extraordinary ability reflected by sustained national/international acclaim, achievements recognized in the field, which must be extensively documented, and show that the foreign national has the intent to enter the U.S. to continue to work in the extraordinary field while substantially benefiting the U.S.
- If the student-athlete cannot present evidence of a highly acclaimed sports recognition or awards such as an international championship,

the student-athlete must show evidence of at least three of ten criteria, including Receipt of lesser recognized prizes or awards for excellence; Membership in associations requiring as a condition of membership outstanding achievements as adjudged by recognized experts; Published material in professional or major trade publications or major media about the person and their work; Participation as a judge of others in the field; Performance in a critical role for an organization with a distinguished reputation; and Command of a high salary or other high remuneration.

Until the Department of Homeland Security clarifies whether NIL money can be passive income without jeopardizing a student-athlete visa for F-1 student-athletes, there are options available to student-athletes that would allow them to transition from their current F-1 visa to either a P-1 visa or O-1 visa, thereby allowing them to receive monetary compensation for their participation in their sport. To do so, however, requires meeting the rigorous criteria and providing compelling evidence of their talent, achievements, and international recognition. With a solid record of demonstrated achievement, industry support, and recognition, many student-athletes may find a path to earning NIL money without impacting their immigration status and ability to permanently reside in the United States.

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The *Rashada* Lawsuit: A Wakeup Call for Compliance Offices and Coaches

By Kasey Havekost and Joel Nielsen, Bricker Graydon, LLP

One of the first ever NIL lawsuits, *Rashada v. Hathcock, et al* (Case No. 3:24-cv-00219-MCR-HTC, N.D. Fla.), focuses on broken promises related to an NIL deal during the recruiting process. This case raises questions about the parties involved, whether the arrangement and communications adhered to NCAA guidelines at the time, and the potential impact of this significant and possibly precedent-setting case on compliance offices and coaches.

The rise and fall of the record-breaking NIL deal

On May 21, 2024, a former football recruit for the University of Florida (UF), Jaden Rashada (Rashada), filed a lawsuit in the Northern District of Florida against the UF's Head Football Coach, Billy Napier, and Director of Player Engagement and NIL, Marcus Castro-Walker – as well as an NIL collective and the collective's CEO – for allegedly failing to follow through on its offer to pay Rashada $13.85 million in NIL money in return for committing to UF. According to media reports, this was rumored to be the most lucrative NIL deal at the time.[7]

The complaint alleges that Castro-Walker, who appeared to report to the University of Florida's head football coach, texted Rashada's agents in October 2022 to persuade Rashada to decommit from Miami and commit to UF by offering an NIL deal exceeding the $9.5 million he was set to receive at Miami.[8] As National Signing Day approached, the lawsuit alleged that head coach Napier promised Rashada $1 million if he signed his National Letter of Intent. However, Rashada further alleges that he only received $150,000 before transferring. The quarterback asserts that the defendants devised a "bait-and-switch" scheme, luring him to UF with a lucrative NIL deal they never intended to honor.

Notably, the named Defendants have yet to respond to the complaint by filing an answer or a motion.

A compliance failure?

At the time of Rashada's recruitment in the fall of 2022, the NCAA banned using NIL agreements as "recruiting inducements," meaning prospective athletes could not negotiate NIL deals before committing to a member institution.[9] The NCAA also prohibited collectives, classified as "boosters," from engaging in NIL discussions with prospective athletes.[10] Collectives that engaged in recruiting conversations on behalf of a school put institutions in a difficult spot as it would have been

7 Crabtree, Jeremy. *Jaden Rashada turned down millions, will still have highest known NIL deal for recruits*, On3NIL. https://www.on3.com/nil/news/jaden-rashada-turned-down-millions-will-still-have-highest-known-nil-deal-for-recruits/ (June 26, 2022).

8 P 26, 31, 32.

9 *See* NCAA, Interim NIL Policy (July 2021).

10 *See* NCAA, Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement (May 9, 2022).

the institution held responsible for any impermissible recruiting.[11]

Fast forward a year and a half: neither UF nor any other school, will have to entertain the idea of enforcement actions from the NCAA for NIL-recruiting rules. This, of course, is due to a preliminary injunction, issued in February 2024, which prohibited the NCAA from enforcing its so-called "NIL-recruiting ban," i.e., the NCAA guidance that prohibited boosters and collectives from communicating with athletes about NIL opportunities before they committed to a particular school.

If the logic follows, and even if what Rashada is alleging is proven true, it's not likely that the University of Florida will see any significant consequences for its actions, despite the fact that those actions – per the letter of NCAA rule – were impermissible. *Basically, if the NCAA isn't investigating it, then does it really matter?*

Let's say the NCAA were to investigate: University of Florida could be looking at similar analysis and outcome as its in-state rival, Florida State University (FSU). Recall that on January 24, 2024, before the NCAA was barred from enforcing NIL-recruiting rules, the NCAA found "Florida State assistant football coach violated NCAA rules when he facilitated an impermissible recruiting contact between a transfer prospect and a booster" and the booster was the chief executive officer of an NIL collective.[12]

It seems as though the FSU case just serves to shine a spotlight on what the NCAA once found egregious enough to punish but is now curtailed from pursuing. So if what Rashada alleges is true, the booster's involvement – with the help of University employees – in negotiating an NIL deal would likely constitute violations of NCAA recruiting bylaws *that were in place at the time. Key phrase being: at the time*.

11 *See* NCAA Constitution 2.1.2 and 2.8.1, and Division I Bylaw 13.01.2 – Institutional Responsibility.

12 *NIL-related recruiting violation occurred in Florida State football program*, NCAA (January 11, 2024), https://www.ncaa.org/news/2024/1/11/media-center-nil-related-recruiting-violation-occurred-in-florida-state-football-program.aspx

What can compliance offices do to monitor head coaches compliance?

While Rashada's recruitment is likely water under the bridge for the NCAA, this fact pattern serves as a wakeup call for coaches and compliance officers.

For compliance officers, it offers an opportunity to reassess how their institution is monitoring NIL compliance. It is no surprise that the guidance and rules surrounding NIL are changing in real-time based on lawsuits, rewriting of state laws, and shifting NCAA guidance. The flexibility of the guidance also oftentimes lends itself to a considerable amount of discretion and institutional risk, making any sort of uniformed approach unlikely.

One NCAA bylaw that does hold true is Head Coach Responsibility. Known as being one of the most frequently violated bylaws, under NCAA Bylaw 11.1.1.1, head coaches are presumed responsible for violations that occur under their watch (within their program). To promote compliance:

- Hold educational sessions to remind coaches and staff of boundaries and expectations related to NIL, collectives, recruiting, and other relevant bylaws;
- Keep an open line of communication and encourage coaches and staff to ask about the permissibility of an act before acting;
- And more, as outlined by the NCAA.[13]

In light of the Rashada case and given that NIL is often linked to recruiting, it is a good time to review the institution's obligations related to NIL under the NCAA bylaws and form an approach to monitor compliance.

Coaches could face more dire consequences

As for coaches, the lawsuit has the possibility of holding University employees personally liable for the promises they make during the course of recruiting a prospective athlete. Coaches could also face serious employment repercussions. Generally all head coaching contracts contain some type of language where they can be fired for cause if they are "fraudulent or

13 Head Coach Responsibility Educational Document, NCAA, https://ncaaorg.s3.amazonaws.com/enforcement/d1/D1ENF_HeadCoachResponsibilityEducationalDocument.pdf

dishonest" in their duties (which almost always lists recruiting).

This begs the question: if a head coach (or staff) provides fraudulent information during the recruiting process as it relates to available NIL money, as alleged by Rashada, does that give the institution ample reason to terminate a head coach for cause?

The answer: *Possibly.*

We have yet to see a head coach terminated for violating any type of NIL rule or law, but we have seen plenty of examples in the past where coaches were let go for violating NCAA rules. In the *Rashada* lawsuit, it is difficult to determine whether the University employees' alleged conduct – including the head coach – could serve as the basis for a "for cause" termination because it was arguably impermissible at the time but, now, unenforceable.

While a federal court has forced the NCAA to turn away from enforcing NIL-recruiting related rules, this lawsuit may set impactful precedent for coaches, athletic department staff, and NIL collectives negotiating NIL deals.

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Contractual Dispute in Volving 49ers Resolved in Santa Clara

By Gil Fried, Editor-in-Chief

A long-standing dispute between the City of Santa Clara, Calif., and the San Francisco 49ers over various costs was recently resolved. The primary issues that generated the most media coverage over the dispute, that traced itself back to the 2017-18 contract year, revolved around policing and buffet costs at Levi's Stadium. The dispute revolved around who should foot the bill as the costs have been steadily increasing.

The settlement should funnel around $20 million into the City's general fund over the next two years. The team/stadium had paid for expenses for the police and the buffet offered to some luxury seating customers, and the City was responsible for repaying parts of those expenses. The settlement reduced the amount the City owed to $14.8 million over the covered seasons (2017-18-2023-24). The settlement also would inject $7.1 million in performance rent into the City's general fund. Further, the agreement increased the police-cost threshold by $108,000 per game. That is the amount the team pays for NFL.

Originally, the cap was set at $170,000 per game with a 4% annual increase. From the beginning police costs exceeded thresholds by $75,514. Ever since, the costs have exceeded the threshold for every full season (not counting the Covid shut down). The cost for police presence has skyrockets over the years and the estimate for the 2023-24 season are $521,494 per game. That is $299,531 over the threshold. The new agreement increases the security cost threshold to $360,000 per game. Costs exceeding the contractual threshold were to be reimbursed by the stadium authority through payments out of the authority's discretionary fund or as credits against what would otherwise be the stadium's facility rent obligation. That could mean the city would be on the hook for about $3 million per year in just police costs. As an example, the team had previously paid for police overtime expenses for games such as a Christmas game in 2023. When the team said they would not pay the City was on the hook for $100,000 in overtime police costs.

The buffet part of the agreement focused on amounts the Santa Calara Stadium Authority was supposed to reimburse the stadium management company for complimentary buffet for 942 designated stadium lease holders in various sections. The agreed amount was $90,000 for every NFL game and that amount could increase 3% a year starting in 2025. The city will try to recoup some of these expenses by adding a $4 added ticket surcharge for non-NFL games. This will push that surcharge from $4 per ticket to $8 per ticket. An additional provision increased the youth /senior fee from 0.35 to 0.40 per ticket.

The key for this settlement is to examine what the added costs are for police and security presence at a major event. At a certain point the teams, leagues, venues, municipalities, and others will need to examine how to reduce such costs as the added burden will eventually fall to voters or ticket buyers who might balk at a significant increase in costs just to pay for security. Security is critical, but the question is always who will pay for it.

Fried is a Professor and Associate Dean of Academics and Accreditation for the College of Business at the University of West Florida.

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NBA Fan Sues Arena Owner and Staffing Company After She Was Assaulted in Bathroom

A female Denver Nuggets fan who was attending a 2023 playoff game against the Los Angeles Lakers when she was assaulted in the bathroom by two other women in a case is mistaken identity has sued the women, the owners of Ball Arena (Kroenke Sports & Entertainment) and Argus Event Staffing, claiming the bathroom area was not properly staffed.

Plaintiff Kathy Kim alleges in her complaint that she was washing her hands when "two drunk women walked up to her and asked if she was talking trash," according to media reports. Shortly thereafter, the women attacked her, according to the lawsuit.

Just outside the bathroom, a male security guard was allegedly hesitant to enter the women's bathroom, which allegedly led to Kim suffering further harm. A medical examination revealed that Kim was diagnosed with post-concussion syndrome, communication problems and other injuries as a result of the assault.

The plaintiff is suing Kroenke and Argus for negligence as well as negligent supervision, training, hiring and retention, seeking an unspecified amount of money for damages, economic loss, emotional distress and pain and suffering.

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Proposed 3-On-3 Women's League Highlights Contract Differences Between WNBA and NBA

By Christopher R. Deubert, Senior Writer

It was recently announced that WNBA stars Breanna Stewart and Napheesa Collier are planning to launch a new professional women's 3-on-3 basketball league, to be called Unrivaled, in January 2025. The fact that WNBA players will participate in the league highlights an important difference between the contracts of WNBA players and NBA players.

Basketball Players' "Unique Skills"

To understand the context behind the creation of this new league, it is important to understand the nature of professional basketball players' employment.

WNBA players, via their union, the Women's National Basketball Players Association (WNBPA), negotiate a collective bargaining agreement with the WNBA and WNBA clubs setting forth the core terms and conditions of their employment. The agreement governs salaries, free agency rights, benefits, the WNBA Draft, scheduling, discipline, and a variety of other matters. The most recent agreement was executed in 2020 and runs through the 2027 season.

The National Basketball Players Association (NBPA), on behalf of NBA players, negotiates a very similar agreement with the NBA and NBA clubs.

A principal component of both agreements is the Standard Player Contract (or Uniform Player Contract in the case of the NBA), the template agreement that all players and clubs must use as the basis for any contract. Players and clubs are generally limited to negotiating the terms of a player's compensation while the numerous legal provisions in the contract cannot be changed.

An important component of the Standard Player Contract is the player's agreement that he or she "has extraordinary and unique skill and ability as a basketball player, that the services to be rendered by [him/her] hereunder cannot be replaced or the loss thereof adequately compensated for in money damages."

This provision recognizes the unique abilities of professional basketball players and the difficulty in replacing them if they choose to breach their contract. Indeed, in 1990, an arbitrator ordered NBA player Brian Shaw to abide by his contract with the Boston Celtics rather than play in Italy. In a decision written by future Supreme Court Justice Stephen Breyer, a federal appeals court **upheld that ruling** based in part on the "unique skill" provision.

Basketball Players' "Prohibited Activities"

In further recognition of basketball players' unique skills, both the WNBA and NBA player contracts prohibit players from engaging in activities which "may impair or destroy [his/her] ability and skill as a basketball player." The NBA, for example,

prohibits players from engaging in the following non-exhaustive list of activities:

> *(i) sky-diving, hang gliding, snow skiing, rock or mountain climbing (as distinguished from hiking), water or jet skiing, whitewater rafting, rappelling, bungee jumping, trampoline jumping, and mountain biking; (ii) any fighting, boxing, or wrestling; (iii) using fireworks or participating in any activity involving firearms or other weapons; (iv) riding on electric scooters or hoverboards; (v) driving or riding on a motorcycle or moped or four-wheeling/off-roading of any kind; (vi) riding in or on any motorized vehicle in any kind of race or racing contest; (vii) operating an aircraft of any kind; (viii) engaging in any other activity excluded or prohibited by or under any insurance policy which the Team procures against the injury, illness, or disability to or of the Player, or death of the Player, for which the Player has received written notice from the Team prior to the execution of this Contract; or (ix) participating in any game or exhibition of basketball, football, baseball, hockey, lacrosse, or other team sport or competition.*

The WNBA contract contains similar prohibitions.

However, the WNBA collective bargaining agreement contains a specific exemption that makes the planned new league possible. Article XVIII of the agreement specifically states that players do not need team permission "in order to participate in the sport of basketball" in the offseason (roughly October through April). By comparison, the NBA prohibits players from playing basketball without permission from their team.

WNBA players have taken advantage of this provision for years, playing overseas to supplement their WNBA salaries, which are limited to $208,219 for the 2024 season for most players (though rookies, like Caitlin Clark, make much less). WNBA star Brittany Griner was famously detained in February 2022 by Russian police after playing for a Russian club during the WNBA offseason.

A Necessary Exemption

The new 3-on-3 league would not be possible without this exemption. Also, some might argue that the WNBA would not be as popular as it is (or is becoming) without the exemption. If the WNBA made players choose between playing in the WNBA or playing overseas for higher salaries, certainly at least some of the game's best players would forego playing in the WNBA.

The NBA does not have this problem. It is the highest paying and most skilled men's professional basketball league in the world. Consequently, it has the leverage to tell its players that they cannot participate in other basketball leagues. Indeed, NBA players cannot participate in the Big3, an elite 3-on-3 league, prompting that league's organizers (including Ice Cube) to allege that the NBA is violating antitrust laws.

If Clark and others continue to propel WNBA popularity into new territory, the league may one day desire to reduce the risks to its on-court and off-court product by barring its players from playing in other leagues. But for now, it seems we will get another avenue through which to see women's basketball players shine.

Deubert is Senior Counsel at Constangy, Brooks, Smith & Prophete LLP.

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Drexel's Jeffrey Levine Talks About Teaching Sports Law and New Role as SRLA President

When Dr. Jeffrey Levine stepped aside as SRLA President at the annual meeting in Baltimore a few months ago, every SRLA member knew what that meant. Levine, whose full-time job is that of assistant clinical professor of Sport Business at Drexel University's LeBow College of Business, wasn't going anywhere. The same passion for SRLA he exhibited as president would follow him to the role of past-president and then ultimately to just plain old member.

What follows is his interview.

Question: How did your interest in sports law come about?

Answer: My journey into sports law began as an undergraduate sport management student at the University of Michigan, where I worked for the athletic

department. Observing the impact of legal issues on the business of sports sparked my interest. This interest solidified when I took a sports law class and subsequently assisted a local sports agent in preparing for a sports law CLE with the Michigan Bar. This hands-on experience provided a practical perspective on sports law, leading me to pursue a career as a lawyer within the sports industry. I attended Tulane Law School, taking advantage of a variety of educational and practical opportunities that were part of my sports law journey.
Q: What person (or persons) was responsible for helping you achieve the goal of being a sports law professor?

A: Professors Jordan Kobritz and AJ Moorman were pivotal in my path to becoming a sports law professor. Their mentorship and introduction to SRLA were crucial in guiding my academic and professional sports law academy journey.

Q: What areas of sports law most interest you?

A: I am particularly fascinated by the intersection of sports law with other business and societal aspects. Legal frameworks are fundamental in sport business, dictating the rules of engagement across various sectors. My interest is especially piqued by legal issues in esports, predominantly concerning IP, contracts, and governance, as well as regulatory issues in youth sports.

Q: What trends are you following in 2024?

A: In 2024, I am closely monitoring the evolving governance landscape in youth sports, especially following the recent recommendations from the Commission on the State of the United States Olympic and Paralympic Committee. Additionally, the shifting dynamics in esports and college sports are of great interest, reflecting significant legal and governance changes.

Q: What's the best part of being a member of SRLA?

A: Reflecting on my first SRLA experience in 2014, I was immediately struck by the community's warmth, collegiality, and vibrant energy. These qualities have consistently enriched each SRLA Conference I've attended. The most rewarding aspect is being part of a community that not only engages in impactful work but also fosters genuine, caring relationships among its members.

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Addressing and Combatting the Dangers of Sports Gambling

By Gage Roberts, of the University of West Florida

An ever-growing practice, sports gambling has seen profound growth in recent years. S&P Global reported that Americans alone wagered a record $119.84 billion on sports in 2023 according to the American Gaming Association.

With more states legalizing sports betting every year along with online gambling companies making it easier than ever to wager, record numbers can only be expected to grow.

Looking beyond the dangers that sports gambling potentially brings to the sports themselves, the individuals participating in the process are quite vulnerable as well.

Harry Levant is an internationally certified gambling counselor who has had his own unique battle with gambling addiction as he was convicted for gambling away $2 million of stolen money in 2015.

"Gambling disorder is an addiction on the same level as heroin, opioids, tobacco, alcohol, and cocaine," says Levant. "Gambling addiction is not about money. It's about the way the product makes you feel."

While financial gain is a significant reason why people gamble, gambling itself has shown to be an addictive process. The thrill of placing a winning bet is a feeling many people find almost impossible to give up, and with such high gambling numbers, sports betting has grown far beyond simply putting down some money on a certain team to win a game.

Now, you can place bets on almost anything imaginable related to a sporting event.

For March Madness, one of the biggest gambling events of the year, DraftKings offered a lucrative amount of live in-game wagers, as well as prop bets, for users to wager on. Such as what type of field goal will come next in the game, who will be the one to score it, and whether the end score will be an odd or even number.

The idea behind these bets is to give the bettor as many opportunities to participate as possible. They require the participant to be fully engaged and

on their toes at all times ready to make bets at high speeds, which can play into that addictive feeling that many develop towards gambling.

Relatively, Florida has seen a large spike in gambling helpline calls recently. **The Florida Council of Compulsive Gambling** is projecting to receive 40,000 calls this year. Almost double the amount of calls received in 2023.

While sports betting has grown in popularity for people of all ages, perhaps the most substantial and alarming growth has been seen among the younger generation.

In a 2023 **survey** conducted by the NCAA, results concluded that sports betting is quite widespread among 18–22-year-olds. Finding that at least 58% have engaged in at least one activity related to sports gambling, while 67% of students who live on college campuses are bettors and tend to bet at a higher frequency.

In response, the NCAA launched a new campaign titled "**Draw the Line**" prior to this year's March Madness. The goal of the campaign is to educate students on the many dangers of sports betting.

Additionally, some of the largest gambling corporations in the world are coming together to help fight against problem gambling. FanDuel, DraftKings, BetMGM, Penn Entertainment, Fanatics Betting & Gaming, and bet365 are in the process of forming the **Responsible Online Gambling Association** to promote safe and responsible gambling practices.

Their efforts will also consist of an independent data clearing house. Allowing them to share information with each other in relation to consumer protection.

Major players, and competitors, in the gambling industry working together marks a substantial step forward towards a future of healthy sports wagering. Their efforts, along with Florida's helplines and the NCAA's campaign, may prove such a future is not that far away.

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Attorney Kate Porter of Vela Wood Is Featured as a Guest on Sports Law Expert Podcast

Hackney Publications (HP) has announced that Kate Porter, a partner and sports lawyer at Vela Wood, was interviewed last month on the Sports Law Expert Podcast. The segment can be heard **here**.

Porter, who is well-known for her prowess in international sports law as well as an experienced arbitrator, was interviewed at the annual conference of the Sports Lawyers Association (SLA) in Baltimore.

"Kate is a brilliant attorney, who has a stellar reputation in the sports industry," said Holt Hackney, the CEO of Hackney Publications. "She also has been an incredible role model for young female attorneys pursuing a career in sports law."

About Kate Porter

Kate Porter is a partner at Vela Wood. She focuses her practice in the areas of sports law, alternative dispute resolution and commercial disputes including in arbitration before the Court of Arbitration for Sport ("CAS"). Kate routinely counsels sports organizations on the interpretation and application of league and international federation rules and regulations. Kate also serves as a member of the Investigatory Body of the Aquatics Integrity Unit of World Aquatics and is an arbitrator before the European Handball Court of Arbitration. Kate is a Texas Bar Foundation Fellow, an honor granted to 1/3 of 1% of Texas attorneys.

In addition to her sports practice, Kate also represents commercial clients in all phases of business disputes, including pre-dispute counseling, mediation, and arbitration. Kate has successfully represented clients in complex business disputes before the American Arbitration Association (AAA) and JAMS.

Prior to joining Vela Wood, Kate spent nearly a dozen years as an attorney at Skadden, Arps, Slate, Meagher & Flom LLP in New York where she represented clients in sports related disputes. During her time at Skadden, Kate also served as clerk and ad hoc clerk to arbitration panels in sports-related arbitrations before CAS, under both the ordinary and appeal arbitration procedures. Her work on CAS matters includes disputes relating to the international transfer of players, the interpretation and application of an international federation's rules, and anti-doping matters. Kate also has represented large corporations in international arbitrations before the International Chamber of Commerce (ICC), International Centre for Dispute Resolution (ICDR), and International Centre for Settlement of Investment Disputes (ICSID).

Kate has received several recognitions from WhosWhoLegal (WWL). She's been named a Sports Global Leader in 2021 & 2022, a USA Sports Thought Leader in 2023, and a Sports & Gaming Thought Leader in 2022 – 2024 (the only Texas lawyer on this list!).

Outside of Vela Wood, Kate is a member of the Board of Directors of the Dallas Cup, one of the most prominent youth soccer tournaments in the United States. Kate is also a member of the Editorial Board, North America Panel of LawInSport, a member of Women In Sports Law (WISLaw), the co-chair of the International Bar Association's Sports Arbitration Group, the co-chair of the ABA Forum on the Entertainment and Sports Industries' Sports division, and a member of the Board of Advisers of the Jeffrey S. Moorad Center for the Study of Sports Law. She also frequently speaks on sports law-related matters and currently teaches a module to students at the Swiss School of Business and Management's MBA in International Sports Law.

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Sports Lawyer Allison Rich Appointed to NCAA Division I Council

University of New Hampshire Director of Athletics Allison Rich has been appointed to the NCAA Division I Council, effective immediately. Rich's term on the Council will continue through June 2026.

The Division I Council is the high-level group responsible for Division I's day-to-day and long-term decision-making. Its members include athletics directors, administrators, senior woman administrators, faculty athletics representatives, and student-athletes.

"I am honored to represent UNH and the America East on the NCAA Council.," Rich said. "This is an important time for college athletics, and it is critical that our student-athletes are considered as we develop our collective path forward."

Rich becomes the America East Conference's representative on the Council, which has members from every Division I conference. She will also serve as a member of the NCAA Division I Competition Oversight Committee, which has oversight responsibility of regular season and championships administration in sports other than football and men's and women's basketball.

"Allison is the perfect representative for the America East Conference during this unique time in college athletics," said Brad Walker, Commissioner of the America East Conference. "Her leadership combined with her expertise in legislation and service on various NCAA committees, positions her to be a valuable member of the NCAA DI Council. "

As the UNH Director of Athletics, Rich guides a 20-sport NCAA Division I program focused on athletic and academic excellence, engagement, providing an outstanding student-athlete experience, and developing Wildcats for Life.

Rich has been instrumental in the fundraising efforts for the Wildcats, which saw a record-setting 248-percent increase of athletic-related donations and pledges to support capital projects, endowed scholarships, and program needs to provide the best possible student-athlete experience.

New Hampshire has excelled in both athletics and academics in the two years under Rich's leadership. The ski team placed eighth at the NCAA Championships both years and the men's soccer team also won an NCAA tournament game both years, earning its highest seed in the NCAA tournament at #8. Four teams – football, men's soccer, women's soccer and swimming & diving – have won conference championships—as have several individuals.

Wildcats have been named conference Scholar-Athlete of the Year in football and men's soccer in back-to-back years, and UNH recorded is second-highest GPA in the history of the America East Academic Cup in the 2022-23 academic year.

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News Briefs

Sports Lawyer to Lead Compliance at UNC Charlotte

UNC Charlotte Director of Athletics Mike Hill has announced the promotion of Katie Renaut, who has a law degree from Elon, as Associate Athletic Director for Compliance and Student-Athlete Development. Renaut was previously the school's Assistant Athletic Director for Compliance. Renaut got her start in athletics compliance with the ACC and she also worked for the NCAA. From 2015 to 2017, she held the role of Coordinator of Athletics Compliance at Arizona State.

Sports Law Professor to Coach Hockey Team

Hiram Athletics has announced the addition of three new varsity sports, including one that will be coached by a sports law professor. Dr. Jeffrey Curto, a member of the Sports and Recreation Law Association, will coach the school's first men's ice hockey team in Hiram history, which begins play in the 2025-26 season. Prior to coaching at Hiram, Dr. Curto was the associate head coach of the Eastern Kentucky University Division III ACHA hockey team in Richmond, Kentucky in 2016. While at EKU, the Colonels won their first ever Bourbon Barrel Trophy, which was played annually against the University of Kentucky. The Colonels also played in the Indiana Collegiate Hockey Conference Championship game against Indiana University.

University of South Carolina Star Signs NIL Deal with Law Firm

Debo Williams, a star linebacker at the University of South Carolina, has signed an NIL deal with the Joye Law Firm. Through the "partnership," Williams will participate in various marketing and public relations campaigns to promote Joye Law Firm's commitment "to client care and community involvement." As part of the partnership, the firm expects Williams to:

- "Support Local Athletes: NIL deals empower college athletes to benefit from their hard work and talent. This partnership provides Williams with the resources to focus on his education and athletic career.
- "Inspire the Community: Regardless of where you fall on the Carolina-Clemson divide, one thing we can all agree on is that Debo is an exceptional young man and a solid role model for young people in South Carolina. By partnering with him, Joye Law Firm hopes to inspire the next generation of leaders, while promoting the value of hard work, dedication, and giving back.
- "Raise Awareness of Legal Issues: Through this partnership, Joye Law Firm can reach a wider audience to raise awareness of important legal issues, including the rights of injured South Carolinians."