

EXAMINING THE POSSIBLE OUTCOMES OF STATE COERCION OF NCAA NAME, IMAGE AND LIKENESS POLICY

Imagine for a moment that Kentucky and Kansas meet in the March Madness Championship. After a back-and-forth game, Kansas is down by one. Their best shooter is fouled with no time left and is sent to the free throw line. After making his first free throw, the shooter lines up to take his second shot. Just then, a Kentucky player stands directly in front of the Kansas player, arms outstretched as if to block Kansas' chance to take the free throw. Imagine, theoretically, that the Kentucky legislature had passed a law making it illegal for any athletic association to prohibit Kentucky student-athletes from interfering with free throws when a basketball championship game is tied. Further, imagine the law prohibited the association from punishing the school, team or athlete for any such violation. Imagine the outrage from the Kansas players and fans, bettors and college sports fans at large. States would all rush to pass similar or even more restrictive legislation to give their teams an advantage.

This is the dilemma college sports and states face today. Numerous states have filed bills or passed laws aimed at the National Collegiate Athletic Association's (NCAA) prohibition of student-athlete name, image and likeness compensation.¹ For example, California's Fair Pay to Play Act gives student athletes the right to make money off their name, image and likeness and prohibits the NCAA from enforcing contrary rules.² After this bill was introduced, "members of the N.C.A.A. Board of Governors...threatened California colleges' eligibility to compete in championship events and claimed the bill was unconstitutional."³ Yet, the bill was praised publicly, as 60% of adults agreed with the aims of the legislation.⁴

Influenced by states' legislation, the NCAA announced a working group to

study name, image and likeness reform. At its conclusion, the Board of Governors ordered each division to "immediately begin considering modification and modernization" of name, image and likeness bylaws.⁵

In hopes that Louisiana would "get in front of" the NCAA reform, Senator Patrick Connick, (R)-Marrero, pre-filed Louisiana Senate Bill 239 on February 27, 2020.⁶ SB 239 grants name, image and likeness rights to student-athletes by prohibiting retaliatory action from those with authority over student-athletes.⁷

This Article examines the different possible outcomes of the conflict between the NCAA and the states, with a brief focus on Louisiana. If NCAA reforms do not meet state standards, the NCAA has a number of options available to fight state coercion of their operations.

Examining the Four Likely Outcomes

Four possible outcomes exist regarding NCAA's name, image and likeness policy. First, after the NCAA reforms its policy, states could repeal their laws prohibiting NCAA policy enforcement. Second, the NCAA could seek shelter in the preempting arms of the United States Congress. Third, the NCAA could request injunctions against the laws and file a Dormant Commerce Clause challenge. Lastly, the NCAA could refuse to submit to state coercion, notwithstanding reform, and prevent member schools within name-image-likeness states from competing in championship events.

NCAA Could Seek Legislative Cooperation

The easiest possible solution would be that state laws concerning name, image and





likeness be repealed. In order for this to happen, each individual state (at last count, more than two dozen) would have to reconcile NCAA reforms with standards set in their laws, approve the reforms and then repeal the legislation.⁸ Each state, all with legislators with varying degrees of admiration for the NCAA, would need to essentially give its blessing for every NCAA reform. This could be a nightmare scenario for the NCAA, as zealous state representatives could use this to punish the NCAA for any perceived historical slight, real or imagined.⁹

Federal Preemption

Because of the complexity of the state-by-state method, the NCAA would likely prefer the passage of federal legislation preempting state laws. Federal preemption would, in essence, save the NCAA from complex and lengthy litigation, as well as possibly protect the organization from overzealous state representatives. However, there is no guarantee that federal legislators would let the NCAA off without real reforms. In fact, public comments by many indicate the opposite.¹⁰ Furthermore, the federal status of these representatives might influence a harder bargain, as selling a victory against the much-hated NCAA could score big political points for those seeking the spotlight of the national stage.

Another benefit of Congressional preemption is it would give the NCAA exactly what it is seeking—uniform standards throughout the country.¹¹ However, another legal maneuver the NCAA could dispatch to obtain similar results is a challenge based around the Dormant Commerce Clause.

Dormant Commerce Clause Challenge

Another possible outcome of the name-image-likeness fight is that the NCAA could file for an injunction and attempt to consolidate all cases into one Dormant Commerce Clause challenge. States may not “regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.”¹² Federal courts have traditionally given the NCAA wide deference regarding regulation of the “integrity of its product.”¹³ In fact, in *National Collegiate Athletic Ass’n v. Board of Regents*, the Supreme Court held that “the integrity of the ‘product’ cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its

effectiveness as a competitor on the playing field might soon be destroyed.”¹⁴

Legal experts agree that a suit based on the Dormant Commerce Clause provides the NCAA with its best chance for success. The basis for this belief lies in *NCAA v. Miller*.¹⁵ In 1991, after more than a decade of fighting between the NCAA and the University of Nevada-Las Vegas (UNLV), the NCAA charged the UNLV basketball team with “rules violations in 29 areas.”¹⁶ In response, the Nevada legislature passed a law mandating Constitutional due process protections for any Nevada citizen engaged in an athletic association enforcement proceeding.¹⁷ In *Miller*, the NCAA sued the State of Nevada under the Dormant Commerce Clause, asserting that the burden of the law on interstate commerce clearly exceeded the local benefits to Nevada.¹⁸

Though the court did not deny Nevada had a legitimate “interest in assuring that its citizens and institutions will be treated fairly,” it held that the statute was a per se violation of the Commerce Clause because it “puts the NCAA, and whatever other national collegiate athletic associations may exist, in jeopardy of being subjected to inconsistent legislation arising from the injection of Nevada’s regulatory scheme into the jurisdiction of other states.”¹⁹ Further, the court explained, “If the procedures of the NCAA are ‘to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable.’”²⁰

There is no clear distinction between what the Nevada statute did and what the multiple name, image and likeness statutes will do when actively enforced. For these reasons, the NCAA would seek to persuade a court to invalidate all state laws as per se violations of the Commerce Clause in any litigation.

NCAA Refusal to Comply

Lastly, the NCAA could either believe its reforms adequate or refuse to make any meaningful reforms to its name, image and likeness policy. However, this would put its existence in jeopardy, as many had already questioned the need for the organization long before name, image and likeness rights were discussed.²¹

Effects on Louisiana

All of the aforementioned possibilities have consequences

for Louisiana if it passes SB 239. If the NCAA wishes to pursue litigation with the states on any basis, it could get costly. The NCAA brings in over a billion dollars a year, so it would likely consider any litigation over the control of its policies worth pursuing.¹⁹

Further, in the past, the NCAA has withheld championship hosting privileges from states when the organization disagreed with state law.²⁰ This action would have a tremendous impact on Louisiana, in particular New Orleans, as it enjoys the economic benefits provided by hosting NCAA championship events.²¹

Lastly, any conflict between NCAA reforms and Louisiana law could create a conflict of standards for the NCAA. Theoretically, the NCAA could use its bylaws to declare name, image and likeness-receiving athletes and their schools ineligible. In turn, Louisiana schools could be forced to leave the NCAA for other organizations, likely made up of other name, image and likeness states. This could increase travel budgets for college athletic departments in Louisiana, as most schools are farther away than those currently on NCAA-based schedules.

Conclusion

As many as 85% of athletes on full athletic scholarships live below the federal poverty line.²² Third-party payments to student-athletes could relieve student-athlete financial strain and prevent the NCAA, conferences and schools from having to pay out of pocket. States have now prompted the NCAA to discuss compensation for student-athletes, but how the logistics and legalities of such compensation play out is yet to be seen. ■



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¹ Charlotte Carroll, *Tracking NCAA Fair Play Legislation Across the Country*, SPORTS ILLUSTRATED (Oct. 2, 2019), <https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws>.

² Cal. Educ. Code § 67456 provides: "An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness."

³ David Bayard, *After Further Review: How N.C.A.A. Division I Should Reform Name, Image and Likeness Policy*, 47 S.U.L. REV. ___ (2020).

⁴ Seton Hall Sports Poll, *American Public Supports College Athletes Receiving Endorsement Money*, SETON HALL UNIV. (Oct. 3, 2019), <http://blogs.shu.edu/sportspoll/2019/10/03/american-public-supports-college-athletes-receiving-endorsement-money-for-image-and-likeness-as-approved-in-california-this-week/>.

⁵ N.C.A.A. Bd. of Govs., N.C.A.A., Report of the NCAA Board of Governors October 29, 2019 Meeting 3 (2019), https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Oct2019BOG_Report.pdf.

⁶ Brooks Kubena, *Louisiana Bill Filed to Allow Collegiate Athletes to Make Money off Their Name, Image Likeness*, THE BATON ROUGE ADVOCATE, Feb. 28, 2020, at 9A.

⁷ S.B. 239, 2020 Leg. Sess. (La. 2020). Accessed at <https://legiscan.com/LA/text/SB239/id/2154199/Louisiana-2020-SB239-Introduced.pdf>.

⁸ Gregg Clifton, *As the NCAA Formulates Options, More States Opt to Use Legislation as the Solution for Name, Image and Likeness Rights*, NAT'L L. REV. (Jan. 25, 2020), <https://www.natlawreview.com/article/ncaa-formulates-options-more-states-opt-to-use-legislation-solution-name-image-and>.

⁹ See Kansas City Star Editorial Board, *New Missouri Bill Would Let College Athletes Be Paid*, KAN. CITY STAR (Dec. 19, 2019), <https://www.kansascity.com/opinion/editorials/article238517148.html> (suggesting use of legislation to punish the NCAA in retaliation for sanction of local teams). See also Brian Murphy, *Congress Starts Whispering About Ways to Punish the NCAA*, NEWS & OBSERVER (Oct. 4, 2017) <https://www.newsobserver.com/latest-news/article177080791.html>.

¹⁰ For example, Senator Mitt Romney warned the NCAA that "we're coming for you." Senator Chris Murphy, in a 15- page report on the subject, stated that "the NCAA today isn't acting in the best interest of many student-athletes."

¹¹ See Ben Nuckols, *NCAA's Emmert Presses Senate for 'Guardrails' on Athlete Pay*, THE COLUMBIAN (Feb. 11, 2020), <https://www.columbian.com/news/2020/feb/11/ncaas-emmert-presses-senate-for-guardrails-on-athlete-pay/> (quoting NCAA Chancellor Mark Emmert, "We may need Congress' support in helping maintain uniform standards in college sports.").

¹² *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945).

¹³ See *NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993).

¹⁴ *NCAA v. Board of Regents*, 468 U.S. 85, 102 (1984).

¹⁵ *Miller*, 10 F.3d at 633.

¹⁶ Danny Robbins & Elliott Almond, *NCAA Stuck in Nevada*, L.A. TIMES (Nov. 1, 1991), <https://www.latimes.com/archives/la-xpm-1991-11-01-sp-703-story.html>.

¹⁷ See *id.* ("A new law...requires that all NCAA enforcement proceedings involving Nevada institutions conform to due process of law....").

¹⁸ *Miller*, 10 F.3d at 637.

¹⁹ *Id.* at 640.

²⁰ *Id.* (quoting *Southern Pac. Co.*, 325 U.S. at 771).

²¹ Roger Groves, *ESPN and the SEC Make a Deal. So Who Needs the NCAA?*, FORBES (May 2, 2013 11:47 AM), <https://www.forbes.com/sites/rogergroves/2013/05/02/espn-and-the-sec-make-a-deal-so-who-needs-the-ncaa/#24bc2de427ba>.

²² Darren Rovell, *NCAA Tops \$1 Billion in Revenue During 2016-17 School Year*, ESPN (Mar. 7, 2018), https://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first.

²³ See David A. Graham, *Why the NCAA Is Pulling Championships From North Carolina*, THE ATLANTIC (Sept. 13, 2016), <https://www.theatlantic.com/politics/archive/2016/09/ncaa-kos-nc-on-hb2/499733/> (asserting that the NCAA pulled all scheduled championship events from North Carolina after passage of a bill mandating bathroom-birth certificate correlation).

²⁴ Louisiana forecasts the economic impact of the 2020 CFP National Championship at between 150 and 175 million. (Elliot Davis, *College Football Championship May Be an Economic Super Bowl for Louisiana*, U.S. NEWS AND WORLD REP. (Jan. 13, 2020), <https://www.usnews.com/news/best-states/articles/2020-01-13/cfp-championship-impacts-host-states-economies>).

²⁵ Ramogi Huma & Ellen J. Staurowsky, *The Price of Poverty in Big Time College Sport* 19 (2011). <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>.

²⁶ See Bayard, *supra* note 3 (asserting that "[m]any believe the N.C.A.A. was in jeopardy of being replaced 'by a subset of programs' . . . and the same is suspected regarding NIL payments.").