**CONCLUSION:**

With college football being America’s second-most popular sport by viewership, college football players should be able to freely negotiate endorsement deals because fantasy sports platforms now will likely be given access to profit off their name, image, and likeness (NIL) from the National Collegiate Athletic Association (NCAA). According to the National Football Foundation**3**, its 2019-2020 report revealed that roughly 47.5 million fans attended college football games, 392 regular season telecasts reached more than 145 million unique fans, and 39 postseason bowl games reached 90 million pairs of eyes. Needless to say, that’s a massive audience that’s coming across college football players’ names and images. One major way college football athletes would be able to reap the financial and fame benefits through exposing their name, image, and likeness is through daily fantasy sports (DFS) platforms, such as *DraftKings* and *FanDuel*.

**ISSUES:**

With the NCAA’s policy decision to grant access for student-athletes to profit off their name, image and likeness back in October of 2019, there are a myriad of ways college athletes can use this benefit to their advantage. For instance, when current top NFL prospects such as Trevor Lawrence and Justin Fields were performing exceptionally well for their respective collegiate teams, they would’ve been able to profit off jersey sales, endorsements, advertisements, etc.

**RULES:**

First, let’s acknowledge how we got here in the first place with this issue at the NCAA level. First and foremost, it’s important to recognize that the NCAA didn’t autonomously initiate the decision to allow college athletes to profit off their name, image, and likeness. Rather, the association was influenced by California legislation when the state’s governor, Gavin Newsom, signed SB 206 on September 30, 2019. Starting in 2023, this law states that college institutions are prohibited from punishing athletes who accept endorsement money while enrolled in college. In response to this announcement, the NCAA called the legislation an “existential threat” **7** to college amateur sports when it was introduced months before its passage.

The NCAA changed its tune significantly about a month later on October 29, 2019 when its board of governors unanimously agreed to modernize its NIL rules in a manner consistent with their pre-existing collegiate model, according to the NCAA’s press release.**25** The chair of the board and president of Ohio State University Michael V. Drake stated, “We must embrace change to provide the best possible experience for college athletes. Additional flexibility in this area can and must continue to support college sports as a part of higher education. This modernization for the future is a natural extension of the numerous steps NCAA members have taken in recent years to improve support for student-athletes, including full cost of attendance and guaranteed scholarships.”

On the other hand, NCAA President Mark Emmert commented on this change with the following statement: “As a national governing body, the NCAA is uniquely positioned to modify its rules to ensure fairness and a level playing field for student-athletes. The board’s action today creates a path to enhance opportunities for student-athletes while ensuring they compete against students and not professionals.”

This action taken by the NCAA’s Board of Governors was based on several comprehensive recommendations from the NCAA Board of Governors Federal and State Legislation Working Group, which is comprised of presidents, commissioners, athletic directors, administrators, and student-athletes. In effort to make the best decision, this group gathered feedback over several months from various stakeholders, including current and former student-athletes, coaches, presidents, faculty, and commissioners across all three divisions. In addition, the press release outlined several principles and guidelines the NCAA will follow in effort to maintain their amateurism integrity. Among them include: maintaining priorities of education and the collegiate experience to provide opportunities for student-athletes, distinguishing collegiate and professional opportunities, re-emphasizing that compensation for athletes’ performance is prohibited, and that student-athletes aren’t employees of any university. Following this transition, many other states**25** around the nation joined California by adopting their own NIL legislation, such as Colorado, Florida, Michigan, Nebraska, and New Jersey.

I think the NCAA owes this kind of liberty to its student-athletes because of the unethical stances the association has taken, especially in recent memory. Connecticut senator Chris Murphy also provides a lot of context to the corrupt nature of the NCAA’s history through a series of reports called “Madness Inc.”**4** where he makes the argument that the NCAA should compensate student-athletes. In the first report called “How everyone is getting rich off college sports – except the players,” Murphy says, “College basketball and college football have become a multi-billion-dollar industry where everyone’s getting rich except the athletes actually doing the work” in a system that generateswhat Murphy describes as a “civil rights issue.”

To support his point, Murphy cites the fact that college football alone generates a staggering nearly $32 million investment without giving a share of that revenue to student-athletes, where just 3% of NCAA football schools are responsible for over half of the revenue. Furthermore, more than 100 Division I head coaches earn over $1 million annually, all while the highest-paid public employees in 41 of the 50 states are sports coaches.

Despite the impressive financial numbers generated by its top football programs, the NCAA has been a part of more than 40 cases of academic fraud since 1990. The NCAA has also restricted college athletes by placing the “student-athlete” label on them, and the NCAA misrepresents graduation rates (especially for black athletes) by using their own misleading and deceiving measures.**6** Towards the end of this report, Murphy also illustrates the incredibly massive time and effort commitment the typical division I football player would be subjected to. In essence, the player would wake up at 5:00 AM and end his day around 10:00 PM, or even midnight. Throughout the day, the player is training, eating, in class, attending meetings, attending practices, watching game film, and squeezing in time to complete coursework. Needless to say, the consistency and nature of this kind of schedule is difficult to handle successfully, while simultaneously making sure the other areas of the student-athlete’s life are in check, as well.

To illustrate a consequential effect of having this schedule, take former defensive lineman for Kansas State University, Stephen Cline. He had aspirations of using his scholarship to become a veterinarian. But instead, his academic counselor encouraged him to settle for a less demanding major so that he could allocate most of his focus to what everyone at the school perceived his real purpose was: playing football. Cline said, “The whole time, I felt stuck – stuck in football, stuck in my major. Now I look back and say, ‘well what did I really go to college for?’ Crap classes you won’t use the rest of your life? I was majoring in football.’”**6** As Murphy states, these kinds of anecdotes support the notion that the NCAA and its member schools care far more about the appearance of educating athletes than they do about actually educating them.

**ANALYSIS:**

From this context, it is important to see the potential benefits college football players should be able to attain by negotiating endorsement deals with DFS platforms. With DFS sites like *DraftKings* and *FanDuel* accounting for over five million combined users, the opportunity for college football players to increase their potential earnings based off those sites using their name, image, and likeness is through the roof. The objective behind *DraftKings* and *FanDuel* is that users assemble fantasy teams of players that are assigned a price tag (or value)

based on their statistical performances. The users compete with another user who’s trying to create a better team for that particular day’s slate of games. Based on the points system that these DFS platforms use, whichever player’s team scores the higher number of points wins whatever cash prize the DFS platform is offering.**2**

However, it’s important to clarify that the various NIL allowances that are currently being discussed prohibit players from exploiting their particular athletic skills as part of the endorsement deals. For example, it would be prohibited for Trevor Lawrence to coordinate a deal directly with *FanDuel* on the basis of his gifted athletic talent. Instead, the DFS platforms would serve as the means for third parties to place advertisements that may not even be football-related. Hypothetically speaking, if Lawrence endorsed the popular sports beverage of *Gatorade* and *Gatorade* happened buy advertisement space on FanDuel with a picture of Lawrence not in uniform, this would potentially be allowed under the current NIL law considerations. Even with some restrictions, these 14 million plus users would be constantly exposed high-profile players like Lawrence through ads, as they anxiously sit in front of their device’s screen watching the games and checking in on their team’s performance and the matchup’s score.

The courts have already provided keen guidance on the NCAA’s compensation and NIL schemes*,* with the most important one being *O’Bannon v. NCAA* (9th Circuit Court, 2015).**12** This is one of the founding cases on this subject matter that involved a former UCLA basketball player named Edward O’Bannon Jr., who brought a class-action *lawsuit* against the NCAA and the Collegiate Licensing Co, which licenses NCAA’s trademarks. O’Bannon alleged that the NCAA’s amateurism rules prohibiting student-athletes from being compensated for using their names, images, and likenesses was an illegal restraint of trade that violates the Sherman Antitrust Act of 1890**8** and certain states’ right-of-publicity statutes. The NCAA used O’Bannon’s and other former student-athletes (such as former Arizona State University quarterback Sam Keller) name, image, and likeness for commercial purposes, namely, the Electronic Arts video game *NCAA Basketball 09*. This video game contained an anonymous player that coincidentally matched several of O’Bannon’s player characteristics. In response to this allegation, the NCAA claimed that the principles and standards of its coined term “amateurism” should be upheld and maintained in these cases.

However, as a result, District Judge Claudia Wilken ruled in favor of O’Bannon, holding that the NCAA’s policies and rules “operate as an unreasonable restraint of trade” and in fact violate antitrust law. Judge Wilkins mandated that schools offer full cost-of-attendance scholarships to student-athletes who weren’t currently on NCAA scholarship. Judge Wilken additionally ruled that colleges were permitted to place as much as $5,000 into a trust for each student-athlete per year of eligibility. The NCAA dissented the ruling and made the argument that Judge Wilken did not properly consider *NCAA v. Board of Regents of the University of Oklahoma*. With that consideration, the NCAA was denied control of college football television rights, but the court also stated, “To preserve the character and quality of the ‘product,’ athletes must not be paid.”

Another important case that relates to college football players and DFS platforms points to *Akeem Daniels v. FanDuel* (Indiana State Supreme Court, 2018).**11** Akeem Daniels, Cameron Stingily, and Nicholas Stoner (college football players from 2014-2016) were collectively filing a class-action lawsuit alleging that *DraftKings* and *FanDuel* used their names and likenesses in operating and promoting online fantasy sports contests without their prior consent, and that doing so was a violation of Indiana’s right-to-publicity statute.**8** Representatives from *DraftKings* and *FanDuel* contested that the use of those athletes’ information fell within statutory exceptions to this Indiana law. Indiana’s right-to-publicity statute prohibits use of a person’s name, image, and likeness, among other things, for commercial purpose without that person’s prior written consent. However, there are various exceptions to this statute which wouldn’t require consent, such as using information like a “personality’s name, voice, signature, photograph, likeness, distinctive appearances, gestures, or mannerisms” that have a political or newsworthy value.

Consequently, the district court ruled that this information constituted “material that has newsworthy value” and that its use was “in connection with the broadcast or reporting of an event or a topic of general or public interest.” Also, since Indiana’s right-to-publicity statute contains an exception to material that has newsworthy value, the court ruled in favor of *DraftKings*. The plaintiffs then contested that this exception only applies to news broadcasters, not to media companies, noting that the exception was silent as to whether it imposed restrictions on who may publish or use such information. Nevertheless, the court found several compelling reasons why the term “newsworthy value” should be inclusive of fantasy sports operators’ use of players’ names, images and statistics. The court ultimately concluded that the DFS operators’ use of players’ names, images and statistics in conducting online fantasy sports competitions “bears resemblance to the publication of the same information in newspapers and websites across the nation.”

The next case that’s essential to analyze is *Garcon v. FanDuel*(2015, Federal 2nd Circuit).**10** Despite the fact that this case was settled prior to trial, it’s relevant to bring up because it shows how players can use the courts to assert rights of publicity for how their name, image, and likeness are used by DFS platforms. Then-Washington Redskins wide receiver Pierre Garcon filed a class-action lawsuit for $5 million against *FanDuel* in the U.S. District Court for the District of Maryland on behalf of all NFL players. First, Garcon contended that the DFS platform unlawfully used NFL players’ names and likenesses without those players’ consent. Garcon also claimed that his name appeared 53 times in a 28.5-minute *FanDuel* infomercial.**14** The filing of the suit states that, “In the operation and sale of online daily fantasy gaming products, Defendant *FanDuel* knowingly and improperly exploits the popularity and accomplishments… routinely uses the names and likenesses of these NFL players to promote *FanDuel*’s commercial enterprise, collecting huge revenues from entry fees, without the authority of Mr. Garcon or other NFL players.”

Similar to the *Akeem Daniels v. FanDuel* case, this invokes the “right-to-publicity” statute, a right found under some states’ laws that protect individuals from the commercial exploitation of their names, images and other aspects of their persona. The strength of the right-to-publicity statutes varies by state, but as we saw in Indiana, it wasn’t strong enough to win the case for Akeem Daniels. It’s also worth noting that the U.S. Constitution’s First Amendment trumps the right-to-publicity under many circumstances,**11** and it’s particularly applicable when using these characteristics for journalistic purposes that reflect “significant transformative elements.”

Garcon was the leading receiver in the 2015 season for the then-Washington Redskins. As a result, Garcon believes he’s “highly recognizable to potential consumers who are deciding whether to establish a FanDuel account,” so Garcon thinks he deserves compensation when users pay money into *FanDuel*. Without this compensation, Garcon believes *FanDuel* is unjustly enriched. Invoking the prior ruling in the Daniels case, a *FanDuel* spokesperson told Legal Sports Report (an online publication) that, “We believe this suit is without merit. There is established law that fantasy operators may use player name and statistics for fantasy contests. *FanDuel* looks forward to continuing to operate our contests which sports fans everywhere have come to love.”**14**,**15**

*FanDuel* wouldn’t need to go any further with defending itself because this case was settled before trial.**17** Unlike the Daniels case that went to trial, then to an appeals court, and then to a Supreme Court oral argument, Garcon’s claims were never heard by a jury, nor was evidence gathered, nor was a judgement rendered to clarify the value of an NFL players NIL usage without prior consent. However, the NCAA must remain cognizant of the reality that that the NIL of star football players should be viewed as a valuable commodity in the DFS market.

And finally, there’s been an ongoing case for over four months at the U.S. Court of Appeals for the Ninth Circuit called *Alston v. NCAA*.**13** Although this case isn’t directly related to DFS platforms and their involvement with college athletes’ NIL rights, it matters because the Supreme Court's decision in this case could impact how much control the NCAA has in defining amateurism in the future. Considering that the idea of amateurism has been established by the NCAA and in effect for about 115 years**26**, this case could set a precedent for some groundbreaking change, pending the case’s result.

For this case, several Division I football and basketball players, led by Shawne Alston, filed this lawsuit against the NCAA, contending that its restriction on “non-cash education-related benefits” violated antitrust law under the aforementioned Sherman Antitrust Act. On the one hand, the district court ruled in favor of the athletes, holding that the NCAA must permit certain kinds of academic benefits, such as “computers, science equipment, musical instruments, and other tangible items not included in the cost of attendance calculation, but nonetheless related to enrolling in academic studies.” On the other hand, the district court ruled that the NCAA may still limit cash or cash-equivalent awards for academic purposes. The U.S. Court of Appeals recognized that the NCAA desires to “preserve amateurism,” but concluded that its practices nevertheless, violated antitrust law. The latest update on this case is that oral arguments for both sides were heard on March 31, 2021 by the Supreme Court. It will be intriguing and fascinating to see how this case unfolds in the coming months.

In all fairness, we should also consider some of the most credible and reasonable counterarguments on behalf of the NCAA for allowing college football players to negotiate endorsement deals. Three that come to mind include: the conflicts of interest that may arise if players have endorsement deals with school and/or NCAA competing sponsors, the potential gender and Title IX issues that a football-centric opportunity creates, and the NCAA’s consistent stance against promoting DFS and similar gambling entities.

Let’s begin with the conflict of interest counterargument. The NCAA’s central point here is that if student-athletes are allowed to coordinate endorsement or sponsorship deals with any sponsor whatsoever, there could easily be situations where student-athletes create partnerships with businesses that contradict with what the NCAA stands for, particularly with its ethical and integrity values. A major corporation like the NCAA is understandably going to be picky and selective when it comes to what kinds of companies and businesses they want to collaborate with not only because of their standards, but also because of how many member schools and student-athletes it’s responsible for serving. Therefore, a negative stigma would probably begin to circulate in various ways if student-athletes collaborate with sponsors that the NCAA intentionally avoids for all kinds of reasons.

As for the potential Title IX issues counterargument, this is especially relevant for football players because football is one of those unique sports that’s heavily dominated by male representation. Title IX was implemented in 1972 that protects people from discrimination based on sex in educational programs or activities that receive Federal financial assistance.**18** More specifically, Title IX states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Balancing gender equity would likely include NCAA management of student athlete’s NIL. Benefits from sponsorships and endorsements specific to college football players would otherwise be unavailable for female student-athletes solely because of their near-exclusion from playing football. Thus, this would need a great deal of work to address prior to DFS partnerships being authorized by any football-related authority.

The final NCAA counterargument worth mentioning is its consistent stance against promoting DFS platforms and gambling entities. The NCAA website has a page about its rules and regulation on sports wagering.**19,20** It states: “NCAA rules prohibit participation in sports wagering activities and from providing information to individuals involved in or associated with any type of sports wagering activities concerning intercollegiate, amateur or professional

athletics competition. Sports wagering has the potential to undermine the integrity of sports contests and jeopardizes the well-being of student-athletes and the intercollegiate athletics community. It also demeans the competition and competitors alike by spreading a message that is contrary to the purpose and meaning of ‘sport.’  Sports competition should be appreciated for the inherent benefits related to participation of student-athletes, coaches and institutions in fair contests, not the amount of money wagered on the outcome of the competition.”

However, in response to this particular counterargument, it’s worth noting that the Supreme Court struck down PASPA (the Professional and Amateur Sports Protection Act) on May 14, 2018 after ruling in favor of New Jersey in *Murphy v. NCAA.***21, 22** This act prohibited states to sponsor, operate, advertise, promote, license, or authorize sports betting, and for private individuals to do the same if done pursuant to the law or agreement of the state. But, since the highest court in the land eradicated this act, any of the 50 states can now dictate their own sports gambling laws. This legal reality hit home for the NCAA soon thereafter in the Daniels case, as it further opened the flood gates for DFS’ legal and rapid market infiltration into college sports.

Therefore, I think the NCAA is going to encounter a lot of trouble when it comes to maintaining their sports wagering policies when each state across the country will likely have differing laws governing this area. A press release from the NCAA states, “An internal team of subject matter experts will explore how best to protect game integrity, monitor betting activity, manage sports data and expand educational efforts.”**23**

**CONCLUSION:**

Since college football is America’s second-most popular sport by viewership, college football players should be able to freely negotiate endorsement deals because daily fantasy sports platforms now will likely be given access to profit off their NIL from the NCAA. The NCAA would be doing a disservice not just to its student-athletes, but also its own brand if they don’t loosen up their restrictions in this realm. I fully understand the NCAA’s primary concern of maintaining and upholding integrity for its student-athletes, schools, sports competition, and its brand. Its efforts to oppose all gambling ventures have been authentic and consistent in this respect*.* It fully makes sense why an association like this would be hesitant and reluctant to make drastic changes on these kinds of policies that have been in effect for several decades.

However, there was a trace of movement recently after the Supreme Court shot down PASPA, where the NCAA ironically lifted its ban on holding championship events in states that allowed legalized sports betting*.* So, since there’s an ever-growing market with DFS platforms that’s making a tremendous impact in the sports community, I think there’s a lot of realistic opportunity for the NCAA to take advantage of this development. Ultimately, when it’s evident that the legal and profit generating markets are changing, a reasonable business should adjust accordingly. Therefore, I think the NCAA is no exception to this.

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