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LSU Quarterback's Retirement

Brian Ahle*

For more than a century, the National Collegiate Athletic Association (NCAA) ha[d] prescribed rules governing the eligibility of athletes at its more than 1,000 member colleges and universities.¹ Those rules prohibit[ed] student-athletes from being paid for the use of their name, image, and likeness (“NIL”).² In the summer of 2021, however, the landscape of amateurism and college athletes’ opportunities to market themselves changed drastically. The Supreme Court brought this change by handing down a substantial decision on the effects of NIL and its impact on antitrust laws, specifically the Sherman Act, in *Nat’l Collegiate Athletic Ass’n v. Alston*.³ There, the court determined that the NCAA forbidding payment for athletes using their NIL to obtain education related benefits was a violation of antitrust laws.⁴ However, they refused to directly speak on rules forbidding non-educational related benefits which they described as the enforcement of a “no Lamborghini” rule.⁵

Along with the decision in *Alston*, a mixture of new state laws and NCAA rules changes that went into effect on July 1, 2021, started providing athletes with varying degrees of new protections and opportunities to make money by selling their NIL rights.⁶ Athletes from every division and every sport began to take advantage of this new opportunity the moment the clock struck 12. Notably, star Alabama Quarterback and Heisman Trophy winner

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¹ O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1052 (9th Cir. 2015).

² *Id.*

³ See generally *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141 (2021).

⁴ *Id.* at 2166.

⁵ *Id.* at 2165.

⁶ Dan Murphy, *Everything you need to know about the NCAA’s NIL debate*, ESPN (Sep. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

Bryce Young brought in nearly \$1 million in sponsorships... before he ever took a snap for the Crimson Tide.⁷

While every athlete was trying to secure their NIL deals to take advantage of these new rules, Louisiana State University (LSU) Quarterback Myles Brennan was no different. Brennan, who took over for Joe Burrow after the Tigers' dominant 2019 season and national championship, saw his career fall apart after two injuries in consecutive seasons.⁸ Following a coaching change and a new starter coming in through the transfer portal to take his spot, Brennan not only decided he needed to be done with LSU football, but with football altogether.⁹ Before most of this happened however, Brennan signed several NIL deals in the NIL rush of 2021, with companies including Raising Canes, Smoothie King, GameCoin, and a local Ford dealership, back when he was expected to be the Tigers' answer to a 5-5 season and the loss of a Heisman QB.¹⁰ He never managed to play a game after signing these deals, but he may still be able to keep those deals.¹¹

As a part of the new NIL rules laid down by the NCAA, they also forbade “performance based” payments. The policy forbids NIL compensation tied to “specific athletic performance or achievement,” such as “financial incentives based on points scored.”¹² Since NIL contracts cannot be tied to

⁷ David Kenyon, *The Biggest and Most Notable NIL Deals in College Football so Far*, BLEACHER REPORT (July 26, 2021), <https://bleacherreport.com/articles/2946352-the-biggest-and-most-notable-nil-deals-in-college-football-so-far>.

⁸ Grace McDermott, *We asked Leigh Steinberg if Myles Brennan will get to keep his NIL deals*, DEADSPIN (Aug. 16, 2022), <https://deadspin.com/does-myles-brennan-get-to-keep-his-nil-deals-1849419968>.

⁹ *Id.*

¹⁰ *Id.*; Jacob Meyers, *Heisman Trophy winners, runners-up since 1935*, NCAA (December 12, 2021), <https://www.ncaa.com/news/football/article/2021-12-11/heisman-trophy-winners-and-runners-each-year-1935>. (Note, Joe Burrow, LSU's prior quarterback, was a Heisman Trophy winner, the most prestigious award in Division I College Football).

¹¹ *Id.*

¹² Michael McCann, *NCAA to Ban Performance Based NIL Deals in Revised Guidance*, YAHOO SPORTS! (June 26, 2021), https://sports.yahoo.com/ncaa-bans-performance-based-nil-205541938.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xLLmNvbS8&guce_referrer_sig=AQAAAE1r98NXYixzw6iiVVr2DUW4y5gV0RK-1v40Q37Tkhx7bnSIxXZiltQrk6tPrnotfuDHPOOSN2g4L2ZuqNA2StdHuh6Tpd1CZ72C8feEt-i_NicE-oY6Kc0nuRMMF0oT7mDn6kOh8pfEEUciTtTxKIUF3Bs3qmePkYWsWOjG2ha.

performance, the deals remain valid even though he will not be playing.¹³ Essentially, if Brennan had not decided to retire and instead was injured in the first game of the season and forced to sit out for the rest of the year again, his sponsors would still be legally obligated to hold up their end of the deal.¹⁴

There may be ways to void the deals now that Brennan is retired, however.¹⁵ While NIL deals cannot be centered around performance, there may be deals tied to actively being a part of the team or based on certain behaviors by the player, specifically public behavior.¹⁶ This is already common in contracts with professional athletes and endorsers.¹⁷

Unfortunately, the odds of Brennan's contract terms becoming public are low, and therefore, we as the public may never know what comes next in his specific situation.¹⁸ Regardless, Brennan has presented the NCAA with yet another predicament in a NIL landscape already filled with a lot more questions than there are answers, and the way that this plays out could significantly affect NIL contracts going forward.¹⁹

While Myles Brennan's retirement situation is unique, it may provide an example of how endorsers will begin to approach the NIL landscape in the future. Notably, while endorsers cannot pay these athletes based on their performances, it is likely advantageous that they are contracting with "star" players to show their business in the most prominent light possible. This makes a situation where an unproven player, such as Brennan, becomes a more "high-risk" candidate for endorsements.

¹³ Grayson Weird, *Division-I Quarterback's Sudden Retirement Raises Questions About What Happens To His NIL Money*, BROBIBLE (Aug. 15, 2022), <https://brobible.com/sports/article/myles-brennan-retire-lsu-nil-money/>.

¹⁴ McDermott, *supra* note 8.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Kristi Dosh, *First NIL Car Deal with LSU's Myles Brennan Exposes Risk for Brands*, BUS. COLL. OF SPORTS (Aug. 6, 2021), <https://businessofcollegesports.com/name-image-likeness/first-nil-car-deal-with-lsus-myles-brennan-exposes-risk-for-brands/>.

¹⁸ McDermott, *Supra* note 8.

¹⁹ *Id.*

Brennan had just come in and played sparingly during the prior season to the 2021 NIL rush and had been a part of a team that had a rather mediocre 5-5 record.²⁰ This was by no means a sure-fire star in the making, yet companies rushed to endorse him. This may be due to the rush to get there first, or maybe banking on the future of a specific athlete to potentially obtain their services at a cheaper rate. With these business decisions, there are certain questions raised as more highly touted high school recruits do not reach their potential once they actually start playing in college.²¹

Endorsers are thus left with a few choices. While NIL contracts cannot be tied to performance, there is currently no evidence to suggest that they cannot be tied to being actively apart of the program.²² This would suggest that in the future, contracts may be tied into whether or not you are still contributing to the team in any manner. By retiring and moving on from football, as Brennan did, this would allow endorsers to begin to void contracts. This solution also may seem a rise in popularity after the growth and popularity of collectives in the first year of the NIL landscape.

But what is a collective? In the *Alston* decision, Justice Kavanaugh issued a concurring opinion that helped to collectively lay the framework for the future interim NIL policies that the NCAA laid down a few weeks after the *Alston* decision. There, the Supreme Court Justice wrote, "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate... And under ordinary principles of antitrust law, it is not evident why college sports should be any different... The NCAA is not above the law."²³ After this decision and the ensuing NIL policy, it appears the NCAA has a reluctance to invite and defend

²⁰ McCann, *supra* note 12; Note, Myles Brennan played in only 3 games during the 2020 season and went 1-2 in those games played. *NCAAF Statistics Overview for Myles Brennan*, ESPN, https://www.espn.com/college-football/player/_id/4242210/myles-brennan.

²¹ Dennis Dodd, *Spencer Rattler becomes case study for NIL return on investment with Oklahoma starting job in flux*, CBS (Oct. 13, 2021), <https://www.cbssports.com/college-football/news/spencer-rattler-becomes-case-study-for-nil-return-on-investment-with-oklahoma-starting-job-in-flux/>.

²² Weir, *supra* note 13.

²³ *Alston*, 141 S. Ct. at 2141.

additional antitrust lawsuits.²⁴ Because of this, NIL collectives and schools have been able to have internal conversations wondering if the NCAA has what it really takes to police the organizations. Often founded by prominent alumni and influential supporters, school-specific collectives pool funds from a wide swath of donors to help create NIL opportunities for student-athletes through an array of activities.²⁵ Industry sources expect every Power 5 school to be affiliated with at least one NIL-related collective by the end of the year.²⁶

With collectives becoming somewhat of a standard in how the NIL market is advancing, and with the prominent involvement of alumni of the schools, this may suggest that these collectives are not benefitted from the athlete the moment after they leave the school that they were attending, either by transferring athletes, or in rarer cases, retirement. After all, the alumni that are apart of these collectives are funding these NIL opportunities so that the athletes will come to play for their school, not necessarily to advertise a business. As a result, they may start requiring the businesses and athletes to contract in terms that would require the athlete to at least remain as a part of the team in some capacity. The moment they opt to either transfer or retire and leave the team, the contract would be voided.

Alternatively, we may begin to see more contracts based on royalties. While the NCAA has not currently voiced their opinion on deals tied to how many sales a student-athletes endorsement generates, they seem likely to be permissible.²⁷ With deals such as these, the company would only be on the hold for any revenue that the athlete's endorsement brings. So, they may use certain codes to enter or some other algorithm to figure out how much traffic is being brought in because of the athlete.

²⁴ Peter Nakos, *What are NIL Collectives and How do They Operate?*, ON3 NIL (July 7, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Alexander Burrige, *Contract Basics for Every Student-Athlete NIL Deal*, JDSUPRA (Aug. 18, 2021), <https://www.jdsupra.com/legalnews/contract-basics-for-every-student-3793825/>.

These types of already begun to see some form of popularity, as former Georgia quarterback J.T. Daniels struck a deal in this form a year ago.²⁸ There, Daniels, through his agency, Everett Sports Management (ESM), signed an exclusive trading card deal.²⁹ As a part of this deal, Daniels earned \$100 per a signature as well as 50% in royalties on both signed and unsigned cards. This deal manages to protect both sides of the agreement. Daniels, is able to use his platform to be able to sell these cards to his followers, while the endorser is able to determine when he needs more signatures and only has to pay Daniels for the cards of his which sell.

In the case of Myles Brennan, who may have lost a lot of his reputation by losing his starting position and subsequently retiring from the football, the endorser would not be on the line for a lump sum of money. Rather, they would only be held accountable for business that Myles Brennan is able to bring. This solution also solves another issue for endorsers in that royalty deals would not technically fall under a performance requirement, since performance is technically not a factor, but rather how many people you can get to buy the product. As the landscape of NIL evolves and endorsers become more worried about the ramifications of disappointing play, and in rarer cases, retirement, royalty deals may pave the way for a future way to ensure that endorsers are able to keep their assets safe.

Long gone are the days of student athletes fighting to be compensated for their NIL rights as Ed O'Bannon did nearly a decade ago. NIL rights are here to stay and should be used for both parties to incentivize from them. Student Athletes will be able to take advantage of their fame and abilities while endorsers can now use these athletes to conduct marketing to fanbases they may otherwise not have been able to reach. However, it is imperative that these agreements are fair between both sides. Myles Brennan's unfortunate early retirement has created a realization that in these situations NIL endorsers may find it difficult protect their investment

²⁸ Keith Farmer, *JT Daniels reportedly signs NIL deal with royalties that could approach 7 figures*, SATURDAY DOWN SOUTH, <https://www.saturdaydownsouth.com/georgia-football/jt-daniels-reportedly-signs-nil-deal-with-royalties-that-could-approach-7-figures/>.

²⁹ Robert Crosby, *JT Daniels Signs Major NIL Deal With Trading Card Company*, SPORTS ILLUSTRATED (Aug. 16, 2021), <https://www.si.com/college/georgia/news/georgia-football-jt-daniels-nil-deal>.

as a result of being unable to pay athletes based on performance. Through a variety of other options in which to try to compensate athletes, however, we may see an evolution in the typical structure of these NIL deals. NIL deals will be at the front and center of college sports for the foreseeable future; and, as a result, it will be interesting to see how these contracts develop as both sides learn to take advantage of their newfound opportunities.

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