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Contract Law

**Application to NIL Deals:
Just Another Contract?**

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Just Another Contract?

Since the National Collegiate Athletic Association (NCAA) finally allowed students to have the right to use their name, image, and likeness (NIL) to generate profits, the NIL landscape has been an ever-evolving universe. While early twists and changes have involved the regulatory aspect of NIL, recent emerging situations begin to define the contour of NIL deals from a litigation standpoint. In May of 2024, parties to NIL deals filed two civil lawsuits involving disputes over—among other things—the existence and enforceability of their deals. Both lawsuits may begin to shape how parties to NIL deals should apply contract law in the context of NIL deals. On May 18, 2024, Fanatics Collectibles AC, Inc. (“Fanatics”) sued newly drafted Arizona Cardinals wide receiver Marvin Harrison, Jr., in the New York Supreme Court for allegedly refusing to honor their NIL contract (“The Fanatic Lawsuit”). Just three days later, on May 21, 2024, Jaden Rashada, a former high-profile high school football star and recruit, sued University of Florida’s coaching staff members, booster Hugh Hathcock, and others in the US District Court for the Northern District of Florida to enforce an NIL deal allegedly based on an oral agreement (“The Rashada Lawsuit”).

Although both cases are still in early stages, the complaints and the parties’ allegations raise important questions regarding the existence, formation, validity, and enforceability of the involved deals that college athletes, companies, and universi-

ties, along with their respective representatives, should consider while negotiating their next NIL deals.

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Cases Background

Fanatics v. Marvin Harrison, Jr.

Fanatics is a major manufacturer and retailer of sportswear well-known for using athlete’s names, images, and likenesses to advertise and market its products. In the Fanatics Lawsuit, Fanatics asserts breach of contract, anticipatory repudiation, and tortious interference claims against Mr. Harrison, Jr. Summarily, Fanatics alleges

that around April 2023 it approached Mr. Harrison, Jr. (just 20 years old at the time) to discuss a long-term agreement, and that the parties ultimately agreed to and signed a binding term sheet that was “heavily negotiated.” Mr. Harrison, Jr. was represented by his father, NFL Hall of Famer Marvin Harrison, Sr. Fanatics also alleges that per the deal, it paid Mr. Harrison, Jr., a “significant” amount of money but Mr. Harrison, Jr. now refuses to fulfill his obligations under their contract. Mr. Harrison, Jr., on the other hand, denies the existence of a contract. Recently, in August 2024, Fanatics refiled its lawsuit to include Marvin Harrison Sr. Fanatics now claims that Harrison Sr. signed a binding term sheet and attempted to create the impression that Harrison Jr. signed it. As a result, Fanatics now accuses both Harrisons of fraud by knowingly inducing Fanatics to commit to the agreement.

Jaden Rashada V. Hathcock Et Al.

The Rashada Lawsuit asserts fraudulent misrepresentation and inducement, aiding and abetting fraud, civil conspiracy to commit fraud, negligent misrepresentation, tortious interference with a business relationship or contract, aiding and abetting tortious interference, and vicarious liability. Mr. Rashada alleges that he initially made a public commitment to play for the University of Miami, which involved him receiving \$9.5 million through NIL deals. However, the University of Florida,

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through certain employees, ignored Mr. Rashada's commitment to the University of Miami and continued to recruit him, offering him a higher NIL deal worth \$13.85 million—to be paid through two different sources affiliated with Mr. Hathcock. Mr. Rashada claims that Mr. Hathcock and others—including University of Florida staff—represented that they had the authority to negotiate the underlying NIL agreement. Mr. Rashada was represented by his agents. These representations allegedly led Mr. Rashada to de-commit from the University of Miami and publicly commit to the University of Florida instead. However, Mr. Rashada alleges he never received what was promised to him by the University of Florida and Mr. Hathcock, despite forgoing

a \$9.5 million NIL deal from the University of Miami. Mr. Rashada later withdrew his letter of intent and ended up playing for Arizona State University before transferring to the University of Georgia. Additionally, in August 2024, Mr. Rashada filed an amended complaint highlighting more details about the meeting where he was offered the \$13.85 million NIL deal.

Pertinent Contract Law Implication

While NIL rules and regulations continue to evolve, at their base, NIL deals are just like any other contract: written or oral agreements that require certain legal steps to be valid and enforceable. Like parties to any contract, parties to NIL deals—typically student-athletes, companies, boost-

ers, or universities—must look out for many legal issues that may impact their abilities to enter into or to enforce their deals, including but not limited to choice of law, formation, validity and enforceability, scope, modification, and termination. While still in their infancy stages, the Fanatics and Rashada Lawsuits are great case-studies to analyze these issues and help identify and address them in your next NIL deal.

Choice of Law

A choice of law provision is one that sets forth which jurisdictional law governs in case of a dispute. If the parties fail to include such provision, they may be left without a choice as to what law decides

their rights. Accordingly, when negotiating their NIL deals, student-athletes, companies, and their representatives must analyze state laws for an informed decision.

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Among other things, consider whether your particular state:

- Enforces choice of law provisions;
- Enforces risk-allocations, waivers, and other contractual limitations provisions;
- Enforces indemnification provisions;
- Enforces other contract provisions such as arbitration, etc., in contracts involving student-athletes, who may be minors; and
- Makes contracts by minors void or voidable.

Formation

Every state has adopted some steps/requirements that parties to a contract must meet at the formation stage in order for a contract to be valid, binding, and enforceable. In most states, to be valid, a contract must be based on a mutual assent between the contracting parties (offer plus acceptance) and consideration. In the context of an NIL deal, mutual assent would consist of one party—likely the company, university, or a booster—making *an offer* to the other party—likely the student-athlete—to pay the student-athlete a certain sum of money in exchange for the right to use the student-athlete's name, image or likeness in advertising a service or product. The student-athlete may then choose to *accept* the offer. So long as each party believes it received the benefit of the party's bargain, consideration will be deemed to exist and the parties have a contract. Student-athletes, companies, universities, and other parties involved in NIL deals must meet these steps (or similar) when negotiating their NIL deals.

The allegations in the Fanatics and Rashada Lawsuits suggest that one important issue the courts will have to decide is whether the parties fulfilled the required steps of contract formation. Crucial questions for the courts to decide are:

- Did Fanatics make a valid offer to Mr. Harrison through the purported binding term agreement regarding his NIL? Did both parties mutually assent to the terms such that consideration existed? And did Mr. Harrison take any actions that constitute acceptance? If so, was a valid and enforceable contract created?
- Were the alleged promises University of Florida made to Mr. Rashada regarding future NIL deals oral or in writing? If oral, did that constitute a valid offer to which acceptance will seal a contract? Did Mr. Rashada rescinding his letter of intent with University of Miami and signing a letter of intent with University of Florida instead constitute a valid acceptance? If so, what are the terms of the contract?

Authority and/or Capacity

While the formation requirements are crucial, state laws may also scrutinize who has the capacity to enter into a binding contract. Typically, to enter into a contract, a party must have reached the required minimum age and be of sound mind. Further, a party must have the authority to enter into a binding contract. These rules are directly relevant to NIL contracts as they likely involve student-athletes, many of whom may be minors at the time of contracting, or agents or representatives of student-athletes, such as parents or sport agents. Again, the issues in the Fanatics and Rashada Lawsuits illustrate the utmost importance to understand authority and capacity to contract in the NIL context:

- Did Mr. Harrison and Mr. Rashada have the capacity to contract under the relevant state laws? If not, how does that affect the enforceability of their contracts?
- Did Mr. Harrison Sr. have the authority to bind his son to a contract involving the son's NIL rights?
- Did the University have the authority to bind its boosters to a contract with Mr. Rashada? Was Mr. Rashada justified in

relying on the University's representation as to the booster's obligations to Mr. Rashada?

Bargaining Power

Bargaining power is a party's ability to influence the terms and conditions in a contract in its favor due to its position or possession of unique or valuable resources. Courts scrutinize contracts where it appears that the power dynamics were starkly disproportionate during the contract negotiations. This may be the case in NIL deals, where—at least in appearance—one party (likely the company or university) is typically more powerful than the other (student-athlete). While some highly recruited student-athletes may have leverage or other advantages when negotiating NIL deals, most student-athletes have a lesser bargaining power when negotiating their deals:

- Was it reasonable for the Fanatics and the University of Florida to negotiate these NIL deals involving not only student-athletes (potentially minors), but without any lawyers protecting the interests of the student-athletes?
- Does the involvement of an agent or a parent alleviate the inequality of bargaining powers in negotiations for NIL deals?

Terms and Conditions/Scope

While some contracts may be as simple as "I will give you X in return for Y," others may involve complex subject matters that require additional terms and conditions to guide the expected performances by each party to the contract. Terms and conditions may include duration, scope, or condition precedent, etc. In the NIL context, the "thing" being contracted for—the athlete's name, image, and likeness—is such a fluid concept that it may be necessary for the parties to define their respective expectations. For example:

- Do the parties expect the student-athletes' NIL value to increase or decrease over time? If so, how do you measure any increase and decrease?
- Is the student-athlete required to take any steps to improve or preserve her/his NIL?

- Is there any penalty for either party for taking any actions detrimental to the NIL deals? For example, what if the student-athlete does something to tarnish his NIL, thereby tarnishing the company's brand by association? And vice-versa?
- Any opportunities/avenues for early termination or modification?
- Potential indemnification?
- Is there a need to negotiate an exclusivity provision?
- Is there an opportunity to negotiate royalty and similar incentives/compensation?

Termination

While we all want or expect our relationships to last forever, we know that every relationship comes to an end. The question is, if and when it comes to it, how do we want it to end? Relationships change over the course of time, for better or worse. This is the same for all contractual relation-

ships, including NIL deals. Accordingly, you would be better off by agreeing in the contract to a process to facilitate a smooth ending. Giving the fluidity and uncertainty associated with NIL, parties to NIL deals must carefully consider what constitutes termination of the deals and how it may occur. For example:

- Can the parties terminate the deal for cause? If so, what is cause?
- Would a student-athlete "flipping" schools through the transfer portal or otherwise be a cause for the company to terminate the contract?
- Can the NIL deal extend beyond the student-athletes' collegiate career, including to after the student-athlete leaves to play in a professional league?
- Are there actions that would constitute an automatic termination of the deal?

Takeaways

With the excitement of recruiting a star athlete, playing for a championship con-

tender, or having the opportunity to make some money, student-athletes, companies, and universities could easily overlook critical legal requirements as they apply to their NIL deals. Save the speed for the field, and slow down on the contract negotiations.

The Fanatics and Rashada Lawsuits are a cautionary tale: every party negotiating an NIL deal should take the time to consider the legal implications.

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