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# NIL's Not-So-Sleeping Giant: Will Barstool's Reign be Stopped Before it Begins?

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**NIL's Not-So-Sleeping Giant: Will Barstool's Reign be Stopped Before it Begins?**

**By: Cole Manion, Staff Editor Vol. 110**



Boasting over one hundred thousand student-athlete signees,[1] Barstool Sports is positioning itself to be one of the first big winners following the National Collegiate Athletic Association's (NCAA) decision allowing student-athletes to profit from their name, image, and likeness.[2] Even so, there remains a looming potential that student-athlete partnerships with Barstool Sports may violate the law, even in the seeming Wild West[3] of NIL regulations.

Barstool Sports is no stranger to public scrutiny. After slowly becoming a major player in the ever-changing online "content creation" sphere, and engendering plenty of controversy along the way, Barstool has caught the eye of a significant population of internet users.[4] And, following the recent decision of the NCAA to allow student-athletes to profit from their name, image, and likeness, Barstool once again finds itself both on the cutting edge of an emerging market and walking a tightrope of controversy.[5]

While the idea of allowing student-athletes to be paid for their services has been debated for decades,[6] it has recently been revived with great fervor. Beginning with California's decision to allow student-athletes to be paid for their name, image, and likeness[7], the recent outcome of *NCAA v. Alston* marked a significant shift in the national dialogue in favor of greater compensation for student-athletes.[8] While *Alston* is cabined to the NCAA's limitations on education-related aid for student-athletes,[9] it is emblematic of a shift in the culture toward supporting greater compensation for collegiate student-athletes in even the non-academic context. This shift in both the culture and the law shows that it is certainly no coincidence that the NCAA announced its "interim" name, image, and likeness policy less than two weeks after *Alston*. [10]

The tea leaves suggest a shift in favor of student-athletes, and the NCAA is showing at least nominal support for the movement, but student-athletes are not free to profit in any way they please. The NCAA requires student-athletes to profit in a manner consistent with applicable state laws, and many states are placing explicit restrictions on how student-athletes may profit.[11] Common among these restrictions are prohibitions on student-athletes partnering with alcohol, tobacco, or gambling companies.[12] Notably, even where new state laws do not prohibit student-athletes from partnering with gambling companies, sports betting is still illegal in twenty states.[13]

Whether a state remains hostile to gambling or if it has explicitly prevented student-athletes from partnering with gambling companies, such rules may spell difficulty for Barstool's burgeoning stable of collegiate athletes. Penn National Gaming, a company that "owns and operates casinos and hotels across the

country,” has a thirty-six percent stake in Barstool Sports.[14] Further, Barstool currently operates sportsbooks in six states,[15] which allows Barstool to receive bets on various activities,[16] and it intends to expand into more states this year.[17] It also promotes gambling by advertising with gambling companies, running gambling shows, and promoting its sportsbooks through its online presence.[18] While there is not yet precedent showing what a “gambling company” is under name, image, and likeness rules, Barstool may be a prime candidate to receive this moniker.

The legal consequences of Barstool’s potential status as a gambling company are yet to be seen, but at least one athletic department has already advised its student-athletes against partnering with Barstool to preempt any potential violations. According to an internal communication sent to all student-athletes at the University of Louisville, “Barstool Sports . . . does not comply with the criteria outlined in the Kentucky Governor’s executive order.”[19] While the communication does not specify how Barstool fails to comply, it gives a quick glimpse into how Barstool’s ambiguous status as a gambling company may be dealt with by athletic departments nationwide.

Until further action is taken by the NCAA or state governments, the issue of Barstool as a supposed gambling company will probably be left to individual athletic departments to deal with internally.[20] But, given Barstool’s current strategic choice to push sports betting at seemingly every turn, student-athletes should not be surprised when it becomes a violation to be a “Barstool Athlete.”

[1] Leah Vann, *One week into NIL, lawyers caution athletes on Barstool, YOKE gaming and misinformation that could affect Iowa athletes*, The Gazette (Aug. 9, 2021, 10:04 AM), <https://www.thegazette.com/iowa-hawkeyes/one-week-into-nil-lawyers-caution-athletes-on-barstool-yoke-gaming-and-misinformation-that-could-a/>.

[2] Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA.org (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>.

[3] Vann, *supra* note 1 (referring to the lack of rules surrounding NIL).

[4] See Alex Reimer, *Barstool Sports Founder David Portnoy Says His Website Isn't Sexist*, Forbes (Jan. 15, 2016, 4:21 PM), <https://www.forbes.com/sites/alexreimer/2016/01/15/barstool-sports-acquisition-elevates-david-portnoy-to-mainstream/?sh=7d40bf4770e5>; *Barstool Sports*, Social Blade, <https://socialblade.com/instagram/user/barstoolsports>.

[5] See Vann, *supra* note 1.

[6] *National Collegiate Athletic Association v. Alston*, 594 U.S. \_\_\_, 2–6 (2021).

[7] James L. Johnston, *Regulators and Businesses Are Racing to Fill the Collegiate NIL Void*, Davis & Gilbert LLP (Dec. 3, 2020), <https://www.dglaw.com/press-alert-details.cfm?id=1165>.

[8] *Alston*, 594 U.S. at 35

[9] *Id.*

[10] See *Alston*, 594 U.S. \_\_\_; Hosick, *supra* note 2 (observing the dates of both occurrences).

[11] Hosick, *supra* note 2.

[12] See Vann, *supra* note 1; Jordan Goldstein, *A Guide to All Things NIL: Kentucky*, Romano Law (July 24, 2021), <https://www.romanolaw.com/2021/07/24/a-guide-to-all-things-nil-kentucky/>; Joey Kaufman, *New name, image and likeness era arrives at Ohio State. Here's how it will work starting July 1*, The Columbus Dispatch (July 6, 2021, 10:28 AM), <https://www.dispatch.com/story/sports/2021/07/01/ohio-state-athletics-new-name-image-and-likeness-era-arrives/7799217002/>.

[13] Ryan Rodenberg, *United States of sports betting: An updated map of where every state stands*, ESPN.com (Apr. 7, 2021), [https://www.espn.com/chalk/story/\\_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization](https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization); See Vann, *supra* note 1.

[14] Peter Kafka, *A casino company is buying Barstool Sports in a \$450 million deal*, Vox (Jan. 29, 2020, 1:37 AM), <https://www.vox.com/recode/2020/1/29/21113130/barstool-sports-penn-national-deal-dave-portnoy-chernin>; Vann, *supra* note 1.

[15] *Barstool Sportsbook & Casino*, Apple App Store, <https://apps.apple.com/us/app/barstool-sportsbook-casino/id1474416533>.

[16] Doc’s Sports, *What Is A Sportsbook in Regards to Sports Betting and Wagering?*, Doc’s Sports Service (Oct. 13, 2014), <https://www.docsports.com/how-to-what-is-does/sportsbook-regards-sports-betting-wagering.html>.

[17] Jason Ziernicki, *When Will Barstool Sportsbook & Casino Come to Your State?* Action Rush (Aug. 20, 2021), <https://actionrush.com/when-will-barstool-sportsbook-casino-come-to-your-state/>.

[18] See generally *Pardon My Take*, Barstool Sports; *Barstool Bets*; *Barstool Pick Em*; *Picks Central* (not every Barstool Sports podcast or episode relates to gambling; however, the podcasts relate the most to gambling) (download using Apple Podcasts or Spotify).

[19] @DarrenHeitner, Twitter (Aug. 9, 2021, 10:45 PM), <https://twitter.com/DarrenHeitner/status/1424924871277129740>.

[20] See Vann, *supra* note 1.

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