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This Play is Under Review: How State Name, Image, and Likeness Statutes Fail to Protect Student-Athletes from Unscrupulous Agents

MATTHEW S. THOMAS*

ABSTRACT

For over a century, the National Collegiate Athletic Association's concept of amateurism prohibited student-athletes from receiving compensation for their name, image, and likeness. Amateurism has been successfully challenged in the Supreme Court of the United States in recent years. In the wake of these challenges, states have passed legislation allowing student-athletes to profit from their name, image, and likeness. Additionally, the legislation allows student-athletes to utilize an agent without losing their athletic eligibility. Unfortunately, the legislation is largely void of proper attempts to regulate agent behavior and instead relies on a prior regulatory scheme. This raises a question as to whether student-athletes are protected from unscrupulous agents under this scheme as agents seek to profit in this new era. This article seeks to address the pitfalls of the prior regulatory scheme and proposes solutions that should be considered as part of a unified federal approach.

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I. INTRODUCTION

The National Collegiate Athletic Association (“NCAA”) was established in 1906 after President Theodore Roosevelt urged coaches to clean up the sport of American football after 18 deaths were suffered in the previous season.¹ Fifty years later, the organization regulated recruitment, established academic standards for athletes, and formally adopted rules of amateurism.² From this point onward, the revenue generated by the college sports industry increased exponentially.³ By 2019, college sports had exploded into a \$14 billion industry benefitting the NCAA, its member universities, and the athletic conferences.⁴ The athletes--the stars of the show--earned nothing as the industry grew because the amateurism rules created by the NCAA strictly forbade athletes from receiving benefits or compensation unrelated to education.⁵

This era of college athletics came to a close on July 01, 2021, as student-athletes were allowed to monetize their name, image, and likeness (“NIL”).⁶ D’Eriq King, a quarterback at the University of Miami, was the first to benefit from the new rules as he inked a \$20,000 endorsement deal one minute after midnight on July 01, 2021.⁷ Within weeks, student-athletes like Bryce Young, a quarterback at the University of Alabama, had signed multiple deals worth nearly seven figures.⁸ This new financial opportunity was so enticing to Quinn Ewers -- a quarterback at Ohio State -- that he changed his high school graduation year through the reclassification process to enroll at Ohio State a year early.⁹ Reclassifying himself allowed him, along with his agent, to negotiate a NIL deal valued at \$1.4 million over three years.¹⁰ Football players are not the only beneficiaries of these new rules. Olivia Dunne, a gymnast at Louisiana State University, is expected to become the top-earning athlete as she profits off her social media following of 5 million followers.¹¹

This new market is projected to become worth \$500 million by July 2022 and further mature into a market worth one billion dollars annually.¹² Sports agents are

1. Sara Germano, *Payday for US College Athletes Rattles \$14bn Industry*, FINANCIAL TIMES (Oct. 2, 2021), <https://www.ft.com/content/447c3300-2fd2-4d70-829a-18b3715be498>.

2. *Id.*

3. *See id.*

4. *Id.*

5. *See id.* at 1, 5.

6. *Looking Back at a Busy Summer of NIL Deals*, JD SUPRA (Aug. 18, 2021), <https://www.jdsupra.com/legalnews/looking-back-at-a-busy-summer-of-nil-8439967>.

7. Mike Cungo, *Hurricanes QB D’Eriq King First to Land NIL Deal*, CBS MIAMI (July 1, 2021), <https://miami.cbslocal.com/2021/07/01/miami-hurricanes-deriq-king-nil-deal>.

8. *See* Alex Scarborough, *Sources: Alabama Crimson Tide QB Bryce Young Has Already Signed More Than \$800k in NIL Deals*, ESPN (July 29, 2021), https://www.espn.com/college-football/story/_/id/31911674/sources-alabama-crimson-tide-qb-bryce-young-already-signed-800k-nil-deals.

9. Tom VanHaaren, *Ohio State Buckeyes QB Quinn Ewers has NIL Deal for \$1.4 million*, *Source Says*, ESPN (Aug. 31, 2021), https://www.espn.com/college-football/story/_/id/32120440/ohio-state-buckeyes-qb-quinn-ewers-nil-deal-14-million-source-says.

10. *Id.*

11. *See* Dana DiPiazza, *After NCAA rule change, LSU Gymnast Expected to Earn More Than Any Other College Athlete*, WBRZ (July 1, 2021), <https://www.wbrz.com/news/lsu-gymnast-expected-to-earn-more-money-than-any-other-college-athlete>.

12. Justin Birnbaum & Olivia Evans, *College Athletes Are Ready To Reap The Rewards Of A Billion-Dollar NIL Market. Opendorse Is Here To Help.*, FORBES (June 24, 2021), <https://www.forbes.com/sites/oliviaevans/2021/06/24/college-athletes-are-ready-to-reap-the-rewards-of-the-billion-dollar-nil-market-opendorse-is-here-to-help/?sh=10bff77e4f57>.

eager to enter this market but are limited to representing athletes strictly for NIL purposes and are prohibited from contracting for future services.¹³ Agents who negotiate NIL deals can earn an uncapped commission.¹⁴ Additionally, agents have the opportunity to establish relationships with student-athletes in hopes that the athlete will enter a representation agreement when the athlete enters the professional ranks.¹⁵ As part of laying the foundation for representing athletes in their professional careers, agents are agreeing to represent athletes for NIL purposes and giving athletes six-figure cash advances to be credited against the athlete's future NIL earnings.¹⁶ The broad effect is that agents have shifted their recruiting cycle to begin when an athlete is entering college as opposed to when an athlete is on the precipice of a professional career.¹⁷

Whether an agent seeks to profit in the NIL era in the short term or the long term, the result is that student-athletes are vulnerable to signing bad deals.¹⁸ Examples of bad deals include incentive-based schemes for statistical performance, pay-to-play arrangements, and a quid-pro-quo arrangement where a player is awarded a deal for committing to a particular institution.¹⁹ A student-athlete entering into this type of deal will lose their athletic eligibility because the prohibition on these types of deals remains in effect.²⁰ One concern that arises would be an overzealous agent arranging a profitable NIL deal with a university booster contingent on the athlete's attendance at the booster's alma mater.²¹ Though this deal has the appearance of an NIL deal, it is a quid-pro-quo arrangement that would be punished by the NCAA.²² It should come as no surprise that there are a lot of bad actors wanting to get into this market who are willing to take advantage of student-athletes at the student-athlete's expense.²³

This article will present solutions to protect student-athletes from predatory sports agents seeking to profit in the NIL era. Part II focuses on the historical legal background that created the current NIL environment. Part III discusses the four approaches that state NIL statutes take to certify, monitor, and enforce the law against sports agents. The federal enforcement mechanism will also be discussed

13. See Cody Benjamin, *NFLPA Permits NFL Agents to Represent College Football Players in NIL Marketing Agreements, Per Reports*, CBS SPORTS (July 1, 2021), <https://www.cbssports.com/nfl/news/nflpa-permits-nfl-agents-to-represent-college-football-players-in-nil-marketing-agreements-per-reports>.

14. See *A Sports Agent's Role in the World of NIL: Part II*, ADU <https://www.athleticdirector.com/sanil/a-sports-agents-role-in-the-world-of-nil-part-ii> (last visited Nov. 14, 2021).

15. Mike Florio, *Looming Launch of NIL Rights Has Some NFL Agents Mobilizing*, NBC SPORTS (June 20, 2021), <https://profootballtalk.nbcsports.com/2021/06/20/looming-launch-of-nil-rights-has-some-nfl-agents-mobilizing>.

16. *Id.*

17. See Kalyn Kahler, *NIL Is Transforming The NFL Agent Business, Too*, DEFECTOR (July 13, 2021), <https://defector.com/nil-is-transforming-the-nfl-agent-business-too>.

18. *See id.*

19. *See generally Name, Image and Likeness Policy Question and Answer*, NCAA (Nov. 2021), available at https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf.

20. *See id.*

21. See Ryan Fagan, *NIL Need-to-Know: Answers to Basic Questions You Have About New Rules For College Athletes*, SPORTING NEWS, (July 1, 2021), <https://www.sportingnews.com/us/ncaa-football/news/nil-need-to-know-answers-to-the-basic-questions-you-have-about-new-rules-for-college-athletes/nc9f6trq3oh1dwd1m5vmvww4>.

22. *See id.*

23. *See Colloquium, Name, Image, and Likeness of the Modern Athlete*, 16 N.Y.U. J. L. & BUS. 839 (2020).

here. The role that the state statutes and the federal enforcement mechanism play in regulating sports agents will be critiqued in Part IV. Part V provides solutions to overcome the critiques introduced in Part IV. Part VI concludes.

II. THE LEGAL LANDSCAPE THAT CREATED THE CURRENT NIL ENVIRONMENT

The concept of amateurism is the heartbeat of the NCAA, whose bylaws limit participation in intercollegiate athletics to amateur athletes.²⁴ The amateur status is terminated if an athlete engages in one of seven distinct activities centered on receiving compensation as well as entering into an agreement with an agent.²⁵ Courts have tended to view the NCAA's amateurism rules as reasonable.²⁶ In *NCAA v. Bd. of Regents*, the Supreme Court articulated that the preservation of the student-athlete is vital to intercollegiate athletics.²⁷ In dicta, Justice Stevens explained that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role."²⁸ He further opined that "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid."²⁹ Some commentators have suggested that this decision provided precedential support allowing lower federal courts to treat NCAA restraints on players differently than other NCAA regulations.³⁰

Early on, legal challenges to the NCAA's business model brought in federal court solidified this approach. In *McCormack v. NCAA*, the Fifth Circuit heard a case alleging that the NCAA restrictions on compensation violated the antitrust laws.³¹ The court ruled in favor of the NCAA, relying heavily on the sentiments towards amateurism put forth in *Bd. of Regents*.³² The Seventh Circuit similarly relied on the concept of amateurism to dispose of another antitrust challenge to the NCAA's business model.³³ The appellant, in this case, challenged the NCAA's ban on agents on grounds that the ban constituted an antitrust violation.³⁴ The court's response was that "[t]he elimination of the no-draft and no-agent rules would fly in the face of the NCAA's amateurism requirements."³⁵

The NCAA's firm foundation of amateurism began to crack in the 2014 *O'Bannon v. Nat'l Collegiate Athletic Assoc.* decision when a U.S. District Court in California determined that *Bd. of Regents* did not create a sweeping proposition barring

24. See NCAA, DIVISION I MANUAL BYLAW 12.01.1 (Aug. 1, 2021), <https://web3.ncaa.org/lstdbi/reports/getReport/90008>.

25. See *id.* at 12.1.2(a)-(g).

26. See Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 343 (2005).

27. *Nat'l Collegiate Athletic Assoc. v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

28. *Id.*

29. *Id.* at 102.

30. See Daniel E. Lazaroff, *The NCAA In Its Second Century: Defender of Amateurism or Antitrust Recidivist*, 86 OR. L. REV. 329, 340 (2007).

31. See *McCormack v. Nat'l Collegiate Athletic Assoc.*, 845 F.2d 1338, 1340 (5th Cir. 1988).

32. See *id.* at 1344.

33. See *generally* *Banks v. Nat'l Collegiate Athletic Assoc.*, 977 F.2d 1081, 1093-94 (7th Cir. 1992).

34. See *id.* at 1084.

35. *Id.* at 1091.

student-athletes from profiting off their name, image, and likeness.³⁶ The Ninth Circuit vacated a portion of the district court's decision but importantly affirmed that the NCAA's amateurism rules violated the federal antitrust laws.³⁷ This outcome paved the way for California to become the first state to consider codifying the *O'Bannon* decision and directly attack the NCAA's concept of amateurism.³⁸ California officially became the first state to have an NIL statute on the books when Governor Gavin Newsom signed the "Fair Pay to Play Act" on September 30, 2019.³⁹

California's NIL statute makes it illegal for an educational institution and an athletic association like the NCAA to prevent a student from participating in intercollegiate athletics for earning compensation from their name, image, and likeness.⁴⁰ California's state legislature also added provisions making it illegal to remove a student's athletic eligibility for obtaining professional representation from an agent or an attorney in relation to contracts.⁴¹ By definition, California's NIL statute is in direct conflict with the NCAA bylaws with respect to compensation and obtaining professional representation.⁴² This raises the question of whether the NCAA bylaws preempt state law when there is a conflict. There is potential that state NIL laws could be deemed unconstitutional because, under the Dormant Commerce Clause, the NCAA retains an ability to uniformly enforce its bylaws to avoid an extraterritorial effect.⁴³ However, this conflict has been temporarily removed as the NCAA announced an interim policy allowing individuals in states without NIL laws to engage in NIL activities without having their eligibility impacted.⁴⁴ This policy further adds that student-athletes who enter into NIL agreements in states with NIL laws will not lose their eligibility status.⁴⁵ Nor will a student athlete's eligibility be removed for obtaining professional representation.⁴⁶

III. STATE NIL STATUTES AND SPORTS AGENTS – CERTIFICATION, MONITORING, AND ENFORCEMENT

Shortly after Governor Gavin Newsom signed California's NIL bill into law, several states began to introduce legislation with a similar goal of allowing students

36. *O'Bannon v. Nat'l Collegiate Athletic Assoc.*, 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

37. *O'Bannon v. Nat'l Collegiate Athletic Assoc.*, 802 F.3d 1049, 1079 (9th Cir. 2015).

38. See Michael McCann, *Could 'Fair Pay to Play Act' Pave Way Toward End of Amateurism in Collegiate Athletics?*, SI (May 29, 2019), <https://www.si.com/college/2019/05/25/california-fair-pay-play-act-end-ncaa-amateurism>.

39. Steve Berkowitz, *California Governor Signs Bill That Makes It Easier For College Athletes to Profit From Name, Likeness*, USA TODAY (Sept. 30, 2019), <https://www.usatoday.com/story/sports/college/2019/09/30/college-sports-california-governor-signs-image-and-likeness-bill/2367426001/>.

40. CAL. EDUC. CODE § 67456(a)(1)-(3) (2021).

41. *Id.* § 67456(c)(1)-(3).

42. See NCAA, *supra* note 24, at 12.1.2.

43. See Nicolas Chapman, *Money For Nothing (I Want Publicity)*, 52 UNIV. PAC. L. REV. 649, 651-52 (2021).

44. *Interim NIL Policy*, NCAA (July 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf.

45. *See id.*

46. *See id.*

to be compensated for their name, image, and likeness.⁴⁷ Though the goal is similar, the legislation varies by state.⁴⁸ With respect to the provisions concerning sports agents in particular, the state NIL statutes follow one of four approaches: (1) the Uniform Athlete Agents Act (“UAAA”) approach, (2) the California approach, (3) the New Jersey approach, or (4) the South Carolina approach.

A. *The UAAA and RUAAA Approaches*

After its introduction in 2000, the UAAA was enacted in 42 states.⁴⁹ The primary goal of the Act is to protect athletes by establishing a uniform regulation of agents.⁵⁰ States who follow the UAAA approach, like Florida, have provisions in their NIL statute requiring agents to be licensed in the state.⁵¹ The NIL statute does not lay out new licensing requirements but rather points to the state’s existing UAAA statute.⁵² Under § 5 of the UAAA, anyone who wants to represent a student-athlete must register with the Secretary of State.⁵³ Registering with the Secretary of State requires agents to disclose their formal training, criminal convictions, disciplinary action taken against them as an agent, and any denial of a sports agent license in another state.⁵⁴ Section 6 lays out license renewal requirements which incorporate the § 5 requirements.⁵⁵ Each state determines its registration and renewal fees.⁵⁶ The UAAA registration requirements are a gatekeeping mechanism intended to ensure compliance with state law, and it is recommended that the fee structure be reasonable to promote compliance.⁵⁷

The UAAA is the dominant approach as 22 states have adopted the Act.⁵⁸ Fourteen states who previously adopted the Act have enacted the Revised Uniform Athlete Agents Act (“RUAAA”).⁵⁹ The RUAAA adds an additional layer to the registration requirements laid out in the UAAA by proposing two alternatives to §§ 5 through 9.⁶⁰ Both alternatives contemplate agent registration systems.⁶¹ Alternative A requires a state to register an agent who is registered in another state if the registering state determines the other state’s registration law is either substantially

47. Agota Peterfy & Kevin Carron, *Show Me the Money!*, 76 J. MO. B. 68, 69 (Mar. – Apr. 2020).

48. See Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT. L. 247, 249 (2020) (explaining some of the differences between the NIL statutes in Florida, New York, and South Carolina).

49. See James Masteralexi, Lisa Masteralexis, & Kevin Synder, *Enough is Enough: The Case for Federal Regulation of Sports Agents*, 20 JEFFREY S. MOORAD SPORTS L. J. 69, 90 (2013).

50. *Id.*

51. FLA. STAT. § 1006.74(d) (2021).

52. *Id.*

53. UNIF. ATHLETE AGENTS ACT § 5 (UNIF. L. COMM’N 2000).

54. *Id.*

55. *Id.* § 6.

56. *Id.* § 9.

57. See *id.* cmt.

58. See *Athlete Agents Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=cef8ae71-2f7b-4404-9af5-309bb70e861e> (last visited Nov. 14, 2021) (showing an enactment history list of the twenty-two states that have enacted the UAAA).

59. See *id.* (showing that fourteen states have enacted the RUAAA).

60. See REVISED UNIF. ATHLETE AGENTS ACT §§ 5-9, legislative note to alternative A for sections 5 through 9 (UNIF. L. COMM’N 2019).

61. See *id.*

similar or more restrictive.⁶² Alternative B is the establishment of a central registration agency where enacting states enter into a compact with each other.⁶³

Section 14 of both the UAAA and RUAAA establish prohibited agent conduct.⁶⁴ For example, the UAAA prohibits giving false or misleading information or promises with the intent to induce a student-athlete to enter into an agreement with an agent.⁶⁵ Furnishing anything of value to a student-athlete is also prohibited.⁶⁶ The RUAAA mirrors these provisions but adds revisions to accommodate the updated NCAA eligibility rules established in response to the 2017 scandal involving basketball coaches and shoe companies.⁶⁷

Agents who violate the UAAA can face criminal, civil, and administrative penalties.⁶⁸ Violators of the RUAAA face identical penalties.⁶⁹ The UAAA and RUAAA give states the discretion to define the criminal penalties.⁷⁰ The civil penalties in the UAAA include damages caused by a sports agent for violating the Act.⁷¹ However, an action can only be brought against an agent by an educational institution.⁷² The RUAAA mirrors the UAAA's civil penalties with one exception; student-athletes have a right of action against a sports agent who violates the Act.⁷³ Both Acts permit a state administrator to issue a civil penalty against an agent who violates the Act.⁷⁴ However, the maximum fine differs between the UAAA and RUAAA as the maximum is set at \$25,000 and \$50,000, respectively.⁷⁵

B. *The California Approach*

California is among the states who have non-UAAA laws to regulate agents.⁷⁶ However, California's law governing agent is similar in many respects to the law enacted by states who follow the UAAA. First, California's NIL statute also adopts language requiring professional representatives of student-athletes to be licensed according to established agent laws rather than establishing new licensing requirements.⁷⁷ Second, California requires prospective agents to file an application with

62. *Id.*

63. *Id.*

64. UNIF. ATHLETE AGENTS ACT § 14; REVISED UNIF. ATHLETE AGENTS ACT § 14.

65. UNIF. ATHLETE AGENTS ACT § 14(a)(1)-(2).

66. *Id.* § 14(3).

67. REVISED UNIF. ATHLETE AGENTS ACT § 14 cmt.; Mitch Sherman, *Everything You Need to Know About the College Basketball Scandal*, ESPN (Feb. 23, 2018), https://www.espn.com/mens-college-basketball/story/_/id/22555512/explaining-ncaa-college-basketball-scandal-players-coaches-agents (the alleged scandal involved coaches taking cash bribes from shoe company business advisors in exchange for the coaches' influence of players to sign contracts with the shoe company once the player enters the NBA).

68. *See generally* UNIF. ATHLETE AGENTS ACT §§ 15-17.

69. *See generally* REVISED UNIF. ATHLETE AGENTS ACT §§ 15-17.

70. UNIF. ATHLETE AGENTS ACT § 15; REVISED UNIF. ATHLETE AGENTS ACT § 15.

71. UNIF. ATHLETE AGENTS ACT § 16(a).

72. *Id.*

73. REVISED UNIF. ATHLETE AGENTS ACT § 16(a).

74. UNIF. ATHLETE AGENTS ACT § 17; REVISED UNIF. ATHLETE AGENTS ACT § 17.

75. *Id.*

76. Jon Solomon, *Sports Agent Laws Reboot: Uniform Athlete Agents Act Tries Again 13 Years Later*, ADVANCE LOCAL (Jan. 2019), https://www.al.com/sports/2013/09/whats_the_best_way_to_control.html.

77. CAL. EDUC. CODE § 67456(c)(2).

the Secretary of State.⁷⁸ Applicants are required to provide basic demographic information, prior convictions, professional disciplinary history, and proof of completion of formal training.⁷⁹ Third, applicants must pay a reasonable filing fee.⁸⁰ Lastly, California's agent law prohibits an agent from providing false, fraudulent, or misleading information.⁸¹

California's agent law adds additional regulations to agent conduct that is not present in the UAAA.⁸² For example, California prohibits an agent from having an ownership or financial interest in an entity of a sport that the athlete they represent participates in.⁸³ Additionally, agents who provide financial services or financial advice to their athletes are required to disclose any ownership interest the agent has or any commission the agent may receive.⁸⁴

California's enforcement provisions are more punitive than the UAAA. California law creates a civil cause of action, allowing *any* person to bring a civil action for recovery of damages from an athlete agent.⁸⁵ A prevailing plaintiff is permitted to recover actual damages, punitive damages, court costs, and attorney's fees.⁸⁶ Criminal penalties consist of a maximum fine of \$50,000, or imprisonment of up to one year, or both.⁸⁷

C. *The South Carolina Approach*

South Carolina's NIL statute defines an agent as a person registered with the Department of Consumer Affairs in accordance with existing agent licensing laws.⁸⁸ As an adopter of the UAAA, many of South Carolina's licensing requirements, prohibited conduct, and enforcement provisions align with the UAAA.⁸⁹

However, when South Carolina passed its NIL statute, it uniquely extended its regulation of agents beyond the normal UAAA boundaries.⁹⁰ First, South Carolina instituted a continuing athlete agent education requirement of 20 hours biennially.⁹¹ Second, the legislature requires the Department of Consumer Affairs to maintain an online registry that contains a list of all registered agents who are in good standing.⁹² Third, the state increased registration fees to be \$1,500 for new registration and \$700 for renewal.⁹³ Registration fees based on registration in another state are set

78. CAL. BUS. & PROF. CODE § 18896 (2021).

79. *Id.* § 18896(a)-(n).

80. CALIFORNIA SECRETARY OF STATE, <https://www.sos.ca.gov/business-programs/special-filings/forms> (last visited Nov. 14, 2021).

81. CAL. BUS. & PROF. CODE § 18897.37 (2018).

82. *E.g.*, § 18897.3.

83. *Id.* § 18897.27.

84. *Id.* § 18897.3.

85. *Id.* § 18897.8(a).

86. *Id.* § 18897.8(b).

87. *Id.* § 18897.93(a).

88. S.C. CODE ANN. § 59-158-10(a) (2021).

89. *See id.* § 59-102-50; *See id.* § 59-102-140; *see id.* § 59-102-150.

90. *See* Darren Heitner, *South Carolina Gets More Aggressive With Agents, Including A 10% Cap On NIL Fees*, SPORTS AGENT BLOG (Aug. 19, 2021), <http://sportsagentblog.com/2021/08/19/south-carolina-gets-more-aggressive-with-agents-including-a-10-cap-on-nil-fees>.

91. S.C. § 59-012-70(C).

92. *Id.* § 59-102-85.

93. *Id.* § 59-102-90(1), (3).

at \$2,500 for new registration and \$1,500 for renewal.⁹⁴ Finally and most uniquely, South Carolina caps agent commission on NIL activities to 10%.⁹⁵

D. *The New Jersey Approach*

New Jersey's NIL statute has no state-mandated licensing requirements.⁹⁶ Athlete agents are only required to comply with the Sports Agent Responsibility and Trust Act ("SPARTA").⁹⁷ As discussed below, SPARTA tasks the Federal Trade Commission ("FTC") with regulating the athlete agent profession.⁹⁸

E. *The Federal Enforcement Mechanism*

SPARTA aims to both deter and protect.⁹⁹ It deters by preventing sports agents from engaging in overreaching activities.¹⁰⁰ It protects by attempting to prevent universities and athletes from violating NCAA regulations unknowingly.¹⁰¹ To accomplish these two purposes, the Act prohibits multiple activities such as providing false or misleading information, providing anything of value, pre or post-dating contracts, or failing to disclose in writing that a student-athlete may lose NCAA eligibility.¹⁰² Furthermore, SPARTA creates civil causes of action that allow universities and state attorney generals to file suit against agents who violate the law.¹⁰³ Lastly, SPARTA classifies violations of the Act as unfair or deceptive acts or practices of trade to be regulated by the FTC.¹⁰⁴ SPARTA grants the FTC jurisdiction to penalize violators to the full extent of the powers granted under the Federal Trade Commission Act.¹⁰⁵

IV. CURRENT STATE LAWS AND SPARTA DO NOT PROTECT STUDENT-ATHLETES.

The regulatory scheme created by SPARTA and the UAAA is ineffective at protecting student-athletes from agents engaged in bad behavior.¹⁰⁶ This regulatory scheme has three pitfalls. First, the laws are rarely enforced against sports agents who engage in illegal acts.¹⁰⁷ Second, the scheme is weak and ineffective at

94. *Id.* § 59-102(2), (4).

95. *Id.* § 59-102-100(H).

96. N.J. REV. ST. § 18A:3B-87(3) (2020).

97. *Id.*

98. *See infra* Section III(E).

99. *See* Eric Willenbacher, *Regulating Sports Agents: Why Current Federal And State Efforts Do Not Deter the Unscrupulous Athlete-Agent and How a National Licensing System May Cure the Problem*, 78 ST. JOHN'S L. REV. 1225, 1234 (2004).

100. *Id.*

101. *Id.*

102. 15 U.S.C. § 7802 (2004).

103. *Id.* §§ 7804-7805.

104. *Id.* § 7803(a).

105. *Id.* § 7804(b).

106. Timothy G. Nelson, *Flag on the Play: The Ineffectiveness of Athlete-Agent Laws and Regulations – and How North Carolina Can Take Advantage of a Scandal to Be a Model for Reform*, 90 N.C. L. REV. 800, 820-21 (2012).

107. *Id.* at 821.

detering bad behavior.¹⁰⁸ Third, the UAAA and SPARTA fail to grant a private cause of action to student-athletes who are harmed by agent misconduct.¹⁰⁹ These pitfalls persist in the wake of NIL legislation because the NIL statutes do not modify existing sports agent laws, thereby upholding the ineffective regulatory scheme.¹¹⁰ To illustrate, Florida's version of the UAAA allows "[a] college or university [to] sue for damages, as provided by this section . . .," and does not grant a cause of action to student-athletes.¹¹¹ The Florida NIL statute does not repeal or modify this provision.¹¹² The NIL statute only acknowledges the existing agent law by requiring an agent to ". . .be licensed under part IX of chapter 468."¹¹³ Thus, Florida's enactment of NIL laws allows an ineffective scheme to persist.

A. *The Enforcement Problem*

In 2010, sports journalists discovered that state laws regulating agents were widely unenforced.¹¹⁴ This is an odd paradigm considering agent misconduct is a growing problem.¹¹⁵ More than half of the 42 states that implemented the UAAA have not revoked or suspended a single agent's license.¹¹⁶ Twenty-four states took no disciplinary or criminal action against sports agents.¹¹⁷ There is a strong indication that enforcing these laws is a low priority because states who have enforced the laws have done so only a "few times" or "rarely."¹¹⁸ For example, Pennsylvania only issued four fines from 2003 to 2010, and none of them exceeded \$1,000.¹¹⁹ Texas is the outlier as state officials took disciplinary action against 31 agents from 2008 to 2010.¹²⁰ These actions resulted in fines averaging close to \$1,000 per agent.¹²¹

The FTC, the enforcer of SPARTA, reported "very, very few" complaints.¹²² Not a single license has been revoked or suspended by federal law enforcement as the FTC reported taking no enforcement actions.¹²³

The lack of enforcement on both the state and federal levels is not surprising when prosecutors are tasked with prioritizing agent misconduct amongst robberies,

108. Willenbacher, *supra* note 99, at 1242-43.

109. Marc Edelman, *Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform its Sports Agent Laws to Conform with True Agency Principles*, 4 HARV. J. SPORTS & ENT. L. 145, 173, 179 (2013).

110. *See supra* Section III (explaining how different state NIL statutes point to existing state law that governs how agents are licensed, prohibited conduct, and how the provisions are enforced for misconduct).

111. FLA. § 468.4562(1).

112. *See generally id.* § 1006.74.

113. *Id.* § 1006(d).

114. *See* Associated Press, *Report: State Agent Laws Unenforced*, ESPN (Aug. 17, 2010), <https://www.espn.com/college-sports/news/story?id=5470067>.

115. Jessica Mullican, *The Little College Ball Play and the Big Bad Agent: How Texas Can Address Its Growing Problem of Athlete Agent Violations*, 15 TEX. TECH ADMIN. L. J. 253, 272 (2013).

116. *See* Associated Press, *supra* note 114.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *See id.*

122. *Id.*

123. *See id.*

sexual assaults, and white-collar crime.¹²⁴ This is compounded by the level of staffing allocated to enforce agent laws.¹²⁵ Staffing levels in most states are low or non-existent.¹²⁶ Poor funding is an additional factor that contributes to low enforcement levels.¹²⁷

B. *The Deterrence Problem*

One commentator said, “. . . the collective failure of states to pursue action against agents . . . is the codification of empty threats.”¹²⁸ Putting the enforcement problem aside, the threats themselves do not deter sports agents from performing illegal acts.¹²⁹ One obvious threat to an agent would be the revocation of his or her state agent license. However, the effect of this threat is severely diminished because an agent who loses a license in one state can simply establish headquarters in a neighboring state.¹³⁰ The agent can engage in the same illegal activity and take the chance that he or she will not be caught in a different jurisdiction.¹³¹

Additionally, the financial penalties authorized by state statutes are ineffective deterrents.¹³² Agent misconduct can result in a civil, criminal, or administrative penalty of up to \$50,000, depending on if the state has enacted the UAAA or the RUAAA.¹³³ Though this seems like a substantial penalty, there are three reasons why it falls short as a deterrent. First, it is unlikely the law will be enforced against an agent involved in misconduct resulting in a financial penalty.¹³⁴ Second, even when the law is enforced, states have shown they will issue small penalties of around \$1,000 rather than approach the maximum penalty allowed under the law.¹³⁵ Third, the benefits an agent can gain significantly outweigh the risks both of getting caught and paying a fine that falls well below the potential maximum.¹³⁶

Agents who negotiate NIL deals on behalf of student-athletes are likely to set their commission rate between 15-20%.¹³⁷ The value of representing a student-athlete will be minimal as the vast majority of student-athletes will make less than five figures when agreeing to NIL deals.¹³⁸ Although an agent’s actual earnings from NIL deals may be small, the real goal is to build a relationship that will pay off when the athlete goes pro.¹³⁹ The average NFL salary is \$2.7 million, and a sports

124. *Id.*

125. Nelson, *supra* note 106, at 824.

126. *Id.*

127. *Id.* at 825 (explaining that North Carolina’s Secretary of State was forced to reassign investigators to new roles due to the legislature’s failure to dedicate new resources for enforcement when it enacted the UAAA).

128. *Id.* at 822.

129. Willenbacher, *supra* note 99, at 1242.

130. Associated Press, *supra* note 114.

131. *Id.*

132. Nelson, *supra* note 106, at 803.

133. *See* UNIF. ATHLETE AGENTS ACT § 17 (explaining that states who have enacted the UAAA have a maximum penalty of \$25,000); *See* REVISED UNIF. ATHLETE AGENTS ACT § 17 (explaining that states who have enacted the RUAAA have a maximum penalty of \$50,000).

134. *See supra* Section IV(A).

135. Associated Press, *supra* note 114.

136. *See* Willenbacher, *supra* note 99, at 1243-44.

137. *A Sports Agent’s Role in the World of NIL: Part II*, *supra* note 14.

138. *Id.*

139. *Id.*

agent will make between 4-10% of a player's salary for negotiating the contract.¹⁴⁰ This salary information illustrates what is at stake. An agent can make between \$108,000 and \$270,000 for representing an average NFL football player.¹⁴¹ A superstar athlete could potentially yield millions of dollars in earnings for an agent.¹⁴² Unfortunately for student-athletes, agents employ unscrupulous measures to recruit a potential client who has even a minuscule chance of becoming a professional athlete.¹⁴³ The lack of enforcement and low fines do little to dissuade an agent from acting illegally when weighed against the potential gains.¹⁴⁴

SPARTA's financial penalties are also ineffective as deterrents.¹⁴⁵ Recall that SPARTA classifies a violation of the Act as an unfair or deceptive act or practice of trade to be regulated by the FTC.¹⁴⁶ Finding a violation of this type requires the FTC to issue a cease and desist order to the violating actor.¹⁴⁷ Should the violating actor continue to engage in the unfair or deceptive practice, the FTC may pursue a maximum penalty of \$43,792 for each violation.¹⁴⁸ It is worth noting that the current maximum penalty represents a substantial increase from the initial \$10,000 maximum penalty.¹⁴⁹ However, a question of effect still remains when the FTC has yet to use its jurisdictional power granted by SPARTA to issue a single penalty.¹⁵⁰ The deterrent effect remains low in spite of increasing the maximum penalty.

The combined effects of both the state and federal regulatory schemes serve as a weak deterrent.¹⁵¹ A scheme that is rarely enforced combined with inadequate penalties that do not offset potential gains is not enough to deter agents from engaging in bad behavior.¹⁵²

C. *The Principal Protection Problem*

Under the traditional tenets of agency law, one would expect the student-athlete to be the true principal in a fiduciary relationship between a student-athlete and an agent.¹⁵³ However, this is not the case as the UAAA and SPARTA subordinate the interests of student-athletes to the interests of the NCAA and its member universities.¹⁵⁴ Prioritizing the interests of the NCAA and its member universities over student-athletes resulted in drafting committees whose members served in NCAA

140. Kerri Renzulli, *Here's What the Average NFL Player Makes In a Season*, CNBC (Sept. 5, 2019), <https://www.cnbc.com/2019/02/01/heres-what-the-average-nfl-players-makes-in-a-season.html>; Madilyn Zeegers, *How Much Do NFL Agents Make*, SPORTSCASTING (Jan. 19, 2020), <https://www.sportscasting.com/how-much-do-nfl-agents-make>.

141. See Renzulli, *supra* note 140; see Zeegers, *supra* note 140.

142. Willenbacher, *supra* note 99, at 1244.

143. See *id.* at 1229-30.

144. *Id.* at 1245.

145. *Id.* at 1243.

146. See *supra* Section III(E).

147. 15 U.S.C. §§ 45(a)(2), (g) (2006).

148. *Id.* §§ (l)-(m), amended by 16 C.F.R. § 1.98 (c)-(e) (2021) (increasing the FTC fine from \$10,000 to \$43,792).

149. Compare 15 U.S.C. § 45(g) (2006) (establishing a maximum penalty of \$10,000 for each unfair or deceptive act) with 16 C.F.R. § 1.98 (c)-(e) (2021) (increasing the maximum penalty to \$43,792 for each unfair or captive act).

150. See 15 U.S.C. § 7803(b).

151. Nelson, *supra* note 106, at 820-21.

152. See *id.* at 821.

153. See Edelman, *supra* note 109, at 147-48.

154. *Id.* at 147.

leadership positions.¹⁵⁵ The drafters were concerned with protecting the concept of amateurism, and they skewed the remedies for agent misconduct in favor of preserving amateurism.¹⁵⁶

A cause of action for violating the UAAA can only be brought by the NCAA member schools.¹⁵⁷ As expected, a cause of action can be brought against an agent.¹⁵⁸ Additionally and shockingly, the UAAA permits an NCAA member school to pursue a cause of action against their *own* student-athletes who violate the Act.¹⁵⁹ Notably, the UAAA fails to provide a right to a cause of action under the Act to student-athletes who are harmed by agent misconduct.¹⁶⁰ Under this scheme, the student-athlete is not granted meaningful legal protection and is in a position to be held liable if their agent violates the UAAA.¹⁶¹

Fortunately, failing to provide meaningful legal protection to student-athletes for violating the UAAA is not the status quo.¹⁶² The RUAAA grants student-athletes a cause of action against an agent.¹⁶³ Moreover, the action can be brought for both a violation or an agent's omission if the student-athlete suffers financial damage or has their eligibility adversely affected.¹⁶⁴ Additionally, the RUAAA removes the provision permitting an NCAA member school from seeking action against the student-athlete.¹⁶⁵ Although this is a step in the right direction, this progress only exists in the 14 states who have enacted the RUAAA and in California.¹⁶⁶

In the same vein as the RUAAA, SPARTA does not grant NCAA member schools a right of action against student-athletes.¹⁶⁷ However, SPARTA replicates the principal protection problem at the federal level as the statute fails to grant a cause of action to student-athletes against agents.¹⁶⁸ Thus, like the UAAA, SPARTA further upholds a scheme that does not protect the interest of the student-athlete in their relationship with a sports agent.¹⁶⁹

V. A FEDERAL NIL STATUTE

Congress entered a race in the spring of 2021 to pass a federal NIL bill before many state NIL laws went into effect on July 01, 2021.¹⁷⁰ After a U.S. Senate Commerce Committee hearing regarding NIL issues, chairwoman Maria Cantwell

155. *Id.* at 168-69, 177.

156. *Id.* at 172-73.

157. UNIF. ATHLETE AGENTS ACT § 16(a)-(c).

158. *Id.* § 16(a).

159. *Id.*

160. *See generally id.* § 16.

161. Edelman, *supra* note 109, at 174.

162. *See* REVISED UNIF. ATHLETE AGENTS ACT § 16(a).

163. *Id.*

164. *Id.*

165. *Id.*

166. *See Athlete Agents Act, supra* note 58; *See* CAL. BUS. & PROF. CODE § 18897.8(a) (stating any student-athlete may bring a civil action to recover damages if they are adversely affected by an agent's violation of California's sports agent laws).

167. *See generally* 15 U.S.C. §§ 7803-7807.

168. *Id.*

169. *See* Edelman, *supra* note 109, at 147-48.

170. Ross Dellenger, *As July 1 Nears, Congress Making Critical Progress on NIL and College Athletes' Rights*, SI (May 18, 2021), <https://www.si.com/college/2021/05/18/ncaa-athletes-rights-profit-congress-nil-bill>.

revealed that Congress would not make it to the finish line.¹⁷¹ Congress took up the issue again in October of 2021 as both the NCAA and the National College Players Association (“NCPA”) solicited Congress to establish a federal framework around NIL.¹⁷² The NCAA claims that a federal NIL statute will provide uniform protections for student-athletes, increase the transparency of NIL deals, and create a level playing field among its member universities.¹⁷³ The NCPA views this as an opportunity to create broad-based reforms like agent certification, student-athlete NIL education, health, safety, and sexual abuse prevention.¹⁷⁴

In many respects, a federal NIL statute is a logical next step due to a complex landscape of non-uniform state NIL laws and an interim NCAA policy.¹⁷⁵ Creating a federal NIL statute is an opportune time for Congress to protect student-athletes from agent misconduct and address the pitfalls in the current regulatory scheme established by the UAAA and SPARTA. A federal statute must establish a national agent registry and include a right of action for student-athletes against agents who violate the NIL statute.

A. A National Agent Registry

Agent licensing and registration is a core component of the UAAA, but a registry system on the state level limits enforcement power and is a weak deterrent.¹⁷⁶ The drafters of the RUAAA identified this problem and recognized the benefits of a licensing system that crosses state lines.¹⁷⁷ Congress should note what the RUAAA drafters hoped to accomplish and establish a national registry of sports agents.¹⁷⁸

To create an effective registry, Congress must implement a comprehensive statutory scheme. First, Congress must establish licensing requirements. Congress could adopt the UAAA framework that states use to establish their own licensing requirements.¹⁷⁹ Second, Congress must make it illegal for agents to enter into a representation agreement with a student-athlete without being listed on the registry.¹⁸⁰ Congress could also adopt the UAAA framework here, which makes any agency contract void and requires the agent to return any consideration under the

171. Michael McCann, *Federal Nil Bill Stalls in Congress, Setting Table for July Chaos*, SPORTICO (June 17, 2021), <https://www.sportico.com/law/analysis/2021/name-image-likeness-federal-1234632214>.

172. Maria Carrasco, *Congress Weighs In on College Athletes Leveraging Their Brand*, INSIDE HIGHER ED (Oct. 1, 2021), <https://www.insidehighered.com/news/2021/10/01/congress-holds-hearing-creating-federal-nil-law>.

173. *See id.*

174. *See id.*

175. *See generally* James Leonard & Richard Wegener, *Name, Image and Likeness Scouting Report, Week 3: What’s Next for the NCAA?*, JD SUPRA (Sept. 27, 2021), <https://www.jdsupra.com/legal-news/name-image-and-likeness-scouting-report-8606880>.

176. UNIF. ATHLETE AGENTS ACT §§ 4, 6, 8; *infra* Section IV(B).

177. *See generally* REVISED UNIF. ATHLETE AGENTS ACT §§ 5-9 legislative note to alternative A for sections 5 through 9 (alternative A mentions that the alternative solution—titled alternative B—for sections 5 through 9 proposes an interstate compact for a new central registration agency).

178. *See* Willenbacher, *supra* note 99, at 1249.

179. *Id.*

180. *Id.* at 1250.

contract.¹⁸¹ Third, Congress must make the possibility of being removed from the registry a penalty for violating any of the NIL provisions.¹⁸²

The direct effect of this scheme is that it makes conducting business as an agent conditional on obtaining a federal license and being listed on the registry.¹⁸³ Agents risk having an agreement declared void should they enter a representation agreement with a student-athlete without being listed on the registry.¹⁸⁴ Agents further risk forfeitable commissions should they act as unregistered agents.¹⁸⁵ Under these conditions, an agent considering taking advantage of a young student-athlete will have to consider the risk of losing their livelihood and being blocked from a multi-billion dollar industry.¹⁸⁶ This deterrent is more robust because the risks here would go beyond minor fines and the remote possibility of being penalized for bad behavior.¹⁸⁷

B. *Grant Student-Athletes a Cause of Action Against Agent Misconduct*

A federal NIL statute must eliminate the principal protection problem that exists in the current regulatory scheme.¹⁸⁸ A legal remedy for student-athletes adversely affected by agent misconduct can accomplish this.¹⁸⁹ It is critical to provide a cause of action for student-athletes because it gives them a method to enforce their rights as a principal in a fiduciary relationship.¹⁹⁰ Congress can look to California for inspiration as California law establishes that *any* person represented by an agent is a principal.¹⁹¹ As a matter of law, student-athletes who are adversely affected by agent misconduct have a legal remedy.¹⁹² This legal remedy has proven to be an effective regulator of sports agents in California.¹⁹³ Congress can find similar success by granting student-athletes a right to action when sports agents harm them.

VI. CONCLUSION

The many attempts to protect student-athletes from unscrupulous acts of agents have, to date, been unsuccessful. A unified federal approach could alleviate the many problems such attempts have sought to address. The federal NIL bill should include both a national agent registry and a right of action for student-athletes against agents to avoid the problems that persist in the current regulatory scheme. The national registry will force agents to weigh the risks of being removed from the registry and the effect such removal will have on their ability to participate in the multi-billion-dollar sports agency industry. Granting student-athletes a right of

181. UNIF. ATHLETE AGENTS ACT § 4.

182. See Willenbacher, *supra* note 99, at 1250.

183. *Id.* at 1249-50.

184. *Id.* at 1250.

185. *Id.*

186. *Id.*

187. *Id.*

188. See *infra* Section IV(C).

189. Edelman, *supra* note 109, at 185.

190. *Id.* at 186.

191. CAL. BUS. & PROF. CODE § 18896.

192. *Id.*

193. Edelman, *supra* note 109, at 188.

No. 1] *Thomas: This Play is Under Review...* 217

action will provide them with a retributive remedy when they are adversely affected by agent misconduct. The protection of student-athletes against agents must be a central focus of any federal legislation.