

NIL Rules with Lawyer

Oh new nil laws are making waves throughout the country and there's a lot of confusion on the legislation leading to rampant speculation and instead of the blind leading the blind like we often see on social media I need to talk to somebody who actually knows the law Darren Heitner is a practicing lawyer specializing in sports law and is currently an adjunct professor at the University of Florida teaching for its law to the next generation Let's hear about the new world of nil from a credible source but first make sure to pick up your new hat for the new season from last Stand Hats use promo code Texas Homer all caps for 10% off your purchase at last stand hats dot com All right So let's get into it Darren I'm excited to learn from you So I'll have a better understanding on the topic First things first we give the viewers a quick intro on your background Sure My name is Darren Heitner born and raised in South Florida graduate of the University of Florida for undergrad and also for law school which is also the school that I teach at Currently I teach a sports law class at the University of Florida 11 College of Law My background is primarily as a lawyer I've been practicing for over 11 years I'm licensed in the State of Florida Washington DC State of New York and various federal courts I've also written at various publications I started a website called Sports Agent Blog back in 2005 written for Forms for six years INC magazine for four years And currently at above the law And I've also had a few books published called um How To Play The Game What every sports attorney needs to know which those books have been published by the American Bar Association man man I didn't even know all that And NIL is a new space in which everyone is learning how to operate and you've been following this topic closely for a while So what does nil allow college athletes to do that They couldn't do previously Nil stands for name image and likeness And these are the three primary focus areas for an individual's right of publicity an individual's right of publicity really derives out of an individual's right to privacy But when we're talking about publicity we're typically discussing influencers athletes entertainers people who have developed fame and have the capacity to commercialize that fame and make money off of it And so number one it's those rights to make money off of your fame but it's also the opportunity to prevent others from exploiting your name image and likeness misappropriating those things without your consent and using them in commercial manners such as advertising promotions et cetera And so with college athletes it's one unique sector of individuals who

had been denied these rights over time by the NCAA based upon a bylaw that was in existence that completely prevented these athletes from benefiting off of their fame And that ended as of July 1 2021 After many states including my state of Florida and Texas decided to pass its legislation allowing these rights for athletes And then the NC A ultimately on June 30th deciding to remove that bylaw with the prohibition and then institute very few guard rails concerning and I yeah and I think the majority of fans are all for you know paying players and profiting off of these laws But the fear seems to be that it'll turn into the wild west There's a lot of hyperbole and worst case scenarios being floated around But where do you see things going in the next few years But I suppose it depends on your definition of the wild West From my perspective I love the fact that athletes have rights that were taken away from them without foundation and without cause Now here we are not even a full half year in and I would say the chaos and anarchy that many people suggested would appear has not actually occurred thus far by and large We've seen athletes begin to benefit from these rights and enter into deals with brands create their own companies do camps and clinics do autograph deals et cetera And that's all fine and good and it's great for them The anarchy or the concern that I think a lot of people have revolves around the athletes maybe getting more than what their market value is But that's a very subjective concept who decides what an individual's market value is other than the person who's obviously paying for the deliverables But there are certain Guden rules in place There must be quid pro quo an athlete has to provide something in exchange for the money that he or she is receiving It can't just be a gift Uh the money cannot be paid contingent on an athlete enrolling at a specific university and it can't be paid for play An athlete cannot earn money contingent on amassing a certain number of yards receiving or or throwing as a quarterback or or points on a basketball court So it has to be second and apart from that as well I don't think we're going to see the quote unquote wild wild west that many people suggest Will athletes continue to make money and will the blue chip athletes make more money than what we see currently Absolutely But how is that very different than what athletes can do in the professional race for sure And people often talk about these things like there aren't currently minor league baseball players and NBA G Leaguers of the same age being paid for their labor and it doesn't seem to destroy their lives or their leagues And with the quid pro quo concept nil organizations are able to provide blanket nil deals for position groups or even entire teams because players have to do XYZ in order to

receive the payments Right That's correct And so there's been some discussion about the deals at BYU and University of Miami I can speak to University of Miami specifically because I assisted the brand American top team which decided to do the deal with University of Miami football players And that deal was not contingent at all upon a player's performance on the field It wasn't contingent upon their enrollment They weren't getting it only if they enrolled at the university and they had not already been committed and there was quid pro quo It wasn't as though American top team was saying here's \$500 per month for a year and you can just kick back and relax and receive that money No the athlete actually had and has deliverables built into the contract where they have to do certain things particularly with regard to social media deliverables in exchange for that money That's what is called consideration that I believe uh substantiates and actually satisfies the quid pro quo requirement And so there's there's discussion about it I think there will continue to be discussion about whether these are legit deals and fall within the scope of what the NC A allows until the NC A decides to take some sort of punitive action Uh It means absolutely nothing to me that they may be looking into these deals and in regards to the NCAA what power do they hold Because it appears to me the NCAA is on the way out So what true legal power does that organization actually possess So there's there's really three areas of influence with regard to enforcement of NIL right now you have the NCAA which has always uh organized and governed college athletics and its member schools So the universities uh voluntarily decide to be part of this association known as the NC A and thus are bound by the bylaws that the NC A delivers and distributes And thus if there is a violation of the NC A rules with regard to nil the only thing that the NCAA can do is punish the athletes or the universities where these athletes attend The NC A has absolutely no control over the brands over agents over anyone other than those classes of individuals the athletes and the universities which is why over time we've always seen the punitive action being that an athlete perhaps loses eligibility has to sit out for a certain amount of time or the school loses scholarships has to pay in money et cetera Then you had the the states that have passed NIO laws this far and made them effective Again Texas being one of them by the state of Florida being another to the extent that there is some sort of body enforcing those laws they could take action against any violators of those laws But those laws are also very focused on the NC A itself It says if the if the NC A the conferences the schools do anything to prohibit or restrict the athletes from participating in nil then they're violating

those state laws And finally you look at the individual schools which many of them have published their own nil policies and to the extent that there may be a violation by an athlete that athlete could be subject to some sort of punishment under the code of conduct or otherwise And looking past the state laws the Supreme Court had some strong opinions regarding the NCAA and it seems that the NCAA is in a tough spot because universities could send these cases right back up to the Supreme Court and ostensibly render the NCAA illegitimate So where is the NCAA in the legal world currently particularly at the federal level The NC A is absolutely in a very precarious position and it's a byproduct of a Supreme Court decision 90 unanimous decision by the court in mid 2021 In the case of Alston B NCAA it originated as a case that talked about many different types of restrictions but was narrowed down to the academic related benefits that athletes could receive And ultimately what the the the majority opinion of the court decided was that the NC A was operating as a sort of cartel and colluding to restrict what athletes could receive And that that was impermissible under antitrust law and that the NC A could not tell the conferences or the schools what they wish to provide to the athletes at least with regard to academic related benefits Now obviously that's been construed to mean that there really should not be many other restrictions the the decision of the court the majority opinion didn't really go into that However Justice Kavanaugh his concurring opinion did outright say the NCAA is not above the law and questioned whether other restrictions outside of those related to academic related benefits also would violate antitrust laws and discuss the potential of further litigation perhaps legislation and maybe even collective bargaining by the players in the future In order to really hash these issues out We haven't seen a lot of that yet There are pending cases still with regard to the NSA restricting nil rights prior to July 1 2021 and those will play out Uh But I again I think the NC A has to be very careful and the NC A knows that it has to be very careful with regard to the restrictions that it places on NIL which is why the Guard rules that are in place are very few And very basic and I know you're not a psychic you're a lawyer But do you see the future being collective bargaining and schools paying athletes directly So we don't have these nil organizations on the periphery Does it look more like an NFL model going forward It's possible But then obviously we completely eradicate any association with amateurism uh which I think is a sham anyway but we really do then cause college athletes to become professional athletes And it it comes with some issues that not a lot of people consider

which is that no longer will there be scholarships or if there are they're likely going to be taxable these athletes will now likely be on payroll and they can be terminated most likely their employment can be terminated whereas now they're not technically considered to be employees So I think while there may be many benefits that come along with being classified as employees and having the right to uh create a union or unions and bargain for you know the amount of time that they're practicing that they're playing um they're health and safety their welfare their their payroll their salaries there are negative consequences that can come with it as well And again I think that we're quite a ways away from that at a minimum five years probably more likely than 10 plus years if we ever get there there's just so many complications that have to be flushed through Um but it's something that is being at least discussed on Capitol Hill I am aware of that There are certain individuals in Congress at the national level who strongly believe that these athletes should share the revenues uh that they're really responsible for creating for the athletic programs I just think it's gonna take some time And another common fear is with these nil announcements and pr splashes that prospective high school athletes could be lured to join a school they wouldn't have otherwise And that's when we get into the concept of inducement So hypothetically what could an inducement look like in the legal sense in regards to NIO Well it's it's hard to say I mean at its core from a legal perspective it's a promise made to some individual that the promise that is relied upon by that individual to make a decision and that the actual decision is premised on the promise that has been made So that person's been induced to do something that that person may not have done otherwise Um And so that's sort of where you look at the and you have to look at it on a case by case basis And it's a very difficult inquiry I mean the NCAA and others would have to be very careful and cautious in the provision of some sort of punishment based on inducement because I think it has to almost be crystal clear otherwise they're asking for some sort of legal challenge and then you sort of can blow up the whole thing and ask whether any restrictions are permanent on on the side of the NCAA I mean we're we're sort of going down that path now where we're edging closer and closer to what sort of looks like an inducement I would strongly argue that there's no way the deal that we did at University of Miami for \$500 a month to current student athletes or college athletes I hate calling them student athletes but I would argue that that's not an inducement because those athletes are already enrolled while it could perhaps influence future athletes to commit to the

University of I mean that's gonna happen across the country Every individual is gonna look at what athletes have entered into historically starting with this year and perhaps factor that into their decision as to where they should go to school and coaches are actually going to be using that to their advantage as well The newer Texas offer related to Texas um gets us a little bit closer to that er of inducement because it's not being offered to the current college athletes at Texas It's an offer that's been announced for August of 2022 which could then specifically cause players not yet committed to Texas to decide to go there I think the timing is the distinction there And again I'm not arguing one way or the other whether or not it is or isn't an inducement but I think we're getting closer at least to where we're certainly in a gray area or getting closure of that line where it actually could be true to be an inducement to cause an individual who's not yet committed to decide to commit And does it have to be direct contact like an nil organization or a school directly offers a prospective player Or can it just be out in the ethos through broad marketing or pr because that's the interesting question I think do you have to reach out on a personal basis or can marketing be construed as an inducement without the direct contact It's a fair question right That does it have to be a direct inducement or can it also be indirect And and that I think is what's clear about Texas that if it is deemed to be an inducement this was not a direct inducement You didn't have a horn with heart coming out and saying you know we want you to enroll at Texas This is what we're offering you If you enroll they didn't go that far that would obviously be a direct inducement The question is does what they have offered rise to the level of an indirect inducement Who makes that determination And does that then fall within the scope of what's prohibited under the NC A rules And that's a very those are very complex questions to answer Yeah and it seems everyone is positioning and we should see these questions answered eventually And I do wanna circle back to the concept of fair market value It's tricky to define is it just the first group pays and then the second group pays then we wait for some sort of financial equilibrium I think to the extent that certain states included the requirement of it being fair market value that's paid to athletes the states sort of got it wrong because it's it's impossible It is absolutely impossible to peg what an individual's fair market value is Yes you can look to the history of the deals that the athlete has entered into but we're in the infancy of nil right now Um A lot of athletes just took whatever offer was coming to them in the beginning and that's not necessarily indicative of their fair market value Um Additionally you really have to look

at the terms of those deals then because values and compensation is oftentimes largely dependent on the actual deliverables of the athlete. If the athlete just has to post once on social media obviously he's going to get paid a lot less than if it's a multiyear deal with tons of deliverables. So you can't look at it in a vacuum. Um But then also look at Forbes valuations for NBA teams. How often do people actually pay? What Forbes says the value is for the team almost never. They typically pay quite a premium. So again this concept of fair market value is a construct, a construct that's impossible to define. So when people are saying this is not the fair market value well who are you to decide that for sure who makes that call ultimately? Right. And talking about NIL in the broader sense I'm technically an influencer even though I despise the majority of influencers but I'm able to make money on brand deals and the like. So do you have to have clout? Do you have to be famous? Because technically it's your name, image, likeness regardless of your social standing. I mean I'll give you a perfect example. Me I just signed a deal with the company. It's not announced yet but I signed a deal with the company to endorse the brand. And quite soon you'll see a couple of posts on Twitter and Instagram of me wearing the specific brand's product. I'm getting consideration for that. I'm not an athlete, I'm not an entertainer. Um I'm a lawyer and yet a brand finds value in me associating with it. And so to your question no you don't have to be an athlete. You don't have to be an entertainer. You don't have to be a celebrity. You could be a podcaster. Uh You could be doing videos on YouTube you could be a lawyer. Uh Anyone who has value to a specific third party has these sorts of publicity rights and that's sort of you know that's a great question because if you think about it how many people on college campuses around the country had this capacity to make money off of their names, images, and likenesses outside of athletes, musicians, artists, good looking people on Instagram. I mean you name it. Yeah we the NCAA decided athletes shouldn't have those rights and it was unfortunate and we fixed it. Well often we hear explain isn't famous. How can they use NIL? And my background is in film. So identifying talent and then building them into a star. So you see an athlete that's funny with a good personality and say hey he isn't known yet but I want to make him into a prominent name. Can you build their star through NIL or do they already have to have that prominence? I talk to athletes and families all the time with athletes who are not yet in college and maybe are restricted from doing NIL deals whether it be based on their respective state law or their high school athletic associations bylaws. And oftentimes I ask them what can we do to at

least put ourselves in a position to really take advantage of this when the time comes And there's no reason that you can't start building your brand Now I mean I I'm a firm believer in that as a lawyer even I've been trying to build my brand and continue to build my brand from day one and I think there's no better time than now for lawyers for athletes entertainers podcasters you name it Um There's nothing that prohibits you from building that brand earning your voice getting a nice following engaging with your audience So that again when the time comes you can flick the switch and start earning money Great example the Caven twins who I represent basketball players at Fresno State I mean before July 1 they couldn't monetize their brain fans but for a little bit of time they were building it up and they had over 3 million followers on tiktok By the time July 1 came around and there they were ready to take advantage and monetize it And so the same is true for anyone else who may not be big time yet but wants to build his or her brand give it a shot And ultimately this new world is the true reality of college athletics The previous iteration was an artificial amateur environment held together by questionable authorities and their self imposed policies being paid for your labor is enforced in every other industry throughout America So I'm glad we're finally taking the steps nationally to rectify some of these misdeeds And Darren Thank you for coming on and educating us on these concepts Please tell the viewers where they can track you down man Yeah sure First of all thank you so much for having me Great questions Uh And it was a pleasure I think the best place to follow me I I try to stay as active as possible on Twitter So it's my name Darren Darren last name Pitner Heitn Er you can find me there and that's a wrap for the impressive Darren Heitner And if you're interested in learning more about sports law make sure to go pick up his book How to play the game Hope you enjoyed the show Thanks for hanging out watch more of my videos here and like subscribe and share if you'd like to support quality Texas content as always