Regulating athlete investing in the name, image and likeness era

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Big League Advantage ("BLA") gained prominence in 2021 when MLB star Fernando Tatís Jr. signed a 14-year, $340 million contract with the San Diego Padres. News surfaced that as a teenager in the minor leagues, Tatís had received an up-front payment from BLA in exchange for a percentage of his future baseball earnings. While the financial figures are unknown, BLA's average payment at that time was reportedly $350,000 in exchange for around 10 percent of future salary — meaning that Tatís could pay BLA tens of millions of dollars by the end of his contract with the Padres.

NIL agreements — which are governed by contract laws, statutes, and school policies — grant third parties, such as brands or companies like BLA, the right to provide a student athlete compensation in exchange for the use of the student-athlete's NIL.

Observers are divided on the merits of such "athlete investing" through structures like BLAs. Proponents position these "investments" as providing financial security for young athletes whose futures may be uncertain. Opponents frame them as predatory loans to young athletes, particularly those from underprivileged backgrounds or who may lack the proper representation to fully understand the ramifications of such arrangements.

This debate is now at the forefront following the NCAA's 2021 decision to allow athletes to earn compensation from selling the use of their name, image and likeness ("NIL"). NIL agreements — which are governed by contract laws, statutes, and school policies — grant third parties, such as brands or companies like BLA, the right to provide a student athlete compensation in exchange for the use of the student-athlete's NIL (e.g., in a commercial or on a billboard). Under the auspices of NIL arrangements, BLA — which previously focused its "investments" on minor league baseball players — has begun offering contracts like the one it signed with Tatís to college football players. Others will likely follow, if they have not already.

One such contract between BLA and Gervon Dexter — a former University of Florida football player selected in the second round of the 2023 NFL draft — was recently challenged by Dexter in federal court. The lawsuit raises questions about how this practice falls under NIL laws and policies and who — if anyone — should be regulating these deals with amateur athletes.

Dexter's lawsuit against BLA

On Sept. 1, 2023, Dexter filed suit in the Northern District of Florida seeking a declaratory judgment that his contract with BLA is unenforceable. *Dexter v. Big League Advance Fund II, LP*, No. 23-cv-228(N.D. Fla., Sept. 1, 2023) ECF No. 1. Dexter alleges that in 2022, he received over $430,000 in exchange for allowing BLA to use his NIL for advertising and promotional purposes, as well as 15 percent of the first 25 years of his pre-taxed NFL earnings. *Id.* ¶¶ 44-56. Dexter's principal argument is that the contract is void because it violates Florida's NIL statute in effect at the time he signed the contract, as well as the University of Florida's rules surrounding NIL. *Id.* ¶¶ 68-73.

Two statutory provisions are central to Dexter's case to void his contract with BLA. Dexter alleges that when he contracted with BLA, Florida's NIL statute contained provisions — which have since been removed through amendments to the statute — that an NIL contract "may not extend beyond [an athlete's] participation in a [college] athletic program," and may not provide a college athlete compensation "in exchange for athletic performance." *Id.* ¶¶ 22, 25 (citing Fla. Stat. § 1006.74(2)(j); Fla. Stat. § 1006.74(2)(a)).

Thus, Dexter asserts that his contract with BLA violates Florida's then-operative NIL law (and parallel policies adopted by the University of Florida) primarily because it: (i) covers his professional earnings and therefore extends beyond his eligibility as a college athlete; and (ii) pays Dexter in exchange for a percentage of his future earnings if, based on his "athletic performance," he is able to play football professionally. *Id.* ¶¶ 69, 72.

How stakeholders could address athlete "investing"

To be sure, providing up-front financial resources to young athletes in exchange for future earning streams is not novel to BLA. "Investors" in young golfers have used a similar structure to help the golfers pay their way through developmental tours. And street agent "buscones" in Latin American countries have long provided training and resources to teenage baseball prospects in exchange for a percentage of their professional signing bonuses.

But the regulatory vacuum around NIL compensation has opened up a new class of NCAA athletes to "investors" like BLA. And lawsuits like Dexter's could well provide an opportunity for courts and other stakeholders — such as the NCAA, individual universities, and lawmakers — to examine the interplay between athlete "investing" and NIL compensation, including the breadth of permissible NIL contracts, the interpretation of existing NIL laws and policies, and the possibility of new regulation altogether. For example:

The NCAA. One potential question for the NCAA is the applicability of current NCAA rules to payments like BLA's to Dexter. In 2021, the NCAA issued general guidance that athletes compensated for their NIL maintained their amateur status, but left it to individual states to enact their own NIL policies.

Nonetheless, NCAA Bylaw 12.1.2 — which states that an athlete loses amateur status in a sport if the athlete "[u]ses athletics skill (directly or indirectly) for pay in any form in that sport" — remains in effect. The NCAA has not indicated whether up-front payments in exchange for athletes' future earnings as professionals are based on athletes' "athletics skill" in a sport, or merely reflect compensation for the use of their NIL.

Individual universities. An individual university's ability to regulate payments like the one from BLA to Dexter could also be impacted by a court's interpretation of the NIL statute in the university's home state. Many states' NIL statutes allow individual universities to craft their own NIL policies within certain parameters, e.g., as long as the policy does not "prohibit or prevent a student athlete from earning compensation" for the use of the athlete's NIL. *See, e.g.*, Ga. Code Ann. § 20-3-681(g); La. Rev. Stat. § 17:3703(B); Tex. Educ. Code § 51.9246(c)(1)(A).

A university that wants to regulate athlete "investing" could establish guardrails — like requiring athletes to disclose their contract to the university — or even ban the practice altogether. Dexter's lawsuit is unlikely to answer universities' questions about whether such restrictions on athlete "investing" might conflict with state NIL law, because the University of Florida's NIL policies at issue mirror the Florida NIL statute at issue. Nevertheless, it is possible that the outcome of the suit (and others like it) could clarify whether existing state laws permit the practice of athlete "investing," and whether universities that favor regulation need to craft their own policies.

State legislatures. For individual states, the question is not whether they could regulate or ban payments like BLAs to Dexter, but whether their existing laws already do, or whether new laws should.

A survey of NIL statutes does not reveal direct guidance on the permissibility of athlete "investing," meaning that its ultimate fate is likely to involve interpretative questions like those before the court in Dexter's suit. For example, some states have provisions similar to the previous Florida statute that an NIL contract may not extend beyond an athlete's participation in a college athletic program. *See, e.g.*, 110 Ill. Comp. Stat. Ann. 190/25; La. Rev. Stat. § 17:3703(J); Tex. Educ. Code Ann. § 51.9246(g)(2)(C).

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Depending on the outcome of Dexter's lawsuit, states that wish to prohibit or regulate athlete "investing" might seek to add similar language to their own NIL statutes, while states that wish to promote athlete investing might choose to remove such language from existing laws as did Florida (though not necessarily for that reason). Indeed, Florida's own amendments to its previous NIL statute illustrate that the NIL regulatory landscape is continually — and rapidly — evolving.

Congress. Numerous federal proposals to create a uniform, nationwide NIL policy have emerged over the last several years. Some of these proposals contain provisions similar to the state statutes discussed above, and the same considerations would apply to federal lawmakers.

Conclusion

Allowing NIL compensation for college athletes has led to varied regulation and, as Dexter's lawsuit illustrates, grey areas as to what is permissible under those policies. While the impact of Dexter's lawsuit remains to be seen, its outcome could provide important color for others with a potential interest in the regulation of NIL policies and the practice of athlete "investing," whether at a university, state, or even national level.

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