Los Angeles lawyer Jeremy M. Evans analyzes the various possible ramifications of the newly passed Fair Pay to Play Act permitting college athletes to pursue profitable sponsorship and endorsement deals in the future.

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In September 2019, California Governor Gavin Newsom signed into law the Fair Pay to Play Act (FPPA).1 Otherwise known as Senate Bill 206,2 the legislation allows college athletes playing a sport at a qualified academic institution in California that makes $10 million or more in media rights annually to enter the marketplace and profit from their names, images, and likenesses. The law forbids educational institutions from suspending or otherwise penalizing a student for pursuing such sponsorship or endorsement deals. It also allows student athletes to retain the services of an agent and/or attorney to help them obtain and secure such deals. The law, which becomes operative January 1, 2023, exempts the California Community Colleges system until 2021, when a report will be submitted to the California Legislature to determine whether community colleges should be subject to the FPPA.

In October 2019, the Atlanta-based National Collegiate Athletic Association (NCAA) Board of Governors voted to remove restrictions on student athletes competing at member institutions, allowing them to profit from their names, images, and likenesses. The NCAA’s decision followed that of the California Legislature, the first in the nation to pass such a law, and the introduction or discussion of similar legislation in the U.S. House of Representatives and in Florida and New York. NCAA President Mark Emmert said, “There’s no question the legislative efforts in Congress and various states has been a catalyst to change.”3

This foundational change of course pursuant to the California legislative effort and the NCAA will indeed open opportunities for student-athletes to make money while playing college sports. It is also a complete change from the NCAA’s historical stance. In addition, the FPPA raises five important sets of concerns or issues:4

1) The law raises questions about implementation when looking at how the NCAA, the conferences, states, individual universities, and student-athletes will or will not be regulated, and, as important, what regulatory scheme will be in place, and when?
2) What about minor league player development? The NCAA has received a lot of criticism for not being student-athlete friendly, but it is the National Basketball Association (NBA) and the National Football League (NFL) that forbid high school students from entering their drafts, requiring them to go through the NCAA or a foreign league.
3) Does the Fair Pay to Play Act go far enough or too far? The...
act raises questions about caps on student-athlete dollars made from their names, images, and likenesses and whether such money should be placed in a trust until the student leaves college. The law also raises questions about limitations on existing deals made with apparel, beverage, and tech companies with the universities that are mostly exclusive. For example, in the collegiate environment, generally, should protections be in place to allow amateurism to still exist or should the free market determine all?

4) The ability of a student athlete to retain an attorney or an agent is a game changer, but it also raises regulation issues and questions about whether the agent or attorney is now full or partial service. How can one administrator or court of law distinguish between advising on signing an endorsement deal and advising for the upcoming draft, and should there be a distinction?

5) What is amateurism in the wake of SB 206? Essentially, student athletes are being treated like Olympic athletes who can earn revenue while participating in the Olympics during school but do not lose their collegiate eligibility. What does this mean going forward? Will tension build in the locker room between the haves and have nots? What type of athlete does the law affect?

**Compliance Issues**

Implementation and enforcement of the FPPA may be the most difficult because these aspects have so many moving parts. How will each state comply with NCAA rules, once implemented, and how will the states comply with federal law, if implemented? How will individual universities and the conferences, specifically the Power Five conferences, comply with federal, NCAA, and state laws and regulations?

Lastly, how will agents, attorneys, coaches, athletic directors, and the student-athletes be regulated?

Until a scheme is in place, the new area of business development for student athletes will be prospective only. Whether or not one standard is implemented, or whether that is a good idea, universities will complain about unfair advantage when it comes to a player’s marketability in Los Angeles versus Tempe, Arizona, or Oxford, Mississippi. The FPPA also opens administrators, coaches, agents, attorneys, and student-athletes to NCAA inquiries, civil lawsuits, criminal investigations, and liability because there is now a whole new area of business development that was once illegal. Moreover, what occurs when a coach decides to sit a player for reasons other than performance, like preventing marketing exposure, and how could that be proven beyond the coach’s discretion? What happens to broadcast copyrights when student athletes have their own media channels like first-person first sports distributed through social media channels and platforms for marketing purposes?

Nevertheless, the beauty of the FPPA is that it places the onus on the player to secure endorsement deals, not the university, and therefore the marketplace will determine who gets paid and who does not. Then again, no real date has been set by the NCAA on when changes will be implemented or how. Furthermore, California’s FPPA does not go into effect until 2023 (when current student athletes are likely to have graduated). It is likely years, not months, before student athletes can begin to be paid for their names, images, and likenesses. However, NBA Commissioner Adam Silver has discussed the possibility of removing the “one-and-done” rule for the NBA by 2021. Under this rule, players who have played at least one year of college basketball are eligible for the NBA draft. Current NFL rules permit only players who are three years out of high school to enter the draft. Thus, high school student athletes playing basketball and football are required to go to an NCAA institution to be drafted by a professional sports franchise in the NBA and NFL. The NFL has dabbled with the Alliance of American Football (AAF) and has challengers like the XFL, twice, and the Arena Football League (AFL), among others, but it does not have—and has never really had—a true minor league. However, the NBA and the NFL utilize the NCAA talent as its minor league pool for talent.

The NBA has the G-League (named for its lead sponsor, Gatorade), formerly the D-League (short for Development League), but it is not a development league like the minor and development leagues of Major League Baseball (MLB), the National Hockey League (NHL), or Major League Soccer (MLS). For these leagues high school athletes have a choice to go professional (get drafted) or go to college. If the player is drafted, the player goes into the minor league or development system to train for the highest level. Because the NBA and NFL have been unwilling to change, California and the NCAA wanted to find a way to compensate student athletes for their, names, images, and likenesses as they attend college. That said, the new system in which student athletes can profit from their names, images, and likenesses may be incomplete unless college athletes have a say in where and when they go pro or go to college.

In New York, one state senator proposed legislation that would require the universities to pay student athletes directly. More specifically, the law “allows student-athletes to receive compensation including for the use of a student’s name, image or likeness; allows student-athletes to seek professional representation; requires colleges to establish an injured athlete fund to provide compensation to athletes for career-ending or long-term injuries” and was amended to give a “15% share of annual revenue to student-athletes, which would be divided equally.” The provisions on paying for university-sold merchandise and use of the student athlete’s name, image, or likeness, compensation for post career-ending or long-term injuries, and 15 percent of annual revenue are clear departures from the California’s FPPA and not likely what the NCAA envisioned when it voted yes to change in October.

**FPPA Compromise**

Did the FPPA go far enough? The FPPA was a compromise considering the limitations on trade pursuant to the NBA and NFL drafting rules, understanding that, for the most part, academic institutions generally are debt-ridden as research universities not focused on business development, and that beyond student fees, generally, the moneymaking athletic departments are in the Power Five Conferences, while most athletic programs are subsidized by the university. Requiring universities to pay student athletes directly or for past or current sales is a much larger type of request and a longer debate, especially given the history of student athlete attempts at unionization and, more important, what the market will bear when it comes to paying student athletes to endorse a product. That said, if the NBA and NFL eliminated their draft rules, it would significantly diminish the effectiveness of the argument that student athletes should be paid when there is a choice to go pro or enroll in college. Without that rule in place, the California Legislature and the NCAA made a compromise to free student athletes to seek money-making ventures from their names, images, and
likenesses while attending college and playing a sport.

With enactment of the FPPA, the question becomes how the competition and acceptance of money for names, images, and likenesses might play out in the marketplace. First, student athletes and universities are now competitors. These parties may now compete for the same companies for sponsorships and endorsements. For example, UCLA has a $280 million apparel deal with sportswear company Under Armour. A student athlete would not, according to the FPPA, be able to enter into a conflicting agreement with athletic apparel maker Nike, for example. It is conceivable that similar language would appear in any NCAA or university policy. Section 674.56(e) (1) of the FPPA states: “A student athlete shall not enter into a contract providing to the compensation to the athlete for use of the athlete’s name, image, or likeness if a provision of the contract is in conflict with a provision of the athlete’s team contract.”

Universities have similar deals with beverage, tech, banking, and other company sponsors and therefore student athletes would have limitations on how they are able to compete in the market.

It also is conceivable to see student athletes enter into deals that are completely off the field, but the fine print of the underlying contracts with the universities will have precedence over the student athlete deals. In the marketplace, without a national or even a local television audience to see a player wearing or discussing a product, marketability is limited to the social media following of the player, which could be substantial for select individuals.

**Student Athlete Deals**

If a student athlete does land a deal, should those deals be capped in terms of how much money can be made and/or should the money be placed in a trust until the student athlete graduates from college? The question is whether student athletes should be able to walk around campus with thousands, hundreds, or millions of dollars in their proverbial pockets. Will this affect team morale? Will it cause issues with performance? Regarding these last points, a trust is something that the Ed O’Bannon NCAA/EA Sports litigation discussed, but it could be a great solution to protect amateurism while allowing the free market to determine value.

When the NCAA allows student athletes to profit from their names, images, and likenesses while enrolled in school and playing sports, what are the repercussions of that financial benefit? Professional sports include both have and have-not athletes considered, which may alleviate some of the issues discussed here. The trust idea will also be discussed alongside caps on revenue from the student athlete’s name, image, and likeness, but setting caps will be the more difficult request because that will essentially do, in effect, what opponents claimed of the old system: prevent a free-market and individual decision-making process.

Somewhat lost in the shuffle of the FPPA is the allowance of attorneys and agents to enter the picture, working with student athletes at an earlier stage. An example of how the FPPA might play out is illustrated by former Duke University basketball player and New Orleans Pelicans phenomenon Zion Williamson and his deal with Gatorade. The deal was signed after he was drafted and signed with the Pelicans. Under the FPPA, if Duke were in California instead of North Carolina and the year was 2023, Zion would have been able to sign the Gatorade deal while in college and collect its proceeds. Again, however, had Zion not been forced to go to college, one could surmise that choosing to be drafted over the NCAA would have been the choice anyway.

**Representation**

In addition to timing, representation is an important issue that has evaded student athletes by law, regulation, and possibly the fear of getting into trouble. Under the existing scheme, agents and attorneys must register with a school as an advisor, register with the underlying union of the professional league, and file agent paperwork with the state in which they are doing business and representing athletes. There are differences between attorneys and agents in terms of requirements, registrations, and sometimes education, but, under the existing sports agent scheme, both are treated equally. However, student athletes are forbidden by the NCAA and individual university regulations from signing a contract with an agent or attorney or receiving anything of value (down to and including a car ride, lunch, a T-shirt, and the like). Communication is allowed, but without signing a contract and having the ability to make a deal, what would be the point?
The issues that arise are: How will agents and attorneys be regulated? Should universities and the NCAA, the likely enforcement arm of the FPPA, care about whether the agent or attorney’s services expand beyond endorsements or sponsorships? What if the agent or attorney gives advice on entering the draft? Should someone be disciplined? An important additional concern is how best to protect some of the most vulnerable. Those who are leaving home for the first time with little to no real-world experience need protection, and the implementation and enforcement arm of the FPPA and any NCAA, state, or federal legislation will help create that structure. Some of that protection should also come from the agent or attorney in terms of giving advice when anything seems misplaced if there is a proper regulation scheme in place.

Amateurism

Concerning the FPPA legislation in California and the NCAA decision, what is the definition of amateurism now? One argument is that student athletes in non-Olympic sports are being treated exactly like student athletes competing in Olympic sports in which professionals do not play. This is a sound argument because Olympic athletes in college can get paid for endorsements. The FPPA and NCAA are expanding the pool of available talent. However, practically speaking, how many student athletes are really going to take advantage of the FPPA or changed NCAA rules in general? Before answering that question, it is necessary to consider the NBE and NFL rules regarding restrictions of age/experience on entering the draft. Also, athletes who receive the largest sponsorship and endorsement dollars generally are playing in sports that do not require helmets or hats so that visually the stars are more recognizable.22 In addition, individual sport athletes generally earn more in endorsements than team sport athletes because there is no salary being paid by a team or franchise.

Companies looking to get into the action will want a return on the investment so any deal will have to make financial sense (meaning dollars given to a student athlete should be fewer than dollars received in prospective sales and market share).

The existing market with the added FPPA and NCAA changes will consist of the top one- or two-star athletes from the top 25 to 100 colleges in the country playing men’s basketball and football. If the market expands beyond that, it will be because the student athlete has created a market through a strong social media following, personality, memorable play, and/or competitive drive. This arena also is where agents and attorneys can help to land certain deals, but, ultimately, talent wins the day. Nevertheless, companies are more inclined to be inclusive today, so it is likely that a company would enter into endorsement deals with the top female and male basketball stars at certain colleges, or, possibly with more streaming options for less watched sports, companies might see value in lacrosse, volleyball, water polo, swimming, and even baseball, soccer, and hockey, which do have established minor league systems creating options. However, the pool of talent will likely be small. The option for the company paying the money and/or giving the product, or even ownership to the student athlete, must be profitable and that pool will be limited.

The Fair Pay to Play Act in California has indeed sparked a great conversation. Many are excited about the prospects of business development. However, implementation and enforcement, the idea of minor league development and draft rules, competition, representation, and the amateurism rules and regulations present issues that need to be resolved. The structure of the FPPA, similar laws at the federal level or in other states, and ultimately the NCAA and university regulations and policies will determine the success of this new frontier.

1 Enacted as Educ. Code § 67456, with parts added and repealed to Educ. Code § 67457.
5 Id.
14 EDUC. CODE § 67456(c)(1).
23 Kathleen Joyce, These athletes make more money through endorsements than sports, FOX BUSINESS (June 14, 2019), https://www.foxbusiness.com/features/these -elite-athletes-make-more-money-through-endorsements -versus-sports.