COLLEGE ATHLETICS ARE A-CHANGING

The transfer portal and NIL (name, image, and likeness) payments have recently significantly changed the landscape of college sports. The combination of the two has resulted in free agency for student athletes and hotly contested litigation in connection therewith.

The National Collegiate Athletic Association created the transfer portal in 2018. Prior to its creation, student athletes had to obtain permission from their existing schools to transfer to other schools and had to sit out a year from competition upon transferring. The creation of the transfer portal changed those rules, allowing student athletes to transfer at will and play immediately.

The NCAA created its NIL policy in 2021, which permits student athletes to profit from their name, image, and likeness while in college.

When colleges pay their student athletes, they typically have them sign agreements (frequently called “NIL License Agreements”). The NIL License Agreement used by the Big Ten Conference schools, for example, provides that the student athlete grants the school a “license to use the Student-Athlete’s name, nickname, pseudonym, voice, signature, caricature, likeness, image, picture, portrait, quotes, statements, writings, identifiable biographical information, other identifiable features and any other indicia of personal identity.” The agreement further provides that during its term, the “Student-Athlete will not . . . enroll at and/or compete in athletics for another college or university” or “use or authorize the use of the Student-Athlete’s NIL in connection with any college or university other than” his or her existing school. The agreement further provides that during its term, the school “is not obligated to enter the Student-Athlete into the transfer portal” and, “even if the Student-Athlete transfers to another university or college, the Student-Athlete will not use or authorize the use of the Student-Athlete’s NIL in connection with the transferee university or college.”

Reports indicate that over 70% of men’s college basketball players with remaining eligibility entered the transfer portal last year, with some schools paying them as much as $4 million or more per year in NIL money.

But what happens when a student athlete who is a party to a multi-year NIL License Agreement decides to transfer to a different school during the term of the agreement? This scenario has recently played out and resulted in aggravated litigation between the current school and the student athlete, and between the current school and the school to which the student athlete transferred.

In July 2024, quarterback Darian Mensah signed a multi-year NIL License Agreement with

Duke University, reportedly worth $4 million per year. The agreement provided that Mensah would not “enroll at or compete in athletics for another collegiate institution” during the term of the agreement, which ends on December 31, 2026. Following the 2025-26 college football season, Mensah announced he would be entering the transfer portal, and it was reported he intended to transfer to the University of Miami. Duke sued Mensah in January 2026, seeking to force him to honor his NIL License Agreement and to prohibit his transfer. On Duke’s motion, the court granted a temporary restraining order prohibiting Mensah from enrolling at or playing for another school through December 31, 2026. Thereafter, Duke and Mensah entered into a confidential settlement agreement pursuant to which, according to reports, Duke permitted Mensah to transfer to Miami, and Mensah paid Duke a significant sum to buy out of his agreement.

In January 2025, the University of Wisconsin sued the University of Miami for allegedly tampering with defensive back Xavier Lucas, who transferred from the University of Wisconsin to the University of Miami a few weeks after signing a multi-year Memorandum of Understanding with the University of Wisconsin. Wisconsin alleged that Miami tortiously interfered with its MOU with Lucas. Discovery is proceeding in the case.

On February 25, 2026, the University of Cincinnati sued its former quarterback, Brendan Sorsby, for breaching his NIL License Agreement with the university by transferring to Texas Tech University during the term of the agreement. Sorsby’s agreement with Cincinnati provided that, if he transferred to another school during its term, he would pay the university liquidated damages of $1 million. As of this writing, Sorsby has not filed a response to the lawsuit; it is due on April 27, 2026.

These cases and others could set a precedent (legal or practical) for future conduct by schools and student athletes. It is unknown whether NIL License Agreements will be governed by antitrust laws, laws relating to restrictive covenants (covenants not to compete), contract principles, or some other legal principle. Depending on what law governs, the results could be very different. For example, if the agreements are governed by laws relating to restrictive covenants, some states prohibit them except in limited circumstances. In contrast, other states consider various factors in determining enforceability, such as whether the agreement is unduly harsh to the restricted party and whether it violates general principles of public policy.

It will be interesting to watch how these cases and others shake out and what impact they have on the NIL environment in college sports. The student athletes may have significant risk either way. If they lose, the courts may prohibit them from transferring and order them to pay damages to their previous school, which could include reimbursement of some or all of the NIL money they received and the school’s attorney fees. If the student athletes win, schools may be more cautious about how much or when they pay the student athletes given that, otherwise, there may be no guarantee that a school will ultimately receive the benefits

of the deal.

College sports are rapidly changing, and litigation in this area is expected to increase, at least until the NCAA or the courts better define the rules.

OBJECTING TO AN OPPOSING PARTY'S REQUEST FOR ATTORNEY FEES CAN HAVE RAMIFICATIONS

You just lost a case in which the opposing party has a claim for attorney fees pursuant to a contract, statute or other fee-shifting mechanism. The opposing party has now filed a motion for attorney fees. Your initial reaction is to oppose the motion by arguing that the amount of time spent by the opposing party's attorneys was excessive and their hourly rates are unreasonable. Before pulling the trigger, however, you will want to consider a potential negative ramification of taking that position.

When a party requests an award of attorney fees, the party must establish that its request is reasonable, meaning that the time spent on the case by its attorneys was reasonable in the context of the factual and legal issues in dispute, and that its attorneys' hourly rates are reasonable in the community in which the case is venued. The party on the other end of the motion, of course, has the right to challenge the fee request. When such a challenge is made, the moving party may counter by seeking discovery of the objecting party's attorney fees in the case. This is usually done for two reasons: (1) to try to back off the objecting party by creating the risk that its own attorney fees will be discoverable, and (2) to argue to the court that the best evidence of what is reasonable is what the objecting party paid in litigating the same legal and factual issues in the case.

Wisconsin has not yet decided whether such discovery is permissible, but courts in other jurisdictions have frequently considered the issue and are split on their holdings. The majority of courts hold that discovery of an objecting party's attorney fees is permissible under these circumstances. As one court held, "the defendant's fees may provide the best available comparable standard to measure the reasonableness of plaintiffs' expenditures in litigating the issues of the case." *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 1996 WL 66111, at *3 (N.D. Ill. Feb. 13, 1996). As another court held, "the time spent by the defense counsel . . . may well be the best measure of what amount of time is reasonable," calling it a "logical yardstick." *Pollard v. E.I. DuPont De Nemours and Co.*, 2004 WL 784489, at *3 (W.D. Tenn. Feb. 24, 2004).

Numerous other cases hold the same way. *See*, *e.g.*, *Henson v. Columbus Bank and Tr. Co.*, 770 F.2d 1566, 1574-75 (11th Cir. 1985); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 587 (3d Cir. 1984); *Frommert v. Conkright*, 2016 WL 6093998, at **2-3 (W.D.N.Y. Oct. 19, 2016); *Mendez v. Radec Corp.*, 818 F. Supp. 2d 667, 668-69 (W.D.N.Y. 2011); *Cohen v. Brown Univ.*, 1999 WL 695235, at **2-4 (D.R.I. May 19, 1999); *Murray v. Stuckey's Inc.*, 153 F.R.D. 151, 153 (N.D. Iowa 1993); *Coal. to Save our Children v. State Bd. of Educ.*, 143 F.R.D. 61, 64-66 (D. Del. 1992); *Real v. Cont'l Grp., Inc.*, 116 F.R.D. 211, 213-14 (N.D. Cal. 1986); *Blowers v. Lawyers Coop. Publ'g Co.*, 526 F. Supp. 1324, 1325-28 (W.D.N.Y. 1981); *Naismith v. Prof'l Golfers Ass'n*, 85 F.R.D. 552, 562-64 (N.D. Ga. 1979); *Stastny v. S. Bell Tel. and Tel. Co.*, 77 F.R.D. 662, 663-64 (W.D.N.C. 1978); *Vulcan Materials Co. v. Chandler*, 992 So. 2d 1252, 1268 (Ala. 2008); *Paton v. Geico Gen. Ins. Co.*, 190 So. 3d 1047, 1050-53 (Fla. 2016); *Miller v. Kenny*, 325 P.3d 278, 303 (Wash. Ct. App. 2014).

A minority of courts go the other way, holding that what an objecting party paid in attorney fees to defend a case is not relevant on the issue of whether what the plaintiff paid to prosecute the case is reasonable. The most recent case to so hold is *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017). In that case, the Texas Supreme Court held as follows:

To the extent factual information about hourly rates and aggregate attorney fees is not privileged, that information is generally irrelevant and nondiscoverable because it does not establish or tend to establish the reasonableness or necessity of the attorney fees an opposing party has incurred. A party's litigation expenditures reflect only the value that party has assigned to litigating the matter, which may be influenced by myriad party-specific interests. Absent a fee-shifting claim, a party's attorney-fee expenditures need not be reasonable or necessary for the particular case. Barring unusual circumstances, allowing discovery of such information would spawn unnecessary case-within-a-case litigation devoted to determining the reasonableness and necessity of attorney-fee expenditures that are not at issue in the litigation.

Id. at 799. Other cases similarly holding include *Hernandez v. George*, 793 F.2d 264, 268 (10th Cir. 1986); *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 659-60 (7th Cir. 1985); *Costa v. Sears Home Improvement Prods., Inc.*, 178 F. Supp. 3d 108, 113 (W.D.N.Y. 2016).

Because Wisconsin has not decided this issue as of yet, and other jurisdictions are split on the issue, it may be risky to oppose an opponent's request for attorney fees on the grounds that the time spent by its attorneys was excessive or its attorneys' hourly rates are unreasonable, particularly if it is anticipated that the attorney fees you spent likely exceed the attorney fees spent by your opponent.

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