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## Move to protect student-athletes, such as Tagovailoa, better for all

Two weeks ago, Tua Tagovailoa, the accurate, athletic and accomplished quarterback from Alabama, seemed destined to be one of the top picks in the 2020 NFL draft. His career earning capacity was projected in the nine figures.

Then, during the second quarter of Alabama's game against Mississippi State, with the Crimson Tide up 35-7 on a third-and-4 play, Tagovailoa was rushed and taken down by Mississippi State defenders. Trainers rushed onto the field with 3:01 left in the half to help the quarterback, who was "screaming in pain."

Tagovailoa had dislocated his hip and broke the back wall of the hip socket – the same injury that ended Bo Jackson's career. Would the worst-case scenario, avascular necrosis, end Tagovailoa's professional career before it even started?

Fortunately, Dr. Chip Rouff of the University of Texas Health Science Center at Houston performed successful surgery and told Tagovailoa's family that the worst-case scenario had been avoided. Nevertheless, the quarterback will be sidelined for the remainder of this season and his draft prospects are now uncertain.

Due to current NCAA rules restricting student-athletes from earning money while attending college on scholar-

ship, Tagovailoa has not made a penny from any of the television promotions of his skills as the face of college football. In college sports today, money rains on everyone but the players.

But, that tide is changing.

The next generation of college football and basketball stars may be able to capitalize on their image and likeness while competing as undergraduates.

In September, California signed into law Senate Bill 206 (also known as the Fair Pay to Play Act). The act passed with overwhelming bipartisan support and made California the first state to allow college players to profit from their name, image and likeness and to allow them to hire state-licensed agents to negotiate business ventures and sign brand endorsements.

Under the act, it is unlawful for schools or institutions to deprive players ability to receive compensation if they appear in video games, if they want to sponsor a camp, appear on a billboard for a local auto dealership or sign autographed memorabilia. The act, which will not go into effect until 2023, does not give the colleges the right to pay athletes, instead, it addresses how athletes can profit from various types of commercial usage of their identities.

Other states have passed



### SPORTS TORTS

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legislation such as California's to avoid falling behind in recruiting top athletes. In Illinois, House Bill 3904, the Student Athlete Endorsement Act, is certain to be passed.

When passed, athletes at colleges in Illinois will be able to profit from their name, image and likeness. Other states are contemplating more expansive bills to protect student-athletes.

For example, while New York's Senate Bill S6722A also allows compensation for use of name, image and likeness, it also calls for universities to set aside 15% of all

sports-related revenue for student-athletes. Half of that 15% would go toward a health savings account to provide compensation upon graduation to student-athletes who suffer career-ending or long-term injuries, such as the one that could have befallen Tagovailoa.

The NCAA was reluctant to accept this seismic shift. But, seeing the writing on the wall, at the end of October, the NCAA announced it would begin the process of changing the rules that ban college athletes from benefiting from the use of their name, image and likeness. NCAA President Mark Emmert said, "As a national governing body, the NCAA is uniquely positioned to modify its rules to ensure fairness and a level playing field for student-athletes."

In doing so, the NCAA emphasized the need for any compensation from NIL use to be done in a manner consistent with the "collegiate model." The NCAA Board of Governors has now formed a working group tasked with gathering feedback through April 2020 on how to best respond to state and federal legislation.

The group also will come up with recommendations on the principles and regulatory framework of new NCAA rules. The deadline for the working group to create new rules is January 2021,

two full years before player fairness act is set to go into effect in California.

If the NCAA fails to amend its rules, it could set the stage for legal challenges from California colleges, athletic conferences and the NCAA itself against the California act. While judicial rulings have allowed the NCAA to prohibit payments that are not “tethered to education,” public opinion is clearly in favor of allowing athletes to earn some compensation. See *O'Bannon v. National Collegiate Athletic Associa-*

*tion*, 802 F.3d 1049, 1079 (9th Cir. 2015) (vacating a U.S. District Court’s judgment to allow NCAA member schools to pay student-athletes up to \$5,000 per year in deferred compensation); See generally *Dawson v. National Collegiate Athletic Association*, 932 F.3d 905, 908 (9th Cir. 2019) (holding that Division I FBS Football Players are not employees of the NCAA or PAC-12 as a matter of federal law when determining whether the NCAA and the PAC-12 failed to pay

employee wages).

In 1993, the NCAA secured a legal victory in *NCAA vs. Miller* against the state of Nevada by successfully arguing in the 9th U.S. Circuit Court of Appeals that a state statute violated the dormant commerce clause. (*National Collegiate Athletic Association v. Miller*, 10 F.3d 633 (9th Cir. 1993)).

The 9th Circuit found that Nevada violated the dormant commerce clause by requiring additional due process protections for Nevada students and employees accused

of NCAA rules infractions. *Id.*

In the event of a legal showdown, the NCAA would naturally argue that the 9th Circuit’s ruling in *NCAA vs. Miller* renders state laws like California’s unconstitutional.

More likely, the NCAA will begrudgingly accept the growing movement in favor of allowing college athletes to profit from the use of their name, image and likeness.

Players like Tua Tagovailoa will be eventually be compensated. This tidal wave will begin to even the playing field for college athletes.