

THE OLYMPIC-SIZED LOOPHOLE IN CALIFORNIA'S
FAIR PAY TO PLAY ACT

*Steven A. Bank**

On September 30, 2019, California Governor Gavin Newsom signed into law Senate Bill 206, otherwise known as “The Fair Pay to Play Act.”¹ When it goes into effect, the Fair Pay to Play Act will allow student-athletes enrolled in California colleges and universities to be compensated for the use of their name, images, and likenesses just like non-athletes. Many observers hope that this Act, which would contravene the current NCAA rules on student-athlete compensation,² will enable student-athletes to share in the huge revenues generated annually by college athletics through apparel deals with large manufacturers like Nike, Adidas, and Under Armour. This Piece argues that such hopes are likely to remain unfulfilled. A little-discussed provision of the Fair Pay to Play Act that prohibits athletes from entering into contracts that would conflict with university apparel deals introduces the kind of limitation Olympic athletes have long complained about with regard to advertising during the Olympic games and largely undercuts the impact of the Fair Pay to Play Act.

INTRODUCTION

The Fair Pay to Play Act, effective January 1, 2023, will require four-year colleges and universities in California to allow college athletes to earn compensation from the use of their names, images, or likenesses.³ It also mandates that the NCAA and any other “athletic association, conference, . . . group or organization with authority over intercollegiate athletics” allow student-athletes in California to profit off of their names,

* Paul Hastings Professor of Business Law, UCLA School of Law.

1. S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019); Melody Gutierrez & Nathan Fenno, California Will Allow College Athletes to Profit from Endorsements Under Bill Signed by Newsom, L.A. Times (Sept. 30, 2019), <https://www.latimes.com/california/story/2019-09-30/college-athlete-endorsement-deals-ncaa-california-law> (on file with the *Columbia Law Review*). The Act currently exempts community colleges pending the submission of a working group report on or before July 1, 2021. Cal. Educ. Code § 67457 (2020) (effective Jan. 1, 2023).

2. See NCAA, 2019–2020 NCAA Division I Manual 73 (2019), <http://www.ncaapublications.com/productdownloads/D120.pdf> [<https://perma.cc/KT9L-JZ4L>] (“[C]ompensation may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.”).

3. Cal. Educ. Code § 67456(a)(1).

images, or likenesses.⁴ The law also requires that the NCAA and partner organizations allow colleges and universities that permit students to earn such compensation to participate in intercollegiate athletics.⁵ The law will not permit colleges and universities to pay its student-athletes or to compensate them directly for the use of their names, images, or likenesses,⁶ but it will allow student-athletes to try to capitalize on the fleeting fame some of them realize as college athletes and to hire a licensed agent or lawyer to help them do so.⁷

Commentators have hailed the new law as “historic”⁸ and a “game changer,”⁹ suggesting that it would allow student-athletes the opportunity to get their share of the “gargantuan sums of money their performances generate for schools in a billion-dollar industry.”¹⁰ Parents of current college stars speculate that the Act will “help redistribute the massive wealth that athletes have generated and universities have received,” such as the “record \$280-million apparel deal” UCLA signed with Under Armour in 2016.¹¹ Proponents claim the Act has the potential to be “transformative for young athletes, especially for those of color and from poor backgrounds. For too long, they argue, corporations and colleges have been able to excessively profit off these students, even after they have left college and joined professional sports teams.”¹²

Such grand predictions of wealth redistribution assume that the California law will open the floodgates for other states to adopt similar laws. It also assumes the Fair Pay to Play Act will survive any legal challenges. Although the NCAA has indicated that it “agrees changes are needed to continue to support student-athletes,” it has already begun to lay the foundation for a Dormant Commerce Clause challenge to the Fair Pay to Play Act based on the absence of a uniform standard, stating that “[a]s more states consider their own specific legislation related to this

4. Id. § 67456(a)(2), (3).

5. Id.

6. Id. § 67456(b).

7. Id. § 67456(c).

8. Sean Gregory, *How California’s Historic Fair Pay Law Will Change College Sports for the Better*, *Time* (Oct. 1, 2019), <https://time.com/5689548/california-ncaa-law> [<https://perma.cc/C83F-YQXK>].

9. Michael McCann, *What’s Next After California Signs Game Changer Fair Pay to Play Act into Law?*, *Sports Illustrated* (Sept. 30, 2019), <https://www.si.com/college-football/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> [<https://perma.cc/WP47-WKR4>].

10. Rodger Sherman, *The Fair Pay to Play Act Has Been Signed. Now the NCAA Must Address a Question to Which It’s Never Had a Good Answer.*, *Ringer* (Oct. 1, 2019), <https://www.theringer.com/2019/10/1/20892842/fair-pay-to-play-act-college-sports-california-law-gavin-newsom> [<https://perma.cc/JE7A-FD6L>].

11. Ben Bolch, *UCLA’s Kelly Supports Law*, *L.A. Times* (Oct. 1, 2019), <https://www.pressreader.com/usa/los-angeles-times/20191001/282054803768753> (on file with the *Columbia Law Review*).

12. Gutierrez & Fenno, *supra* note 1.

topic, it is clear that a patchwork of different laws from different states will make unattainable the goal of providing a fair and level playing field for 1,100 campuses and nearly half a million student-athletes nationwide.¹³ The NCAA Board of Governors instead voted in favor of developing its own name, image, and likeness rules,¹⁴ although it conditioned its approval on doing so “in a manner consistent with the collegiate model.”¹⁵ Many observers are skeptical that it will come close to replicating the rights granted under the Fair Pay to Play Act.¹⁶ This could create a showdown between the NCAA rule and the California rule, leading the NCAA to lobby for changes in California’s law before it is implemented, seek an injunction against the law’s enforcement, or try to expel California schools from the NCAA for complying with the Act.¹⁷ The biggest obstacle to the Fair Pay to Play Act’s potential to effect change, however, comes not from the threat of a legal challenge, but from the statutory language itself.

13. NCAA Statement on Gov. Newsom Signing SB 206, NCAA (Sept. 30, 2019), <http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-gov-newsom-signing-sb-206> [<https://perma.cc/6KND-EWCH>]; see also McCann, *supra* note 9 (discussing the possibility of a Dormant Commerce Clause challenge).

14. Board of Governors Starts Process to Enhance Name, Image, and Likeness Opportunities, NCAA (Oct. 29, 2019), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities> [<https://perma.cc/5RQX-HBA7>].

15. J. Brady McCollough, NCAA Makes Move on Name, Image, and Likeness Use, but There’s a Long Way to Go, *L.A. Times* (Oct. 29, 2019), <https://www.latimes.com/sports/story/2019-10-29/ncaa-athletes-nil-college-athletes-profit-name-image-likeness> (on file with the *Columbia Law Review*).

16. *Id.*

17. See Dennis Dodd, Exiting Big Ten Commish Jim Delany on His 30-Year Tenure and the Future of College Sports, CBS Sports (Jan. 2, 2020), <https://www.cbssports.com/college-football/news/exiting-big-ten-commish-jim-delany-on-his-30-year-tenure-and-the-future-of-college-sports> [<https://perma.cc/8XBD-7B4M>] (describing Jim Delaney’s prediction of litigation and injunctions against the various state laws until Congress enacts national legislation); McCollough, *supra* note 16. The NCAA is susceptible to an antitrust lawsuit if it attempts to expel California schools on the basis of their compliance with the law. See Marc Edelman, California Governor Gives NCAA a Choice: Allow Athlete Endorsements or Risk Annihilation by Antitrust Law, *Forbes* (Sept. 30, 2019), <https://www.forbes.com/sites/marcedelman/2019/09/30/california-governor-gives-ncaa-a-choice-allow-athlete-endorsements-or-risk-annihilation-by-antitrust-law> [<https://perma.cc/P737-STZT>] (asking whether the NCAA will “voluntarily conform its practices to the Fair Pay to Play Act or instead risk a federal court antitrust ruling mandating that the NCAA change its athlete endorsement rules”). Moreover, the mixed results of the recent antitrust image-rights case brought by former UCLA basketball star Ed O’Bannon might give the NCAA pause in this instance. See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1053 (9th Cir. 2015) (“Although we agree with the Supreme Court and our sister circuits that many of the NCAA’s amateurism rules are likely to be procompetitive, we hold that those rules are not exempt from antitrust scrutiny . . .”).

THE “NO CONFLICT” LOOPHOLE

The Act contains a loophole that might allow schools to block a large amount of their revenue from flowing to the athletes. Under a “no conflict” provision, student-athletes cannot sign deals that conflict with the athlete’s team contracts: “A student athlete shall not enter into a contract providing 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.”¹⁸ This arguably means that if a player wanted to sign a shoe contract with one brand, the player would be barred if it would be in conflict with the athlete’s team contract that requires the athlete to wear a different brand of shoe. Indeed, under the Act, students would be required to disclose to the school any contract they enter into to receive compensation for their name, image, and likeness for the purpose of identifying potential conflicts.¹⁹ The school is then required to disclose to the athlete or the athlete’s lawyer the offending contractual provisions.²⁰ Although the athlete is permitted to use the athlete’s own name, image, or likeness for commercial purposes “when the athlete is not engaged in official team activities,”²¹ this would prevent athletes from wearing their branded gear during games, when the cameras are rolling and their endorsement value may be the highest.

COMPARING THE “NO CONFLICT” LOOPHOLE WITH OLYMPIC RULE 40

This limitation on when and what an athlete can endorse is analogous to a recently changed rule applicable to athletes participating in the Olympic Games. As it was written in 2015, Bylaw 3 to Rule 40 of the Olympic Charter stated that “no competitor, team official or other team personnel who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.”²² Rule 40’s blackout provision was originally designed to enforce the amateurism of the Olympic Games.²³ As this rationale became less salient with the elimination of the ban on professional athletes competing in the Olympics, the rule became more of a protectionist tool, enabling the International Olympics Committee (IOC) to

18. Cal. Educ. Code § 67456(e)(1) (2020) (effective Jan. 1, 2023).

19. Id. § 67456(e)(2).

20. Id. § 67456(e)(3).

21. Id. § 67456(f).

22. Int’l Olympic Comm., Olympic Charter 79 (2015), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Olympic-Studies-Centre/List-of-Resources/Official-Publications/Olympic-Charter/2015-Olympic-Charter.pdf> [<https://perma.cc/GX5R-NJ6Q>].

23. See Vidhi K. Tiwari & Suman Setty, *Olympics and Rule 40: A Critical Examination*, 5 *Christ U. L.J.* 37, 39–40 (2016) (discussing the history of Rule 40 and the prohibition of advertisements made by retailers not affiliated with the Olympic Games).

extract maximum revenues from its official sponsors.²⁴ This was particularly problematic for athletes in less well-known sports in which the eyes of the world were only on them every four years. For athletes in these sports, Rule 40's ban on earning compensation from the use of their names, pictures, or sports performances during the Olympic Games effectively meant that they could not capitalize much at all on their fleeting fame.²⁵ Eventually, the IOC gave in to pressure from athletes and started relaxing Rule 40, first by allowing athletes' names and images to be used in generic advertising not associated with the Games or any of its marks.²⁶ After the German Cartel Office in early 2019 ruled that the policy was a potential violation of competition law and negotiated more rights for German athletes,²⁷ the IOC decided to amend Rule 40 to permit athletes to engage in sports advertising during the Olympic Games under guidelines to be developed by national Olympic committees in accordance with the laws of their jurisdictions.²⁸ In some countries, however, Rule 40 has largely remained intact. In Great Britain, for instance, a group of athletes have threatened legal action against the British Olympic Association because they contend that its new Rule 40 guidelines are only a modest change from the former rules.²⁹

24. *Id.* at 39; see also James Schwabe, *The Pledge to Brand Loyalty: A Gold Medal Approach to Rule 40*, 9 *Harv. J. Sports & Ent. L.* 55, 58–59 (2018) (describing the cost of official sponsorships at the 2012 London Olympics and noting that the highest level of Olympic sponsorship can cost over \$200 million); *id.* at 76–77 (“Rule 40 was implemented to ensure that sponsors have a better opportunity to benefit off the goodwill of the Games.”).

25. Tiwari & Setty, *supra* note 23, at 42 (“Athletes have advanced the logic that [the] Olympic Games is . . . when the value of an athlete is the highest. By imposing the blackout period blanket, IOC is affecting their financial earning capacity and their ability to gain public recognition, by reducing their visibility vis-à-vis the advertisements.”).

26. Chris Chavez, *What is Rule 40? The IOC's Rule on Non-Olympic Sponsors, Explained*, *Sports Illustrated* (July 25, 2016), <https://www.si.com/olympics/2016/07/27/rule-40-explained-2016-olympic-sponsorship-blackout-controversy> [<https://perma.cc/YT2W-XC2W>].

27. Ben Cronin, *IOC's Rule 40 Further Diluted by German Cartel Office Ruling*, *Sport Bus.* (Feb. 28, 2019), <https://www.sportbusiness.com/news/iocs-rule-40-further-diluted-by-german-cartel-office-ruling> (on file with the *Columbia Law Review*) (noting that under the German Cartel's recent ruling, German athletes will be allowed to use words such as “medal,” “gold,” and “Summer Games” in their advertising activities); Karolos Grohmann, *Olympics: German Athletes Score Advertising Win over IOC for Games*, *Reuters* (Feb. 27, 2019), <https://www.reuters.com/article/us-olympics-germany/olympics-german-athletes-score-advertising-win-over-ioc-for-games-idUSKCN1QG16V> [<https://perma.cc/Z3FE-LCR6>].

28. *IOC Relaxes Rule 40 Ahead of Tokyo 2020*, *Sport Bus.* (June 27, 2019), <https://www.sportbusiness.com/news/ioc-relaxes-rule-40-ahead-of-tokyo-2020> (on file with the *Columbia Law Review*).

29. Peter Crowther, Lisa Hatfield & Jake White, *Are the British Olympic Association's New Rule 40 Guidelines Still Too Restrictive?*, *Law in Sport* (Dec. 18, 2019), <https://www.lawinsport.com/topics/item/are-the-british-olympic-association-s-new-rule-40-guidelines-still-too-restrictive> (on file with the *Columbia Law Review*); Sean Ingle, *British Athletes Launch Legal Action Against BOA over Sponsorship Rules*, *Guardian* (Nov. 15, 2019), <https://www.theguardian.com/sport/2019/nov/15/british-athletes-launch-legal>

The “no conflict” exception is effectively the Fair Pay to Play Act’s version of the original Rule 40’s blackout provision. It allows student-athletes to earn compensation for the first time from the licensing of their names, images, and likenesses, but not in ways that conflict with the athlete’s team contract when they are engaged in official team activities. In big time college sports, this may be a substantial loophole that removes most of the potential for it to be a “game changer.” Across the country, companies such as Nike, Adidas, and Under Armour enter into comprehensive contracts with university athletic departments requiring that all “uniforms, footwear, apparel and equipment” in every sport be branded with their logos.³⁰ The top contracts are quite lucrative, earning college athletic departments millions of dollars in cash and product allotments each year.³¹ These contracts may foreclose many opportunities for student-athletes to earn compensation for endorsements.

UCLA’s fifteen-year, \$280 million deal with Under Armour illustrates the comprehensive nature of these contracts. This was the largest apparel deal ever signed by a university athletic department in NCAA history.³² Under the deal, student-athletes have very limited abilities to wear or use non-Under Armour products.

UCLA will require all Coaches, Staff and Teams to exclusively wear and use Supplied Products (as opposed to similar types of goods from other suppliers) whenever the Coaches, Staff or Teams coach, practice, perform, or play in UCLA’s intercollegiate athletic program, participate in Team-related activities (including without limitation travel to and from competitions, and participation in media and public relations opportunities, charity events, and photograph/video shoots) or conduct or participate in exhibitions, on-campus summer camps or clinics on behalf of UCLA.³³

action-boa-british-olympic-association-tokyo-2020 [https://perma.cc/EXP4-XQQM]; see also British Olympic Ass’n, Rule 40: Guidelines for Athletes—Updated October 2019, at 10 (2019), <https://www.teamgb.com/docs/default-source/default-library/rule-40-final.pdf> [https://perma.cc/TEG9-3A4L] (prohibiting athletes from promoting personal sponsors during the Games period, except for sending a single “thank you” message).

30. Laura Godlewski, Top Apparel Companies Vying for College Athletic Contracts, *Athletic Bus.* (Oct. 2015), <https://www.athleticbusiness.com/marketing/top-apparel-companies-vying-for-college-athletic-contracts.html> (on file with the *Columbia Law Review*).

31. Daniel Kleinman, The Most Valuable College Apparel Deals: UCLA Leads as Gear Companies’ New Mindset Thwarts Rivals, *Forbes* (Sept. 13, 2019), <https://www.forbes.com/sites/danielkleinman/2019/09/13/ucla-most-valuable-college-apparel-deals> [https://perma.cc/8HNE-LPP2].

32. David Wharton, UCLA’s Under Armour Deal for \$280 Million Is the Biggest in NCAA History, *L.A. Times* (May 24, 2016), <https://www.latimes.com/sports/ucla/la-sp-0525-ucla-under-armour-20160525-snap-story.html> (on file with the *Columbia Law Review*).

33. Athletic Product and Sponsorship Agreement Between the Regents of the University of California, by and on Behalf of the Department of Intercollegiate Athletics on Its Los Angeles Campus and Under Armour, Inc. 14 (May 20, 2016) (on file with the *Columbia Law Review*).

The “Supplied Products” consist of an extremely broad list of products produced by Under Armour beyond the uniforms themselves, ranging from footwear, elbow guards, and compression arm sleeves to mouth guards, eyewear, and heart rate monitors.³⁴

A student-athlete can avoid wearing Under Armour products only “when, in the written opinion of the Team physician, the wearing of such shoes or apparel is medically contraindicated.”³⁵ If that is the case, however, the student-athlete has to “cover all logos, trademarks and brand indicia of any products” that they use instead of the Under Armour products.³⁶ There are exclusions for certain products in which UCLA has a preexisting relationship with the company,³⁷ with the proviso that UCLA generally may extend or renew the contracts only so long as Under Armour does not make such products.³⁸ The agreement excludes certain specified specialty products in specific sports, such as golf clubs and balls, tennis racquets and balls, swim suits, and football helmets,³⁹ but there is nothing that would prohibit UCLA from extending its agreement to cover such products or entering into new agreements with other noncompeting suppliers.

Much like Rule 40’s blackout period for Olympic athletes,⁴⁰ California’s Fair Pay to Play Act’s “no conflicts” provision does not entirely eliminate the ability of athletes to profit from the use of their name, image, and likeness.⁴¹ Athletes can still license their images for use in video games, which was the subject of the lawsuit filed by former UCLA basketball star Ed O’Bannon,⁴² or appear in commercials and advertisements for car dealerships and other businesses. They can also be represented by an agent or attorney in such work. Moreover, the Act does not prohibit endorsements that complement, rather than conflict with, existing apparel contracts. For example, consistent with Under Armour’s deal with UCLA, it could choose to engage a student-athlete to personally endorse a product or create his or her own signature version of it. Apparel brands could even seek to cut

34. See *id.* at 2, 4.

35. *Id.* at 14. Even then, Under Armour has the right to custom-make a product and require the athlete to wear it so long as it does so “in a timely fashion and [it] fully addresses the medical issue, as determined by the Team physician in his or her sole medical discretion.” *Id.*

36. *Id.*

37. *Id.* at 36–37 exhs. A & B (describing existing relationships with Easton for baseball and softball gear; Wilson for footballs, basketballs, and volleyballs; TaylorMade for golf gear; DonJoy for orthopedic braces; and Catapult for athlete monitoring equipment).

38. *Id.* at 17–18.

39. *Id.* at 37 exh. B.

40. See *supra* note 23 and accompanying text.

41. See Cal. Educ. Code § 67456(e)(1) (2020) (effective Jan. 1, 2023) (“A student athlete shall not enter into a contract providing 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.”).

42. See *supra* note 17 and accompanying text.

colleges and universities out of the equation entirely and sign deals directly with a few of the school's most famous athletes, but the schools could circumvent that by signing team contracts with rival brands, even if it meant lowering the prices from their current high values.

Although the Act broadens the ability of athletes to profit off their college fame, the “no conflicts” provision makes it unlikely that student-athletes will share much in the “gargantuan sums of money” the students generate for the school.⁴³ Former UCLA basketball player Lonzo Ball's Big Baller Brand illustrates this limitation. Formed just as Ball was entering college, the NCAA determined that the Big Baller Brand was a “family brand” and therefore did not jeopardize Ball's eligibility as long as he did not appear in any promotional materials for the company.⁴⁴ Under the Fair Pay to Play Act, Ball could have appeared in Big Baller Brand promotional materials while playing basketball for UCLA. Under the “no conflicts” provision, however, he could not have worn the shoes while he played or the apparel while he was participating in official off-court team activities such as traveling to and from competitions. Neither likely would have saved the Big Baller Brand from its current troubles,⁴⁵ but if they were permitted, they might make a similar start-up more willing to seek an endorsement from a student-athlete or to pay a higher price for that right. This is particularly true in the case of a lower-profile athlete from a lower-profile family. Effectively, much like Rule 40, the “no conflicts” provision eliminates what might be the most common use of the new rights—to endorse the product by wearing it in the setting where the athlete is most likely to be seen by a potential consumer. Perhaps more importantly, given the amount of athletic department revenue at stake, it is hard to imagine an NCAA rule or Congressional legislation that would not offer similar protection to team apparel contracts.⁴⁶ Thus, even if the Fair Pay to Play Act is displaced by a national standard, it seems unlikely that student-athletes will

43. Sherman, *supra* note 10.

44. Nick DePaula & Darren Rovell, Big Baller Brand Set to Deliver to Customers, Fulfilling LaVar's Vision, ESPN (Nov. 24, 2017), https://www.espn.com/nba/story/_/id/21519419/more-year-build-big-baller-brand-expected-ship-first-signature-shoe-today [<https://perma.cc/XD7M-VEKT>].

45. Alaa Abdeldaiem, Big Baller Brand Co-Founder Alan Foster Countersues Lonzo, LaVar Ball, MSN (Oct. 2, 2019), <https://www.msn.com/en-us/sports/nba/big-baller-brand-co-founder-alan-foster-countersues-lonzo-lavar-ball/ar-AAIcKgB> [<https://perma.cc/328Q-PJ8E>]; Tania Ganguli & Richard Winton, Lonzo Ball's Former Big Baller Brand Associate Is the Subject of an FBI Investigation, L.A. Times (April 24, 2019), <https://www.latimes.com/sports/lakers/la-sp-alan-foster-lonzo-ball-fbi-investigation-20190424-story.html> (on file with the *Columbia Law Review*); Chelsea Howard, Lonzo Ball Says His Big Baller Brand Shoes Fell Apart Every Quarter, Sporting News (Sept. 5, 2019), <https://www.sportingnews.com/us/nba/news/lonzo-ball-says-his-big-baller-brand-shoes-fell-apart-every-quarter/11e8r0qnikicy17h8pbzbrjgf3> (on file with the *Columbia Law Review*).

46. For example, Florida's H.B. 251, which was introduced after California's Fair Pay to Play Act, also includes a “no conflict” provision. H.B. 251, 2020 Leg., Reg. Sess. (Fla. 2020).

receive the unfettered right to receive compensation for their name, image, or likeness that is currently enjoyed by non-athletes.