MLBPA's Marvin Miller And Baseball Trading Cards – A Historical Guide As We Enter The World Of NIL in College Athletics?

By Jeffrey M. Schlerf August 3, 2021

On June 21, 2021, US Supreme Court issued its opinion in the *Alston* case striking down the NCAA's restrictions on education-related benefits offered to student-athletes. Legislation in several states regarding athlete name, image and likeness ("NIL") recently went into effect. While the Alston decision did not directly address NIL, the opinion expressed clearly that the NCCA is not exempt from antitrust law. The NCCA has finally removed its prohibitions against online endorsements, appearances and sponsorships.

There are already reported NIL deals offered to student athletes including a few team arrangements which have made the national news. A local businessman and booster offered the entire University of Miami football team a $540,000 NIL proposal. Also, it was reported the women's basketball team at the University of Central Florida signed the first *team* NIL deal. There have been various individual college athletes reported to have entered into their own marketing deals including one in the range of $1 million for a heralded but untested quarterback at the University of Alabama.

At this early stage it is very difficult to predict exactly how this new commercial landscape in college athletics will evolve. We already see initial NIL deals with entire collegiate teams like those noted above. But stories of elite, well known athletes in the most popular sports (football, basketball) landing contracts will continue to dominate the headlines. I believe that for the "rank and file" collegians (i.e., most student athletes), individual deals will be less common or lucrative. As explained below, a group or team approach would serve them better.

Among the issues raised by those resistant to loosening limits on collegiate athlete compensation was concern there will be divisive locker-room rivalries and envy among teammates as players negotiate their own deals. Even those supporting change and who do not share this concern recognize there are obvious disparities in sophistication between young athletes and businesses offering marketing deals. This reality means some athletes will be taken advantage of. Moreover, many believe it inevitable the suddenly changed collegiate "landscape" will be too chaotic, at least initially - a "Wild West" atmosphere as individual athletes cut their own NIL deals. With these thoughts in mind, more emphasis in these early stages on collective (team) oriented deals would provide a more organized and less cutthroat environment for athletes and other constituencies in college athletics.

What transpired in Major League Baseball ("MLB") two generations ago is instructive. In the mid-1960s the Major League Baseball Players Association ("MLBPA") took the monumental step of hiring Marvin Miller as its Executive Director.[1] Until then MLBPA existed mostly in name only. The hiring of an experienced union official willing to challenge the status quo in a league bound by its traditions and owner power and control was a game changer. Within a decade MLB's infamous "Reserve Clause" became a relic of history as player free agency ensued. No one can predict all that transpires over the next decade in college athletics. Even if the change is as dramatic as that effectuated in professional baseball after 10 years of Marvin Miller's leadership, the best initial approach for most collegiate athletes could be

[1] The following description of Marvin Miller and his leadership of the MLBPA is based on his autobiography, *A Whole Different Ball Game*, referenced below in Sources.

*gradual, collective actio*n. That is what happened under Miller. The story of baseball trading cards is a great example of the advantages of this approach.

Younger generations may be less familiar with baseball trading cards. Some might view them as like a hard copy version of NFTs of professional baseball players. But among the differences there are several cards with player images packaged together and each contains player statistics on the reverse side and includes an included "confectionary" product (bubble gum). For decades they were extremely popular among baseball fans, especially kids (now cards of former stars are a hot item for wealthy adult collectors, trading at astonishingly high prices). Trading card companies created new player cards before each season – generating more revenue for themselves. For the card collecting fan, one allure of a new card each season was the hope their favorite player would have an all-star caliber year – resulting in their card being highly coveted. A win-win for the players and the League? And the players were fairly compensated for the use of their name, image and likeness? Not quite.

Upon assuming his position, Miller soon realized it was necessary to find revenue sources for the Association – its financial coffers had always been bare. A union without resources did not stand a chance in negotiating with an economically powerful business such as a professional sports league. Miller saw trading cards as a potential opportunity but soon learned how the trading cards market actually worked in professional baseball. In short, the status quo did not favor the players. He learned that almost every MLB player had signed their own contract with one company with a monopolistic position, Topps, entitling them to $125 per season (plus a $5 signing bonus). In exchange Topps had exclusive rights to their photo for use on a trading card with the option of an included confectionary product. Players did not receive a percentage of sales. Remarkably, the players were not permitted to keep copies of their contract so expiration dates were unknown, but it appeared to Miller their terms were akin to a perpetual reserve clause. It is notable that Topps had the audacity to reproduce player contract signatures for use as autographs on the cards.

Miller initially proposed to Topps that the individual contracts be revised to add a percentage of sales. The company refused. Miller proceeded by formally seeking player approval for the MLBPA to act on their behalf for collective marketing deals involving their NIL, including but not limited to trading cards - in lieu of individual player contracts. They overwhelmingly agreed. Surprisingly, few players had their own individual endorsement deals, but Miller proposed that any player who negotiated a deal with a competitor of a new MLBPA sponsor could opt out of the group contract unless the company matched the competitor's offer. During that offseason he negotiated the union's first such endorsement deal, with Coca-Cola. With that in hand the Association was in better financial position to push for a better arrangement with Topps for the next season. Once again demonstrating his leadership, Miller convinced all MLB players not to renew their trading card contracts with that company. This solidarity among players resulted in Topps eventually coming to the bargaining table and agreeing to a contract with the union which substantially increased the fee payable to each of the players and offered them, for the first time, a percentage of sales.

Almost sixty years later there are lessons to be learned from this history in professional baseball which can be applied to the new world of NIL in collegiate athletics. Obviously, that was a different era and college and professional sports are distinct enterprises. However, the value of collective action applies equally, especially when considering how inexperienced most college athletes are in business dealings. Sure, the absence of a union with an effective leader like Marvin Miller in college athletes is a significant distinction. However, that does not negate the underlying principle: there are clear advantages for most college athletes from collective action. We see it occurring already. In addition, many schools have announced programs and resources to facilitate athletes and teams entering into marketing deals, which should facilitate this type of approach. In fact, federal legislation was recently introduced which, if passed, would enable college athletes to unionize. Several years ago when football players at Northwestern University attempted to unionize, that kind of effort was controversial and seemed farfetched. It no longer does.

In the coming days there will be many publicized marketing deals involving star athletes in the popular sports at elite collegiate athletic programs. For most student-athletes, however, group arrangements are the more likely and beneficial outcome in this brand-new NIL landscape.

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