

**Katten**

# Legal Trends in Sports Marketing – Sponsorships and Endorsements

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# Sponsorship Alliances as a Marketing Vehicle

- Increase brand awareness
- More accurate demographic targeting
- Positive publicity/emotional connections/cause-related
- “Business-back” opportunities
- Hospitality
- Sweepstakes/contests

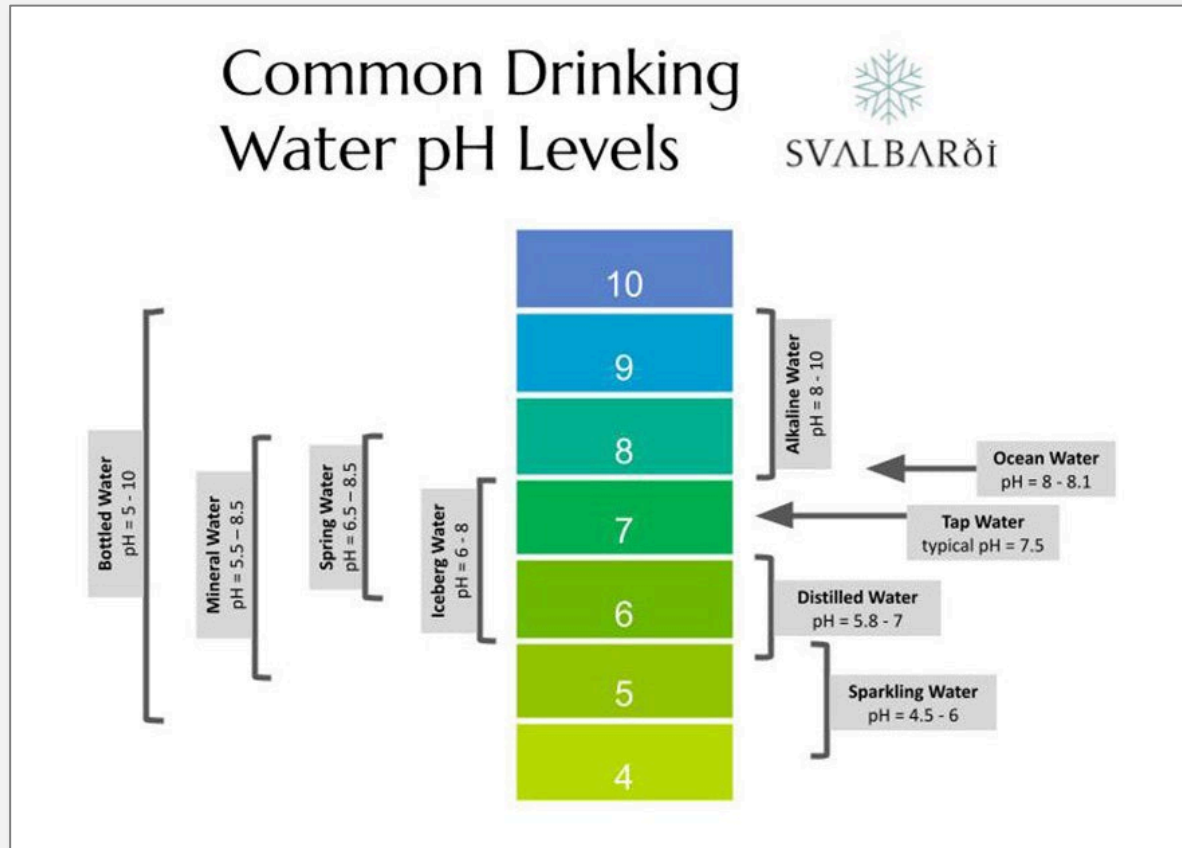
# Types of Sponsorships

- League alliances
- Team alliances
- Event alliances
- Sport governing body alliances
- Naming rights/venue alliances
- Athlete endorsement alliances



# Category Exclusivity

## Thin-slicing vs. the whole pie



# Category Exclusivity



Gatorade Ingredients:  
Water, Sugar,  
Dextrose, Citric Acid,  
Natural and Artificial  
Flavor, Salt, Sodium  
Citrate,  
Monopotassium  
Phosphate, Modified  
Food Starch, Glycerol  
Ester of Rosin, Blue 1.



Vitamin Water Ingredients:  
reverse osmosis water, crystalline  
fructose, less than 0.5% of:  
vitamins A, C, B3, B5, B6, B12  
(beta-carotene, ascorbic acid,  
niacinamide, calcium  
pantothenate, pyridoxine  
hydrochloride, cyanocobalamin),  
sodium selenate, manganese  
citrate, electrolytes (magnesium  
and calcium lactates and  
potassium phosphate), cane  
sugar, citric acid, gum acacia,  
natural flavors, fruit and vegetable  
juices (for color).

# Category Exclusivity

## Carbonated soft drinks vs. energy drinks



**2.8mg  
Caffeine/Fluid  
Ounce**

Carbonated water, high fructose corn syrup, caramel color, phosphoric acid, natural flavors, caffeine



**3.8 mg  
Caffeine/Fluid  
Ounce**

Carbonated water, caramel color, aspartame, phosphoric acid, potassium benzoate, natural flavors, citric acid, caffeine



**10 mg  
Caffeine/Fluid  
Ounce**

Carbonated water, sucrose, glucose, citric acid, natural flavors, taurine, sodium citrate, color added, panax ginseng root extract, L-carnitine L-tartrate, caffeine, sorbic acid, benzoic acid, niacinamide, sodium chloride, Glycine max glucuronolactone, inositol, guarana seed extract, pyridoxine hydrochloride, sucralose, riboflavin, maltodextrin, and cyanocobalamin

## Category Exclusivity Example: Credit Card Sponsorship

- Sponsor shall have exclusive marketing rights within the exclusive category in accordance with the below:
  - All forms of payment cards
  - General purpose prepaid cards
  - Payment networks
  - Digital wallets
  - Payment services
  - Payment Account Access Devices
  - Foreign Currency Exchange Services



# Category Exclusivity Exceptions

- Pre-existing sponsorships in exclusive category
  - Back end rights? Renewal?
- Advertisement of brands by team commercial partners on by local radio and television broadcast and/or streaming partners
- League rules may result in the removal or obstruction of, or failure to light up or activate, a sponsor's signage or other advertisements
- Third party events hosted by third party promoters at arena (e.g., concerts)
- Events hosted by third parties that require "clean arena" (e.g., Olympics)
- Right of team / arena to use products and services of competitors
  - Right to notify fans in factual manner
- Future teams that play home games at arena?

# Sponsor Benefits

- Sponsor is generally responsible for the cost of creating/designing all Advertising Copy to be displayed as part of any sponsor benefits, with any updates thereto at the sponsor's expense
- Specific designations (e.g., “Presenting Sponsor” or “Official Ticketing Partner”)
- Be clear with respect to whether postseason investment is required or optional
- Additional benefits (e.g., suite access)

# League & Team Sponsorship Rights Allocation



- Co-existence between the two?
- League rule subordination
  - Territorial limitations
    - NBA International Team Marketing Program
- Implications of nationally televised games
- Local/regional sports network considerations
- Make Goods / Refund Considerations

# Representations and Warranties

- Typical “fundamental representations”
  - Right and authority, duly authorized
  - No conflicts
  - Good standing
- Acknowledgment by sponsor that teams and arena cannot guarantee on court success or attendance levels
  - But see force majeure...

# Indemnification

- Breach
- Negligent acts or omissions
- Promotion events conducted by sponsor
- Any product or service offered by sponsor
- Content of sponsor's advertising copy
- Fan injuries at the arena during games or events

# Termination Rights

- Material breach
- Relocation of team outside of certain geographic territory
- Opt out?
- Ongoing force majeure?
- Fundamental change in league rules?

# Force Majeure

- Force majeure clauses excuse nonperformance when extraordinary events prevent a party from fulfilling its obligations
- Courts look at (1) whether the event constitutes a force majeure under the contract, (2) whether the risk of nonperformance was foreseeable and mitigatable, and (3) whether performance is actually impossible
- Very relevant during COVID-19 lockdowns (e.g., applicable to epidemics, pandemics, and/or government action)



# Sample Force Majeure Clause

“If a Party is unable to perform its obligations under this Agreement due to a Force Majeure Event, upon notice to the other Parties, such Party’s obligations (other than a payment obligation herein) shall be abated for the duration of the Force Majeure Event. Upon the end of the Force Majeure Event, Sponsor shall be granted in lieu of any unavailable Entitlements during the Force Majeure Event, Substitute Entitlements in accordance with Section XYZ above. In the event that the applicable Team Party is unable to provide Substitute Entitlements of equal or comparable value that are acceptable to Sponsor, then that Team Party shall provide a refund to Sponsor or a reduction of Fees for the amount of Fees applicable to the unavailable Entitlements and other benefits that were not granted and/or provided to Sponsor in accordance with this Agreement; the amount of Fees or reduction of Fees shall be determined by the mutual agreement of the Parties (acting in good faith) and, in the case of a refund, shall be payable by the applicable Team Party within thirty (30) days.”

# Force Majeure

- Do sponsorship payments continue during force majeure?
- Right to terminate if ongoing for certain period of time?
- Relationship of the parties can be critical in avoiding disputes

# Make Good Rights / Refunds

- Typical Definition: “make good rights or benefits that are substantially equivalent in value to the rights or benefits that are otherwise required to be, but for the reasons set forth in the applicable provisions of this Agreement are not, provided by [Team] to Sponsor hereunder.”
- Common practice to use game / event minimum as proxy for materiality
  - Do games played in front of no / less fans count?
- Sponsors want refunds / teams want make goods
- Need to determine what is “fair value” and how to handle disputes

# Back-End Rights

- Extensions/Renewals
  - Does partner have a right to discuss an extension/renewal or an absolute right to extend/renew (or somewhere in between)?
- Right of First Offer
  - Soft: If parties cannot reach mutually acceptable terms, rights holder may negotiate with third parties on any term
  - Hard: Rights holder may not offer third party more favorable terms than those offered to partner
- Right of First Refusal/Right to Match
  - Enables party to make a decision based on the complete information derived from the other party's negotiations with a third party
  - Has chilling effect on third parties to negotiating with rights holders

# Sample Morals Clause

“Without limiting any other rights or remedies Sponsor may have under this Agreement, Sponsor may terminate this Agreement by written notice to Company at any time in the event that Company, the League or the Team (including any player on the Team) becomes involved in any controversy or scandal that has a negative effect on the business, reputation, or the public’s perception of Sponsor or its products or services, as determined by Sponsor in its sole good faith discretion (a “Sponsor Morality Termination”); provided, however, that Sponsor shall not be able to invoke a Sponsor Morality Termination with respect to the conduct of any Team player unless such conduct, during the Term, (a) results in a felony criminal conviction or plea of nolo contendere thereof of or by a Team player, or (b) involves, at a minimum, the suspension by the League of at least two (2) Team players for a minimum of twelve (12) games each during the applicable League Season.”



# Endorsements/Player NIL

- Increase brand awareness
- Build consumer trust
- Boost product credibility
- Leverage an athlete's fan base; Athlete's as influencers
- Differentiate from competitors
- Unlike traditional endorsements, Athletes are viewed as experts with respect to performance products
  - Athlete endorsement of sport apparel and sports F&B brands may be particularly valuable, as they are likely to be viewed as true users/endorsers of the product(s)
  - For Athlete, this means increased reputational risk

# Player NIL - Exclusivity

- Similar Issues regarding scope of exclusivity
  - E.g., apparel vs. specific categories of apparel
- Exclusivity extends to public activities/appearances, with exceptions
- Exceptions for team gear/uniforms
- Athlete may have existing partnerships/exclusivity obligations as well



# Sample Exclusivity Clause

“During the Term, Athlete agrees that ***Athlete shall not authorize the use of Athlete’s name, image, voice, photograph or likeness for or in connection with***, any advertisements, commercials, merchandising, endorsements or testimonials for any caffeinated sports energy beverages (“Competing Products”); provided that (a) Company acknowledges that Athlete may be photographed or otherwise seen in his/her everyday life using and/or in proximity to Competing Products, and that such photographs and/or observance of Athlete shall not constitute a breach of this Agreement, and (b) Athlete’s appearance in any television, film, podcast, radio or any other media entertainment or news program, or at any event or branded experience (including without limitation, event openings such as movie premieres, live musical performances, award shows, fashion shows, and/or concerts) sponsored and/or endorsed by, or including product placement or commercial tie-ins with, Competing Products shall not constitute a breach of this Agreement (***provided that in doing so Athlete does not directly and intentionally endorse any Competing Products and that the main focus of such program or event is not the promotion of any Competing Products***).”

# Sample Existing Exclusivity Obligations Clause

“Due to Athlete’s pre-existing exclusive agreements in the categories of (i) complexion, cosmetic and skincare products (excluding sunscreen and beauty tools), (ii) swimwear, (iii) sneakers, and (iv) denim (the “Exclusive Categories”) the Company shall not require Athlete to: (x) handle any product in the Exclusive Categories or appear in any Marketing Materials which includes copy or images of any product in the Exclusive Categories (provided that the foregoing shall not prevent the Company from requiring that Athlete wear mutually agreed complexion, cosmetic and skincare products), (y) appear, be photographed, or be seen, shown or depicted, in images or recordings of any kind where Athlete **directly endorses** products in the Exclusive Categories, or (z) have Athlete's image published in any media depicting Athlete **directly endorsing** any products in the Exclusive Categories, in each case unless approved by Athlete.”

# Player NIL - Approvals

- Scope of Approvals – NIL vs. Uses
  - NIL: photographs, images, drawn likeness, etc.
  - Uses: Advertisements, on products themselves, etc.
    - Exclusions: merchandise, life size cutouts or standees, product packaging, spam emails, co-promotions, cross-promotions strategic partnerships, third-party commercial tie-ins or third-party product/service integrations, and use with other models, celebrities or public figures
- Social Media Approvals: Use on athlete's vs. brand's social pages
  - Cross posting, advertiser access
- Remedies for Failure to Approve
  - Revisions to likeness; cap on revisions
  - Turnaround time on approvals
  - Termination rights

# Player NIL – Representations and Warranties

- **Basic Representations:** authority, necessary work permits, no conflicts, etc.
- **Disability:** Athlete may represent that they aren't current disabled or aware of circumstances that might lead to them becoming disabled/unable to play
- **Ownership:** Athlete owns the applicable rights in their NIL, and has the right to grant them
- **Infringement:** Reciprocal representations regarding the parties' respective contributions
- **Third Party Permissions:** If Company or Athlete are supplying third party materials, they may make representations regarding those/required clearances (e.g., music)
- **FTC/TOS Compliance:** Who is responsible? Is the Company providing advertising copy?
- **Product Liability:** The Company may be asked to make representations about the Products themselves

# Player NIL - Indemnification

- Company
  - Breach of representations, including false statements, FTC and platform compliance (though Company may be responsible to provide approved FTC compliant copy), content generated by Athlete
- Athlete wants indemnification for the Products
  - Sample: “(i) the **development, production, distribution and/or other exploitation** of the Marketing Materials or of the Products (including, without limitation, any claims that such Marketing Materials infringe upon a third party’s intellectual property rights), (ii) **any defect in the Products (including any product liability claims)**, (iii) the business of the Company generally, (iv) any material breach by the Company of any of its representations, warranties or covenants set forth in this Agreement, and (v) Company’s negligence or willful misconduct, in each case unless arising as a result of matters subject to indemnification by Athlete hereunder, Athlete’s uncured material breach of this Agreement or Athlete’s negligence or willful misconduct.

# Player NIL – Default, Disability and Force Majeure

- Default
  - Does the company have an out if the deliverables do not meet its internal standards?
- Disability
  - Suspension/Termination By Company: Company may have a termination right after a certain period of suspension
    - Exclusions for pregnancy (e.g., Allyson Felix)
  - Termination by Athlete for prolonged suspension: If payments are suspended
- Force Majeure
  - Suspension/Termination by Company: Company may be limited in how often or how long it can suspend for force majeure events
  - Termination by Athlete for prolonged suspension: Often Athlete will have the right to terminate if payments are suspended for long periods of time

# Sample Athlete Morals Clause

“If Athlete at any time (x) fails, refuses or neglects to govern Athlete’s conduct with due regard to social conventions and public morals and decency, (y) **is accused of**, indicted for or convicted of a felony, or (z) commits **or is accused of committing** any act which **might** bring Athlete into public disrepute, scandal, contempt or ridicule (**including the use of performance enhancing drugs**), which **might** shock, insult or offend a substantial portion or group of the community or which **might** reflect unfavorably on Athlete, then, notwithstanding anything to the contrary contained herein, Company may, in addition to and without prejudice to any other remedy of any kind or nature set forth herein, deem Athlete to be in material breach hereof and/or suspend and/or terminate the Agreement without any payment or other obligation to Athlete.”

# Player NIL – Termination

- Payment Remedies
  - Timing of Payments: Upfront vs. tied to deliverables?
  - Break-Up Fee is terminated early (e.g., if Company’s marketing strategy changes)
  - How does termination by each party effect the usage term?
- Post-Term usage restrictions and wind down period
  - Generally, social media content can continue to be left online by Company
  - Athlete may be required to leave certain posts “live” for a period of time following the end of the term
- Procedures for removal of specific content

# Player NIL – Unique Issues

- Is the Athlete on board?
  - Representatives: agent (and pseudoagents), managers, lawyer, etc.
- Shorter career > incentive to capture ownership stake
- Injury/performance risk
- Is Athlete a member of an applicable guide or union?
  - Ownership rules
  - Pension and health payments (e.g., SAG-AFTRA 19.95% - 23.5%)

# Collegiate Player NIL – Legal Risks

- Who controls the rights?
  - Universities - can make NIL deals directly with athletes; control university marks
  - NIL Collectives – aggregate player NIL rights
  - Athletes – can make their own deals directly
- State and Local rules
  - State law may restrict certain categories of products, prohibit the usage of a school’s intellectual property (logos, colors, etc.), prohibit on-campus filming or require disclosure of deals to schools.
  - Particularly true with respect to high school athletes, where there are more restrictions.
- NCAA’s NILGo Portal
  - “Pay for Play” restrictions; does the deal represent the fair market value of services?
  - Rejection for NIL collective deals that lack legitimate, non-university business operations (i.e., not selling products to the public) are commonly rejected for failing to have a “valid business purpose“
  - Rejection for “warehousing” (i.e., pay athletes to reserve their NIL rights for future use without immediate, defined deliverables)
- Transfer/Eligibility Termination Rights