



♥ RUTHIE ♥

BUXOM BARMAID MAKES ANOTHER ROUND, THIS TIME WITH NIL

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Name, image, and likeness (“NIL”) rights have been gaining attention since the U.S. Supreme Court confirmed certain NCAA student-athlete compensation rules violate the Sherman Act in 2020.¹ This has prompted an uptick in the proposal and adoption of right of publicity laws, the legal backbone of NIL rights.² Federal and/or state court decisions involving NIL in the past four years have also doubled those reported from 2015 to 2020.³ Despite this increased attention, 15 states still have no statutory scheme governing rights of publicity and there is no federal legislation directly on point.⁴ Few cases demonstrate the market uncertainty this creates and burden it places on courts better than the case of Iowa’s Buxom Barmaid.

Long before Caitlin Clark’s outstanding athletic performances and record-breaking endorsement deals, Ruth Bisignano (“Bisignano”) drew crowds to Des Moines, Iowa with a unique perfor-

mance of her own. Balancing two-pint glasses of beer on her bosom and delivering them to customers, crowds flocked to see Bisignano do her shimmy in the early 1950s. Korean war veterans diverted their planes to Des Moines to grab a beer off Bisignano’s bosom. Famous Hollywood director, Cecil DeMille (who watched the show twice), encouraged Bisignano to charge more for her services. Authorities were not as thrilled about the spectacle. Local police arrested her for indecency and the IRS charged her a burlesque tax. Unphased, Bisignano charged three times the normal price for a glass of beer. And so, Bisignano was able to own a bar in the 1950s when it was unusual for a woman to work outside the home, let alone make a career out of risqué behavior. Married 16 times to nine different men, Bisignano’s marriages and divorces were also highly publicized.

The sensational headlines Bisignano generated were nothing short of eye opening:

“POLICE NAB RUTHIE FOR
‘SHAKING THE SHIMMY’ IN TAVERN”⁵
“HER BEER-BOSOM ACT GETS AHEAD”⁶
“BALANCING BEER MAID LOSES
HUBBY AND BAR”⁷

As all good things must come to an end, so did the frenzy surrounding Bisignano. By 1970, Bisignano closed her bar. Thereafter, she lived a quiet life with her last husband, Frank Bisignano (“Frank”), until her death in 1993. Frank passed away three years later. They both died without children and without wills.

From 1997 to 2012, only one publication mentioned Bisignano; a 2006 book: “The Life and Times of the Thunderbolt Kid,” a memoir by Bill Bronson, which discussed Bisignano in just three paragraphs. Recognizing Bisignano’s story had transformed from that of a public nuisance to that of a trailblazer who could inspire other women to break barriers, Exile Brewing

Company (“Exile”) sought to honor her. After searching for someone claiming to own Bisignano’s NIL and not locating anyone, Exile named a beer “RUTHIE” as a tribute to Bisignano in 2012. Thereafter, some relatives of Bisignano came forward, assuring Exile that Bisignano would have loved the tribute. In 2019, the beer earned the title “Official Craft Beer of the Iowa State Fair.” In November 2019, Exile filed an application to register the name “RUTHIE” with the U.S. PTO; the mark was registered to Exile on March 16, 2021.

In 2020, one of Frank’s nephews, Fred Huntsman (“Fred”), reopened both of the Bisignanos’ estates (the “Estates”), claiming he inherited Bisignano’s NIL through intestate succession. Suit for misappropriation of Bisignano’s NIL was filed against Exile on June 1, 2020. Because there was no statutory or common law governing rights of publicity in Iowa, the Estates’ litigation against Exile ran the gamut of Iowa’s Probate Court, State District Court, Iowa Supreme Court, Federal District Court, and U.S. PTO.

First, the reopening of Bisignano’s Estate was litigated in the Probate Court. Exile argued the Estates could not be reopened due to jurisdictional limitations in Iowa’s Probate Code. The Probate Court held Exile was an interloper and declined to close the Estates due to a jurisdictional exception for the discovery of “new property.” Although the Iowa Supreme Court affirmed the decision on appeal, it also held that reopening the Estates did not, in and of itself, equate to a finding that Bisignano’s NIL existed, the NIL passed to Fred under Iowa’s intestate succession laws, or the NIL is an “inheritable” right under Iowa law.⁸

Parallel to the probate proceedings, the case moved forward in the District Court for Polk County, Iowa on a common law right of publicity and trademark causes of action. On cross motions for summary judgment, the District Court adopted a common law right of publicity but held whether the Estates abandoned or consented to Exile’s use of Bisignano’s NIL was a jury question. This was, in part, because Fred moved to Washington in 1983, did not attend the Bisignanos’ funerals, and posted Exile’s

“RUTHIE” beer marketing materials on his own social media. Said Court also held there was no applicable First Amendment privilege due to the commercial nature of Exile’s speech and despite the clear intent to spark discussions about women’s rights.

Following the District Court’s ruling, the Estates filed an amended complaint, removing their trademark infringement claim, conceding the Estates could not own a trademark because they were not in the business of selling any goods or services. The trademark claim was replaced with a false endorsement and sponsorship claim under the Lanham Act. Exile promptly removed the case to the U.S. District Court for the Southern District of Iowa based upon federal question jurisdiction.

Around the same time, the Estates filed a Petition to cancel Exile’s trademark registration, claiming the mark could not be registered under the Lanham Act because it is in reference to a deceased person. Said proceedings were stayed, pending the resolution of the District Court case.

After another 18 months of litigation and on cross motions for summary judgment, the U.S. District Court for the Southern District of Iowa issued a lengthy ruling:⁹

1. Holding Copyright Act and Lanham Act preemption defenses must be specifically pled, when other jurisdictions deciding more recent cases hold the defense can be raised via a Rule 12(c) motion for failure to state a claim.
2. Acknowledging a jurisdictional split but holding the Estates have standing to bring a false endorsement claim under the Lanham Act when engaged in no commercial activity.
3. Dismissing the Estates’ Lanham Act false endorsement/sponsorship claim because said Act expressly provides that a mark is abandoned through discontinued use and no intent to resume use (three consecutive years of non-use gives rise to a presumption of abandonment).
4. Holding the Iowa Supreme Court

would adopt a common law right of publicity, that said right descends through intestate succession, and the Estates have standing to bring Bisignano’s right of publicity claims under Iowa’s common law.

5. Refusing to apply the laches doctrine to the Estates’ common law claims on the basis that there is an applicable five-year statute of limitations and barring the Estates from recovering damages accruing prior to June 1, 2015.

6. Holding the issue of whether the Estates abandoned or waived their claims, as well as acquiesced in Exile’s use, was a question for the jury.

Ultimately, the parties reached a settlement before the case proceeded to trial on the abandonment, waiver, and acquiescence issues.¹⁰

But the dispute demonstrates the need for statutory laws governing NIL rights. In addition to involving two issues for which there are federal court jurisdictional splits, the case involved the ever-evolving area of First Amendment rights to free speech. In fact, the U.S. Supreme Court is now set to decide a case outlining the boundaries of free speech in the context of commercial and political speech. In *re Elster*, 26 F.4th 1328, 1333 (Fed. Cir. Feb. 24, 2022) (cert. granted June 6, 2023) (evaluating whether an individual has a first amendment right to trademark the slogan “TRUMP TOO SMALL” for use on t-shirts and apparel). So, when the Supreme Court issues its *Elster* opinion, consider whether Exile had a first amendment right to use its beer bottles, cans, and packaging to discuss the deceased buxom barmaid’s impact on the bar industry. Or, if Exile should be required to pay a fee to spark discussions about women’s rights that are based upon a deceased historical figure. Finally, consider whether legislation is better suited to resolve such disputes and call on your legislatures for a solution.



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¹ *National Collegiate Athletic Association v. Alston*, 594 U.S. 69, 141 S.Ct. 2141 (2021).

² Business of College Sports, Tracker NIL Legislation by State, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> (last accessed Mar. 10, 2024).

³ Westlaw search for the term “name, image, and likeness” in all state and federal databases, search completed March 10, 2024. Results available at: [https://1.next.westlaw.com/Search/Results.html?query=Name%2C%20image%2C%20and%20likeness&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0a-d6ad3e0000018e293f57da92a38e8b&searchId=i0ad6ad3e0000018e293f0ca78ce3d2d8&transitionType=ListViewType&contextData=\(sc,Search\)](https://1.next.westlaw.com/Search/Results.html?query=Name%2C%20image%2C%20and%20likeness&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0a-d6ad3e0000018e293f57da92a38e8b&searchId=i0ad6ad3e0000018e293f0ca78ce3d2d8&transitionType=ListViewType&contextData=(sc,Search))

⁴ Right of Publicity, available at <https://rightofpublicity.com/statutes> (last accessed March 10, 2024).

⁵ *Sioux City Journal*, Sioux City, IA, May 5, 1953.

⁶ *Daily News*, New York, NY, June 4, 1953.

⁷ *Daily News*, New York, NY, Jan. 6, 1954.

⁸ *Matter of Estate of Bisignano*, 991 N.W.2d 135 (Iowa May 26, 2023).

⁹ *Estate of Bisignano v. Exile Brewing Co.*, 2023 WL 7167889 (S.D. Iowa Sept. 26, 2023).

¹⁰ *Id.*