
HIGHWAY TO NIL: NIL ENFORCEMENT (EPISODE 3)**SEPTEMBER 29, 2022****Cal Stein (00:06):**

Hello, and thank you for joining us for the latest episode of *Highway to NIL*. Today, we will be discussing NIL enforcement trends, including what we think is coming next. My name is Cal Stein and I am a litigation partner at Troutman Pepper. As part of my practice, I represent colleges and universities, including in internal investigations and state and federal enforcement actions and lawsuits. I also advise educational institutions on any number of topics, including recently name, image, and likeness questions. Joining me today is my colleague, Chris Brolley. Chris, can you introduce yourself?

Christopher Brolley (00:44):

Thanks, Cal. My name is Chris Brolley and I'm a litigation associate in the Philadelphia office of Troutman Pepper. And as you indicated, I advise institutional, educational institutions, and all things NIL.

Cal Stein (00:56):

So today we are going to be talking about enforcement in the area of NIL and NIL Law. And as we know, NIL is still very new. So far we have not seen any formal enforcement actions from the NCAA, nor from any state regulators. There have, of course been some whispers of enforcement investigations, but no formal actions thus far. We have also seen very little guidance or legislation again at the NCAA, federal, or even state level pertaining to NIL enforcement. But there have been some signs that such guidance or legislation will be forthcoming. Exactly when it will be forthcoming, we don't know, but there have been many stories and interviews that reflect the belief held by many individuals associated with the NCAA and member institutions that further regulations are needed, including potentially from the US Congress.

So today in the absence of that guidance or those laws or regulations that we believe, though do not yet know for sure will be forthcoming, Chris and I are going to examine what we do have, the NCAA guidance we discussed in episode one and the state NIL laws we discussed in episode two. And we are going to try and draw some insights from all of those laws and guidance to discuss what we think NIL enforcement is likely to look like when it does come. And in particular, we are going to focus on the universal prohibition that NIL cannot be used as an inducement that prohibition appears everywhere, in the NCAA guidance and in state laws.

Thus, it is extremely likely that when enforcement does come, it is going to be focused on instances where the NCAA or a state attorney general or some other regulator believes that NIL money was in fact used to induce a student athlete to attend a particular school. One thing we do know is that when enforcement actions come, they are going to be focused on the schools and not on the individual student athletes. At least from the NCAA perspective, they are focused on holding schools accountable, rather than coming down hard on individual students. Whether state AGs or other state officials will do the same remains to be seen.

But there is no question that enforcement actions, at least at the beginning, are very likely to focus on schools when evaluating potential NIL inducements, which brings us to the heart of today's episode, how will those regulators decide what NIL deals constitute an inducement? And perhaps more importantly, how are those regulators going to prove it in an enforcement action should one be brought? Those are some of the questions we are going to at least try to answer today. But before we get to that, we do want to address the one piece of guidance that does exist. Earlier, I said we do not have much guidance on enforcement, and that is true, but we don't have no guidance. The NCAA has released an enforcement letter that bears on this topic. So Chris, can you take us through that NCAA enforcement letter?

Christopher Brolley (04:20):

In June of this year, the NCAA released the enforcement letter addressing the issues of NIL benefits being used inappropriately. Specifically the enforcement office provided a list of how schools can help in enforcement efforts. These include detecting a reporting potential violations on their own campuses, informing the enforcement staff when student athletes on their rosters are contacted inappropriately by schools or third parties, helping the enforcement staff uncover relevant information in a timely manner, and cooperating in efforts to expedite the review and resolution of potential violations.

I think a key factor here, which you addressed at the outset of this episode and in previous episodes, but should be emphasized again, is that the enforcement staff is concerned with behaviors of institutional staff members and representatives not on the eligibility of current or prospective student athletes. I think that's a major takeaway from this episode and from previous episodes, the fact that the NCAA is concerned with the institutional staff members and representatives and not the eligibility of current or prospective student athletes. So Cal, I have to ask you what's next

Cal Stein (05:28):

Having seen what the NCAA has said to date on enforcement, and it's not much, and Chris, you're quite right to emphasize that this at least at the outset is really going to be an institution problem. Without having said much, there is still some helpful and useful information out there for schools. But one thing that the NCAA letter that you just referenced does not address is the question that I posed at the start, the question of, how is the NCAA or a state AG, or anyone else for that matter, how are they going to determine what NIL compensation could be an inducement and how are they going to approve it? And this is really an important question because quite frankly, if NIL deals are being used to induce student athletes, the parties involved are not going to be obvious about it.

It's very unlikely that the NCAA or state AG or really anyone is going to uncover evidence that directly links the student athletes decision to attend a particular school to his or her receiving a particular NIL deal. And while we don't have specific answers to any of these questions, we can glean some answers from our prior experience in the law. There are many laws out there that have been in existence for years, where violations depend on the subjective intent of the potential violator, just like violations of the NIL laws will. And looking at how those other laws have been enforced can give us some valuable insight into how the NCAA and states and maybe one day the federal government will enforce NIL laws.

And the way that typically occurs is through circumstantial evidence. In the absence of some written or recorded statement from an individual that directly admits to an inducement, anyone seeking to enforce NIL laws will likely have to do so through evidence from which the inducement can be inferred. So let me give a real world example that I deal with all the time, and that I think has some application here. There is a federal law that's been on the books for decades. It's called the anti-kickback statute. It prohibits individuals in the medical community, usually physicians, from receiving payments or gifts or really anything of value if one purpose of the payment is to induce that physician to refer certain business.

So for example, a drug company cannot pay a physician to induce him or her to prescribe its drug. There are very few cases where there is direct evidence in the form of a physician saying, "Gee, thanks for this payment. And in return, I will prescribe your drug," but there are still many prosecutions under the anti-kickback statute and many significant prosecutions under it. And the evidence supporting those prosecutions just takes the form of circumstantial evidence, payments to physicians that have one or more hallmarks of an inducement. And that is what we are going to focus on today, hallmarks of an inducement, but in the context of the NIL.

And in the context of what we think the NCAA or state regulators will view as hallmarks of an inducement. And we are going to build on our last episode by mining the myriad state laws to find elements that if they exist in a given NIL arrangement could cause the NCAA or a state regulator to believe then an NIL payment is in fact an inducement. So Chris, let's start with one that is really pretty obvious, fair market value. Talk to us about fair market value and how it could be used as a hallmark of an inducement by the NCAA or a regulator.

Christopher Brolley (09:31):

As addressed in previous episodes. Under some state laws, compensation for name, image, and likeness must be in an amount commensurate to the fair market value of the student, athletes, name, image, and likeness. And one way the NCAA may consider there to be some sort of inducement is if the compensation is way beyond the fair market value. We speculate that this may be harder to prove that it is not an inducement, but how do we calculate the fair market value? Again, this is all speculative, but this is something we suspect will be a hot button issue going forward. And we believe that it's something that NCAA may consider to be one of the hallmarks of inducement.

Cal Stein (10:08):

And again, bringing this back to the real world example that I have dealt with for decades, in the context of other statutes, and again, I'll bring it back to the anti-kickback statute, there are payments that are made from, in my example, drug companies to physicians all the time. For example, a physician may perform legitimate consulting services for a drug company, and there's absolutely nothing wrong with that. And there's nothing wrong with that. If the physician then prescribes that drug company's product, the way fair market value enters the equation is if a drug company, for example, pays that physician a consulting fee that is 2, 3, 4 times the normal amount.

In that situation, federal regulators who enforce the anti-kickback statute have determined that that's an inducement, that the payment is actually for something else. So maybe part of the payment is for the services, but because they're paying that physician in my example so much more than he or she otherwise would receive, there is suspicion and it is a suspicious transaction. And one that they're going to look at as potentially being more for inducement than for the services. And the same paradigm could one day happen in the NIL arena.

If a third party, let's say that is run by an alum of a particular school, pays a particular student athlete or a prospective student athlete, 2, 3, 4 times what he or she would normally expect to get and that student athlete does perform NIL services, but also enrolls in that person's school that they're an alum of, it's not hard for a regulator to see how they would draw the conclusion that the NIL payment is for something more than mere NIL services, and is also an inducement to go to that school. And as Chris mentioned, when faced with those circumstances, it can be very difficult to disprove or dislodge that type of assumption.

Another area where I think the NCAA and state attorney generals may look for potential hallmarks of an inducement is the involvement of the educational institution itself, including through third parties like boosters and collectives. As we discussed last episodes, some state laws arguably restrict institutions from creating or facilitating NIL opportunities. It may be that an investigator looking to draw a link between an NIL payment and a quote inducement will focus on institutional involvement, whether it violates the applicable state law or not. It would not be surprising, for example, for an investigator to examine what role institutional personnel had, if any, in connecting a prospective student athlete with a collective or perhaps directly with an NIL opportunity funded by an alum of that school.

To be clear, depending on the state law, there may be absolutely nothing wrong or illegal with the scenario I just set out, but regardless, an investigator or someone from the NCAA may interpret a close tie between institution and NIL engagement as suggesting the existence of some level of inducement institutions should be aware of this. And to the extent an institution or someone acting on behalf of an institution may insert itself close to one of these arrangements, especially if that involvement borders on facilitation. It should consider taking steps to guard against even the perception that there could be an inducement relationship. Chris, why don't you give us one more thing that we looked at and thought that maybe the NCAA or a state AG or some other investigator could consider a hallmark of an inducement?

Christopher Brolley (14:17):

Yeah. I think what a state AG or an investigator could look at would be the timing of the NIL deal. Under some state laws compensation for NIL must not come before a student athlete has begun his or her career at an institution of higher education. There is a thin line between inducement to a 10, a certain school over another because of where an NIL sponsor is located. I think in real world practice, however, this has become something of a hot button issue at the moment, given the number of transfer student athletes that we have seen going from one institution to another. And right after they enroll, we see an NIL deal announced shortly thereafter. I think this could be another instance of a hallmark of an inducement as you discussed.

Cal Stein (15:00):

And timing has long been one of the stalwart pieces of circumstantial evidence. And you can imagine any number of scenarios where the timing of a particular action or a particular payment from that you could infer the existence of an inducement or some other cause of relationship. I'll give a really easy example and one that we've seen time and time again. In the employment context, there are every day, many, many wrongful termination suits that are filed. Many of them involve allegations of retaliation after an employee, for example, complains about something his or her boss may have done. You can imagine a scenario where if an employee complains about something and then the very next day he or she is terminated, the timing of the termination in comparison to the report certainly begs the inference of a relationship between the two.

And once again, the same could be said for an NIL arrangement here. If for example, a student athlete was considering five different schools that he or she may attend, and he or she makes his or her announcement on one day, and then the very next day, there's an announcement of an NIL deal with the boosters of that school or with a company run by an alum of that school. The timing alone doesn't mean there was anything wrong, but it certainly may be interpreted that way by the NCAA, by a state attorney general or by some other regulator. So timing is something that institutions and student athletes should have at the front of their mind at all times. And with that, I think we are out of time for today. Chris, I want to thank you for joining me on today's podcast and on this entire podcast mini-series.

And I also want to thank everyone for listening. This is the last of our regularly scheduled podcasts in this mini-series, but Chris and I are going to continue to record episodes when news breaks or new guidance or regulations come out. I hope you will join us when we do, if you have any thoughts or any comments about this series, I invite you to contact me directly at callan.stein@troutman.com or Chris directly at christopher.brolley@troutman.com. You can subscribe and listen to other Troutman Pepper podcasts wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you for listening and stay safe.

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