
**HIGHWAY TO NIL PODCAST S02E07: NIL ANTITRUST LITIGATION
RECORDED 11/28/23**

Cal Stein:

Hello and welcome back to Highway to NIL, a podcast series that discusses legal developments in the name, image, and likeness or NIL space. NIL of course affects colleges and universities all over the country, particularly those in Division I athletics, and in this podcast series we delve deep into the current NIL rules impacting colleges and universities and their compliance departments.

Today I am here with three of my terrific Troutman Pepper colleagues to discuss a recent federal court case involving student athletes and their NIL. More specifically, the case and the recent decision that came out earlier this month in that case involved the US Federal Court, the district court for the Northern District of California that certified several classes of plaintiffs in a civil class action lawsuit, thereby clearing the way for them to pursue their litigation. These plaintiffs are former current and in fact some future NCAA student athletes and the litigation is aptly titled *In re College Athlete NIL Litigation*. You know with a name like that our team here at Highway to NIL had eyes on this case and we have been following it closely, and today we're going to talk about it and in particular talk about the recent ruling.

But before we do, let's do some introductions. As you know, my name is Cal Stein and I'm a litigation partner at Troutman Pepper. As part of my practice, I represent colleges and universities including an internal investigations and state and federal enforcement actions and lawsuits. I also advise educational institutions on a great number of topics, including most recently, name, image, and likeness, compliance, and other questions. I'm here today with three of my colleagues, Chris Brolley, Brett Broczkowski, and Connor DeFilippis. I will let them all introduce themselves, starting with you, Chris.

Chris Brolley:

Thanks, Cal. Like you said, my name is Chris Brolley, and I'm a litigation associate at Troutman Pepper. Like you, Cal, I advise colleges and universities on NIL, particularly regarding compliance with state laws, NCAA bylaws, and other NCAA policies regarding NIL activities.

Cal Stein:

Brett?

Brett Broczkowski:

Thanks, Cal. As you said, my name is Brett Broczkowski. I'm an associate in our litigation practice here in the Philadelphia office, and as part of my practice I also involve counseling institutions of higher education on all things NIL.

Cal Stein:

Thanks, Brett. And Connor, why don't you introduce yourself?

Connor DeFilippis:

Sure. My name's Connor DeFilippis. I'm an associate in the firm's business litigation practice group, also sitting in Philadelphia. And as with the rest, part of my practice involves counseling higher education institutions on a number of issues including now with regard to NIL.

Cal Stein:

Let's start our discussion of the *In re College Athlete NIL Litigation* case summarized very briefly. The plaintiffs in this case are student athletes, and they are suing the NCAA and the major collegiate athletic conferences, and they accuse those defendants of conspiring to restrict payments to student athletes related to things like TV broadcasts, video games, and other revenue sources. The plaintiffs seek to represent a class of what they say is more than 180,000 current and former student athletes. In short, this is a lawsuit that sounds in antitrust violations at least. Those are the allegations that the plaintiffs make. The NCAA for its part has strongly defended itself and its conduct in this litigation, including most recently challenging the plaintiff's allegations that they should be permitted to pursue the case as a class action. In early November, however, the judge in the Northern District of California finally weighed in on this and found in favor of the plaintiff's on this issue of class certification.

And with that overview, I want to take a brief step back, and then I want to move forward and explore the class-based allegations and the arguments here. This is a case which consolidated actually two separate actions that were filed. The first is called *House v. NCAA* and it was brought by a current student athlete on a major Division I women's basketball team and another current student athlete on a men's swimming and diving team. The second case that was consolidated was brought by a former student athlete who played on a Division I football team. As originally brought, these cases challenged the NCAA's rules restricting the compensation that student athletes were permitted to receive for the commercial use of their name, image, and likeness. The plaintiffs alleged that these restrictions amounted to anti-competitive conduct, which they claim violated the Sherman Act. The Sherman Act being a federal law that prohibits anti-competitive activities. After the actions were consolidated and after the NCAA introduced its interim NIL rules that we have spent a lot of time talking about on this podcast, the various plaintiffs filed a consolidated class action complaint, which added some important additional allegations.

First, they alleged that the NCAA did not actually repeal its name, image, and likeness, prohibitions, they just suspended their enforcement. This is something we have discussed at length here on Highway to NIL and something that is going to remain the current state of affairs unless and until the NCAA passes new legislation addressing NIL as opposed to just enacting interim policies under which it is currently operating or until the federal government passes federal NIL legislation, which we discussed on our last episode. Second, the plaintiffs added the allegation that the NCAA is still restricting the compensation student athletes can receive in exchange for their use of their NIL. For example, by prohibiting NCAA member conferences and schools from sharing with student athletes the revenue they receive from third parties for commercial use of the student's NIL including broadcast revenue.

This, of course, goes directly to one of the behaviors that the NCAA has come out and issued guidance stating remains absolutely prohibited even under its interim NIL guidance. What we are discussing today is the court's opinion in early November granting the plaintiff's motion to certify damages classes. And let's start with the basics. This is all about class certification. Chris, before we can get into the nitty-gritty, we need to understand what class or classes, as it were, the plaintiffs here sought to certify. What can you tell us about that?

Chris Brolley:

Without making any assumptions for our listeners, before a court will go forward with this type of lawsuit, the plaintiffs seeking certification must first define the actual class of plaintiffs, which requires common characteristics or harms suffered by the potential class members. In this case, plaintiffs sought to certify and successfully did so three separate classes of plaintiffs.

The first class of plaintiffs known as the football and men's basketball class covers all current and former student athletes who one, received full grant and aid scholarships and two, competed on a Division I basketball team or football bowl subdivision team in one of the Power five conferences between June 15th, 2016 and the date on which the class certification order was signed in this case or November 3rd of this year.

The second class of plaintiffs known as a women's basketball class covers all current and former student athletes who one, again, received full grant and aid scholarships and two, competed on a Division I women's basketball team in one of the Power five conferences from the same date, June 15th, 2016 through the date of class certification.

And finally, the third class of plaintiffs known as the additional sports class includes current or former student athletes who one, competed on a Division I athletic team prior to July 1st, 2021 or the date the NCAA's Interim NIL policy went into effect, two, received compensation as a Division I athlete for use of their NIL after July 1st, 2021, and three, competed in the same Division I sport prior to July 1st, 2021. While plaintiffs contend that these combined classes account for at least 14,000 individuals, this actual number could be in the tens of thousands.

Cal Stein:

Thanks, Chris, for that really great overview. Now, I want to turn to you, Connor, because there are some interesting characteristics of these classes. The first, I think, being that they differ in terms of their members participation in NIL, and by that I mean whether the class members did or did not receive NIL compensation. Connor, tell us about that.

Connor DeFilippis:

Whereas class one and class two that deal with football and men's basketball and women's basketball don't require the student athletes to have proof of NIL compensation post July 1st, 2021, the third class in which encompasses all of the other sports does require that showing. And in one sense that's completely understandable because the first two classes encompass sports against football, men's basketball, women's basketball that typically generate the most revenue, and the third class is really a catchall. It's important that they show NIL and antitrust injury in this case, and the injury is much more apparent with the first two classes than it might be with the third class. But in another sense, it's interesting because several non-football and basketball student athletes have signed several year NIL deals, some were six figures or more, so the third class should really not be a throwaway or a mere catchall involving typically low revenue sports. It could actually involve some serious damages.

Cal Stein:

I also found it interesting that the classes differed in terms of what level of athletics in which the student athletes participated, and by that I really mean going down to the conference level, there was some distinction between Power five athletes and non-Power five athletes. And of course, for those who don't

know, the term Power five refers to the five major athletic conferences, at least in terms of football. That would be the Pac-12, the Big 12, the ACC, the SEC, and the Big Ten. Brett, tell us a little bit about that.

Brett Broczkowski:

Yeah, that's entirely correct, Cal. The first two classes include only those college athletes competing in programs that operate within Power Five conferences. It's particularly interesting because part of the damages sought by the class one and class two members are broadcast NIL damages and video game NIL damages, but it remains true that football and basketball games of non-Power five schools are similarly broadcast and many of those schools are also featured in the same video games for which the Power five participants are now seeking damages. This creates a bit of an odd situation.

If we take, for example, a third string punter at a Power five school who has not earned a single NIL dollar to date, based on the definition of class one, even if he were to never see the field of play or generate any NIL revenue, he still falls within the definition of Class one and is seeking damages for use of their NIL in broadcast and video games. Yet, on the other hand, if we take a star quarterback for a non-Power five program, despite his high profile, he's not eligible for participation in the third class, the additional sports class, unless he can first prove he's capable of generating NIL dollars for himself.

Cal Stein:

Yeah, that is a bit of an odd situation and one that I'll be interested to see how it plays out. Okay, now that we have a better understanding of the specific classes here, let's turn to the issue of damages and make sure we understand that aspect. Chris, there were a few categories of damages that the plaintiff sought in this case, one of which involved video games, which I found fascinating because all those great EA sports college football games that we grew up playing, those were always one of the biggest examples to which people pointed when arguing that student athletes should receive some sort of compensation. And in fact, when NIL became a thing after the Alston decision, one of the big things people were talking about was how the players could now get a share of the video game revenue and how the video games might finally be able to use a player's name instead of just his or her height, weight number, et cetera. So tell us about those damages.

Chris Brolley:

I agree with you. I think the video game injury or inquiries is one of the more fascinating ones because I think we all grew up or knew someone growing up who played these video games. They're pretty self-explanatory, but essentially plaintiff's petition argued and the court agreed that there was sufficient evidence to support a finding that the class members would have received compensation within the following three categories of damages, and like you just said, first one is video game injury, which is where student athletes were deprived of compensation from the video game publishers for use of their NIL in college football or basketball video games. The second is broadcast NIL damages or BNIL, which is where student athletes were deprived of compensation they would have received from conferences for use of their NIL in broadcasts of football or basketball games. And the last one is third-party NIL injury, which is where student athletes were deprived of the ability to seek compensation from third parties for use of their NIL between 2016 and July 2021 when the NCAA's Interim Policy went into effect.

Cal Stein:

Thanks, Chris. Okay, let's now turn to the court's examination of the plaintiff's request for class certification, and as it often does in this type of case, when faced with a class certification motion, the court focused on the predominance element in weighing whether to grant or deny the motion. Now, before we get into what the court said, let's have a quick primer on the predominance element. Basically, this requires that the issues the class members have in common predominate over any other issues that would be particular to specific class members. In this sense, the predominance inquiry is one that evaluates whether the proposed class or classes, as is the case here, are cohesive enough such that the primary issues can be properly adjudicated in a single class action case. With that background, the court here ultimately found that the predominance requirement as well as other class requirements were satisfied as to the three class that we have been discussing. Connor, let's start with the broadcast revenue class of damages here. Walk us through the court's analysis with respect to those.

Connor DeFilippis:

Sure. When we're talking about broadcast revenue, we're primarily talking about classes one and two. That's football and men's basketball and the women's basketball classes. As Chris mentioned, damages are for NIL compensation that the members of those classes claim they would've received for the broadcast of their collegiate sporting events. Not to show that the questions regarding the damages for these two classes were similar enough to pass the class certification stage, plaintiffs relied on the opinions of two experts, one on media rights, and then an economics expert. Interestingly, one of these experts had actually been involved in other NCAA related litigation on the top of NIL, including both Alston and O'Bannon.

But basically, what these experts did was, one, determine the market or the value of student athletes NIL with regard to broadcast rights and then determine two, what, if any, compensation those student athletes would receive from broadcast rights if they were allowed to do so under the NCAA rules. And what these experts determined was with regard to the revenue generated from broadcast rights for the relevant sports that we're talking about, about 10% of that revenue was attributable to student athletes NIL. They also went further and said, where broadcast agreements cover multiple sports, the overall allocation of the revenue would be 75% football, 15% to men's basketball, 5% to women's basketball, and then 5% to all other sports.

Now, in terms of how these payments would be split among these student athletes, these experts opined that basically each athlete would be part of a group licensing scheme whereby the conference would license use of their NIL and then pay the student athletes an equal amount for their participation in a given broadcast. Understandably, defendants raised numerous arguments against the certification of the broadcast damages class, and their biggest argument was that broadcast damages could not be apportioned on a class-wide basis because NIL is inherently personal and subjective, what is the value of each student's individual NIL? But the court largely dismissed this argument in light of the plaintiff's economic modeling, which the court basically found adequately supported by the expert reports.

Another argument to highlight though would be the defendant's claim that the plaintiff's broadcast NIL strategy could not support certification because it wouldn't comply with Title IX. Interestingly, the court didn't really address this issue head on instead stating that defendants had not cited adequate authority for their point or demonstrated that Title IX would even apply to these payments because they'd be coming conceivably from the conferences and not the individual schools. Most importantly though, the court in a separate opinion and order excluded defendant's Title IX expert report as unreliable and

unsupported. Although the court did go on to say in a footnote to its order that even if the broadcast NIL model were subject to Title IX, it really wouldn't impact the court's predominance decision here with regard to whether or not these students are getting NIL payments at all for broadcast rights.

It would really only impact the amount that each member would receive, so ultimately the court bought plaintiff's broadcast NIL model and found that common questions predominate sufficiently for class certification. Now, with regard to the impact, it's hard not to view this as a game check. We've seen state level NIL laws and policies prohibiting payment to student athletes solely for their participation in collegiate athletics. With regard to this specific instance, plaintiffs will likely argue they aren't being paid to play. They're being paid because the game that they're playing in is being broadcast and their NILs therefore being used to the advantage of the conferences and the NCAA, but the similarity of the two streams of revenue really makes it hard to differentiate between pay to play and a check that they receive for every game because they're in it.

Cal Stein:

Great. Thanks, Connor. Let's look at the second class of damages, the ones that I had mentioned before, the video game damages. Brett, walk us through what the court said about those.

Brett Broczkowski:

Unlike the broadcast NIL damages class, this category of damages class really focused on class one, which is the football and men's basketball class, as well as class three, which is the additional sports class, and similar to the broadcast NIL model, plaintiff's expert reports, which the court again credited, suggested that like broadcasting, video game developers would compensate members of these classes for use of their NIL in collegiate sports video games, much like the EA sports games Cal referenced earlier.

Interestingly, like the broadcast NIL component, plaintiff's experts suggested that each student athlete would receive an identical amount for use of their NIL in these video games, and the court noted that in this instance, that kind of assumption, that opinion was based on statements produced in discovery by a video game developer who's interested in creating one of these games, but the court declined to name the developer in the order for confidentiality reasons.

In terms of impact of this class, this kind of includes the broadcast class as well. Previously, we may have viewed NIL as available to just a select few athletes, the star athletes of a couple high profile programs. Yet under the theories posited by plaintiffs and their experts, at least with respect to broadcast and video game NIL, all players within certain programs, i.e., D1 football and men's basketball at Power five schools could share in these NIL proceeds.

Cal Stein:

Thanks, Brett. Okay, that brings us to the third and last class of damages. Chris, walk us through those.

Chris Brolley:

Yeah. This is the last final class of damages, compensation from third-party NIL. The third-party NIL damages class certified by the court included members from the three classes that were discussed earlier who would have received compensation from third parties for the NIL prior to July 1st, 2021, or again, the date the NCAA's Interim NIL Policy went into effect. In other words, plaintiffs argued that, but

for the NCAA's rules on NIL pre-July 2021, certain student athletes would have received NIL compensation. Plaintiff's expert used a before and after methodology to estimate the third-party NIL compensation the class members would have received absent NCAA rules prohibiting NIL.

Basically, what the expert was doing was looking forward to determining what the student athlete would have made prior to NCAA Interim Policy. This methodology was designed to measure what a class member could have earned via third parties between 2016 until July 1st, 2021. Specifically, the plaintiff's expert looked at third-party NIL payments from July 1st, 2021 until the date of class certification as a baseline to estimate what the third-party NIL damages would have been in the absence of the NCAA's rules prohibiting NIL. To control for the ambiguity of NIL, the analysis was limited to one year and excluded any student athlete who did not receive third-party NIL compensation after July 1st, 2021 as this was an indicator for the expert that the student athlete may not have ever received third-party NIL payments in the absence of NCAA rules.

As we know, the court ultimately agreed with the plaintiff's expert's methodology and said that it was a reliable baseline of the economic value of third-party NIL payments the class members would have received but for the NCAA's rules prior to July 1st, 2021. It's hard to tell what the impact of this decision is within the context of class certification. However, it appears to make some broad assumptions of student athletes' ability to earn NIL money on paper without really applying it in practice. These factors seem to be individualistic and difficult to apply on a class-wide basis.

Cal Stein:

Thanks, Chris. Okay. As we bring our discussion of this case and of this class certification aspect of this case to a close, I want to take a step back again and look at this from a more practical perspective. I want to peel back all the legal jargon and candidly sometimes hard to follow procedural aspects of a class action case like this, and I want to see what we're left with. What does the court's decision actually mean? What does it actually do? And this involves a little bit of speculation on our part, but what the heck? Let's go ahead and do that and talk about some of the key takeaways or most interesting pieces of this case. And first, I want to talk about what does the fact that the court granted class certification here say at least potentially about the judge's view of the current NIL landscape?

Well, right off the bat, it would seem that at least for this judge, the fact that NCAA now allows student athletes to earn NIL compensation is not in and of itself enough. This judge seems willing to at least entertain further the notion that yes, NIL may now be permitted, but not without restriction, and are those restrictions permissible or are they an improper restraint on trade? This has to be a somewhat concerning development for the NCAA. Flipping the switch to allow NIL in the first place, albeit subject to these restrictions, was a cataclysmic change for the NCAA and the amateurism model it had utilized for decades. And we have heard Charlie Baker and other NCAA power brokers bemoaning the difficulty they have had managing their sports in this new NIL landscape even with those restrictions in place. Given the circumstances, the idea that some judge could come along and further relax those restrictions or perhaps eliminate them altogether has to be concerning to the NCAA.

Second, as I mentioned a moment ago, this case really does underscore just how game-changing federal NIL legislation would be here. This case also, dare I say, vindicates to some degree at least Charlie Bakers and others pleased to the US Congress to get involved in past federal NIL laws. During the congressional hearing episode of Highway to NIL, I openly wondered, as did at least one US Senator, whether the NCAA would come to regret asking Congress to get involved in regulating NIL. To be clear, that type of regret surely remains in play, but given this lawsuit and the decision by the judge on class certification

and the potential implications of that, it does become a little bit easier to understand why the NCAA might be willing to take the risk of federal oversight and regulation in exchange for some federal law on NIL.

Third, at least to me, this case really puts a finer point on the huge NIL disparity between the major athletic conferences and sports and everyone else, the so-called Olympic Sports, for example. Much of the damages in this case are tied to TV revenues and video game revenues, i.e. things that really only come into play, at least in a meaningful way for the major revenue generating sports like Division I football and Division I basketball, and even then kind of only for the major conferences, which is why there's that distinction between Power five and non-Power five athletes, those Power Five conferences, of course, not so coincidentally, were also sued as defendants in this case along with the NCAA. It will really be interesting to see how this case and these issues continue to play out in this litigation in Congress and potential other legal challenges to come.

And with that, we are out of time here today on Highway to NIL, so I want to bring this discussion to a conclusion. I really want to thank Chris, Brett, and Connor for joining me on the podcast. I also want to thank everyone for listening. As always, if you have any thoughts or any comments about this series or about this episode, please feel free to contact me directly at callan.stein@troutman.com. I also invite everyone to check out Troutman Pepper's State NIL Tracker, which Brett and Connor in particular spend a lot of time working on and updating. That webpage, which as I just said, we update any time there's a change in state NIL laws can be accessed through the Highway to NIL webpage or you can always use a simple Google search. We are very proud that our tracker is one of, if not, the first result when you Google State NIL laws. 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. Stay safe.

Copyright, Troutman Pepper Hamilton Sanders LLP. These recorded materials are designed for educational purposes only. This podcast is not legal advice and does not create an attorney-client relationship. The views and opinions expressed in this podcast are solely those of the individual participants. Troutman Pepper does not make any representations or warranties, express or implied, regarding the contents of this podcast. Information on previous case results does not guarantee a similar future result. Users of this podcast may save and use the podcast only for personal or other non-commercial, educational purposes. No other use, including, without limitation, reproduction, retransmission or editing of this podcast may be made without the prior written permission of Troutman Pepper. If you have any questions, please contact us at troutman.com.