

Highway to NIL Podcast: NIL Senate Hearing**Host: Cal Stein****Guests: Chris Brolley, Danielle Clifford, and Patrick Zancolli****Recorded 10/26/23****Cal Stein:**

Hello, and welcome back to *Highway to NIL*, the 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 1 athletics. In this podcast series we delve deep into the current NIL rules impacting colleges and universities and their compliance departments.

My name is Cal Stein, and I'm a litigation partner at Troutman Pepper. I come to you today with three of my colleagues. The first is fellow Highway to NIL host, Chris Brolley. And the two others are new to Highway to NIL, but not new to the NIL space. Dani Clifford and Pat Zancolli are Troutman Pepper associates who have been important contributors to our NIL working group for some time.

We are here today to talk about the Senate hearing that took place just a little over a week ago. The United States Senate Judiciary Committee held a hearing on Name, Image, and Likeness and the Future of College Sports. And with a weighty hearing name like that, you'd better have some heavy hitters in attendance providing testimony, and the Senate Judiciary Committee did.

Among others, they had Charlie Baker, the President of the NCAA testifying, as well as Tony Petitti, the Big Ten Commissioner, and Jack Swarbrick, the current Athletic Director at Notre Dame. They also had several other individuals representing different stakeholders in the industry of collegiate athletics. And today we're going to talk about that hearing, but we're not just going to tell you what happened, we're going to talk about our key takeaways from the testimony that was given.

And equally important, if not more, the questions and comments from the United States senators. But before we dive into those takeaways, I do want to give Chris, Dani, and Pat an opportunity to introduce themselves, Dani and Pat to introduce themselves to the Highway to NIL audience for the first time. So Chris, why don't we start with you?

Chris Brolley:

Thanks, Cal. Like you said, my name is Chris Brolley. I'm a litigation associate in our firm's Philadelphia office. I advise colleges and universities of all sizes on name, image, and likeness, particularly regarding compliance with state NIL laws, NCAA bylaws, and other NCAA policies and guidance concerning permissible and impermissible NIL activities. And like you said, I'm happy to welcome and introduce two of the newest members of our team, Dani Clifford and Pat Zancolli. Dani, why don't you introduce yourself?

Dani Clifford:

Thanks, Chris. Hi, my name is Dani Clifford. I'm a corporate associate at Troutman Pepper sitting in our Philadelphia office. I'm excited to be working with the NIL team here at the firm.

Pat Zancolli:

Hi everyone. My name is Pat Zancolli. I am a litigation associate here at Troutman Pepper, also in our Philadelphia office. And I'm really excited to be working with Cal, Chris, and Dani and speak with you all today.

Cal Stein:

Thanks guys. Thanks Chris, and welcome Dani and Pat. All right, let's get right into the key takeaways from the Senate hearing. As most listeners are going to know, the goal of this hearing was for the senators to get information. They ask questions and people testify and provide answers. But at times this particular hearing became almost like a forum for Charlie Baker and others to make what I would describe as kind of an open plea to US Congress to pass laws regulating NIL activity and laws about other aspects of collegiate athletics.

That brings us to our first key takeaway which is on the topic of federal uniformity of NIL laws. As Highway to NIL listeners know, the current state of NIL legislation and regulation is a little bit murky. There are NCAA policies which apply uniformly to all NCAA member institutions and which the NCAA enforces or at least tries to enforce. Then in addition to those policies there are state laws, and those are anything but uniform.

In fact, many college athletic stakeholders have commented about this, quote, "Patchwork of state laws and how it is simply unworkable to regulate NIL in any meaningful way." And as a result, many stakeholders have openly lobbied the US Congress to step in and pass uniform laws that would apply across the board to even the playing field. Now, Chris, the possibility of Congress passing federal laws to create uniformity is obviously an important topic on something that NCAA President Baker in particular affirmatively brought up to the Senate Judiciary Committee during the hearing. What's the big takeaway here?

Chris Brolley:

I think it's no surprise that the NCAA is pushing for a national uniform standard of NIL laws that would supersede the patchwork of state laws currently in place. We've heard this for the last few months, for the last year maybe, that these state laws that are all over the place aren't really working for a lot of people in the industry. It's also I think no surprise that the NCAA is pushing for this uniformity because as we've seen and as we've talked about, the NCAA has had a difficult time enforcing these rules and regulations.

So I think Charlie Baker specifically is content on waiting for Congress to act before the NCAA actually wants to do something. I think in terms of wanting some federal uniformity most stakeholders have expressed concern for the student athletes specifically around the need for some sort of transparency and the potential for harm if those stakeholders or those in higher positions are not involved in the NIL compensation and deal-making process.

For example, with transparency there is actually no requirement that NIL deals be made public, which is why we see so many guesses as to what these student athletes are actually making or what their market value is. While many states require these student athletes to inform the schools either before or after their NIL deals are entered, there's actually no database that includes the dollar amounts and structure of these NIL deals.

And I think this is something that those in favor of federal legislation have pushed for, some school-wide or some NIL-wide database that allows people, whether it's interested stakeholders or those in the general public, to be able to see what these students are making. And I think the biggest issue that's come to light recently in a federal lawsuit that was filed in the Northern District of Florida is this issue of athlete investing.

Where third-party entities takes a percentage of the student athlete's profits upon signing a professional contract when they're entering their NIL deal. This could be considered some type of predatory lending that I think a lot of those interested in NIL have had some great concerns about. In the last year or month we've seen several uniform bills be pushed into Congress with little to no success.

Some of those involve student athlete health care, extending past enrollment, as I said, transparency of NIL activities, limitation on transferring with some sort of central oversight. But I think, Cal, that there's some bigger questions to ask. Will federal legislation actually lead to more transparency? Is it too paternalistic?

Will Congress actually micromanage the NCAA schools and student athletes, which was something that was raised during the Senate hearing? Also, will Congress actually be able to focus on NIL issues with as we've seen more significant issues going on around the world or actually internally in Congress? I'm not entirely sure that federal legislation will actually help and it could be, as we'll discuss later on, a be careful what you wish for situation.

Cal Stein:

Yeah, we will definitely discuss that later on. I'll say, Chris, on this topic, one thing that I really found interesting is that Charlie Baker has long been the champion of federal uniform laws. But he was not the only witness to raise this in their testimony before Congress. Tony Petitti in particular was very vocal and candid about this topic, perhaps even moreso than Baker, which really surprised me.

He noted in his testimony four challenges that he hoped to be addressed with college sports. The very first one was the patchwork of state laws regarding NIL. What he said was, "Many states are passing NIL and associated laws designed specifically to provide their in-state universities with a competitive advantage." This is something we've talked a lot about, the idea that certain states can leverage their own legislatures to pass laws to give a competitive advantage to in-state universities.

One example are the states that allow high school athletes to benefit from their NIL without losing their amateur status, but only if they go to an in-state university. That is the type of thing that Charlie Baker, and Tony Petitti, and others are looking to Congress to remedy. It's not hard to see how that could create issues, particularly for states that don't have NIL laws or don't have NIL laws that create those sort of incentives. So that is really what we're talking about here.

All right, let's move on to a second key takeaway, and I want to pivot a bit here and talk about congressional preemption of student athletes as employees. Now Pat, this hearing was held to discuss the issue of name, image, and likeness. But quite a bit of time was devoted to this issue of student athletes being employees, which of course is related to NIL but distinct. Senator Lindsey Graham in particular point-blank asked Notre Dame Athletic Director Jack Swarbrick, "What is likely to happen if Congress does nothing on this issue?" And here's what Mr. Swarbrick said.

He said, "I think we'll wind up with a series of rulings that declare student athletes as employees subject to the Fair Labor Standards Act rule or other rules and regulations, but it won't happen uniformly." So clearly there's major concern about this happening at all and then major concern that if it does happen it won't be uniform. One of the key takeaways we have discussed from the hearing is the likelihood that because of this concern Congress may act to preempt state laws in this area. Pat, what do you think about this?

Pat Zancolli:

Thanks, Cal. I thought this issue raised at the hearing was interesting both from a procedural standpoint as well as from a practical standpoint. It makes sense to me that the committee was concerned with this issue given the fact that the Johnson versus NCAA case is making its way through the federal court system as the Third Circuit held oral argument on that case earlier this year. I just wonder from a timing perspective how Congress could actually preempt this issue if it would like to do so before the Supreme Court rules on it.

On one hand, Congress could act by statute, but we know that takes a really long time to create statute. Or it can also work with executive agencies to promulgate some sort of regulations, which presents a whole other slew of issues. I'm just not exactly sure how Congress can achieve this goal given the realities that are at play with respect to procedure.

On the practical standpoint, if student athletes are designated as employees, there will be consequences both on the higher education front as well as with respect to the student athletes themselves. I'm thinking about higher education institutions needing to set up a whole employment framework for these new student athlete employees as well as the student athletes figuring out how to manage their new roles as employees within this larger framework.

On the higher ed front, higher education institutions will have to be confronted with the issue of pay and timekeeping. If student athletes are named as employees, will they be paid on an hourly rate or will they be salaried? If they are hourly, what counts as time spent working? Is it just time performing as athletes? Does strength and conditioning come into play? Team meetings? Do all student athlete employees get paid the same? And how does overtime apply if applicable?

With respect to payroll and benefit management, higher education institutions will be confronted with that issue as well. With student athletes now being named as employees, there will need to be additional staffing required to manage the payroll and benefit systems. And if student athletes are named as employees, will they be offered health insurance? Will they be offered workers' comp? These are questions that higher education institutions will need to decide.

Higher ed institutions will need to think about how they might want to restructure their HR departments or their athletic departments to accommodate for this new framework with respect to student athletes being named as employees. Obviously, with student athletes earning income, they will now have to pay taxes on this income. That will affect their earnings, which student athletes may or may not be aware of, and it could also affect the tax bracket that they fall within depending on how much additional earnings they'll make.

Lastly, with student athletes having to juggle the dual responsibilities of being a student, an athlete, and now adding on their role as employee, they will have to have new responsibilities ensuring they're on the payroll, ensuring that if there are benefits offered to them they enroll in those benefits during the applicable time periods, and making sure that athletic departments and HR departments have the adequate paperwork that they need to manage their role as employees with the university.

Cal Stein:

Thanks very much, Pat. I want to stay on this topic of classifying student athletes as employees for our next key takeaway. Because there was also some discussion at the hearing about how this issue might or will impact smaller schools. And the focus on smaller schools was actually a big takeaway for me. Dani, what did you make of this part of the discussion at the hearing?

Dani Clifford:

I think the classification of student athletes as employees could have large implications for smaller schools including D3, D2, and even smaller Division 1 institutions. Jill Bodensteiner, the Vice President and Director of Athletics at Saint Joe's, was forward about the negative impact the classification would have at her own institution and other similarly situated institutions.

She emphasized it was the, quote, "Number one threat to her institution," end quote. In a landscape where only 2% of NCAA institutions derive a profit from athletics, increasing the cost to schools will inevitably lead to non-revenue sports and women's sports being eliminated. As a former student athlete myself, this type of change is unsettling. Although, at the end of the day if it becomes more expensive to house teams, there will have to be cuts.

In an effort to compete, one option for smaller schools would be to transition NCAA teams or even entire athletic departments to club sports. However, the cost to run these programs without the guise of the NCAA would be a significant undertaking for smaller schools. Another approach the NCAA could take would be to allow schools to take a tiered approach where maybe only basketball and football players are eligible for employment status. As Pat touched on, classifying student athletes as employees might force schools to shift scholarships to salaries just to stay competitive.

In a mixed regime like this, it's hard to imagine working out the details of having some student athletes paid a salary and some given an athletic scholarship. The tax implications alone are significant. Ultimately, these issues will be hard for smaller institutions to not only afford, but to also navigate. My last point is, what kind of effect does classifying student athletes as employees have on our Olympic pipeline?

The large change could leave schools struggling to stay afloat and athletes will certainly be affected. This is definitely cause for concern, especially since the United States is slated to host the Olympics in 2028. Like Pat said, there are a lot of questions surrounding implementation, but the impact of classifying a student athlete as employee is surely wide-reaching.

Cal Stein:

Yeah, that's a really great point, Dani. A lot of the focus on this issue has been on what the law will be and the implementation. But I think equal focus ought to be spent on the impact of it, including on some of the issues you just mentioned. All right, let's move to the next key takeaway, which is on a topic that, Chris, we've talked about a lot, and that's the impact of NIL on international students. This is something you and I have discussed a lot. It's something we've advised institutions on quite a bit.

And no one really seems to fully understand how it all works, how to work NIL within the strictures of federal immigration law. Now, two senators, Senators Blumenthal and Ricketts, have actually introduced a bipartisan NIL bill that if passed would address this issue for international students. But unless and until that happens, schools still have to operate within the rules that exist now. So Chris, do me a favor, give us a quick reminder on why this is such an issue and then let's talk a little bit about the takeaways on it from the hearing.

Chris Brolley:

You're right. This is actually one of the issues we get asked about probably the most from big schools, small schools. It seems like all programs are interested in this issue because their schools and programs have student athletes that are from outside the United States. At bottom, NIL payments to international students on these F-1 visas can jeopardize their status within the United States. So a lot of these schools, and programs, and student athletes, need to be mindful and aware of what they can and cannot do in terms of NIL in the United States and outside the United States.

The student athletes on these F-1 visas may only earn passive income as opposed to active income. For example, if a student athlete were to run a camp or perform other NIL activities outside of the United States and receive compensation outside of the United States, this would likely not violate immigration laws. Active income on the other hand would be, for example, signing jerseys for profit within the United States and being compensated within the United States, thus likely violating immigration laws.

We've actually seen several high-profile schools, and programs, and student athletes, navigate this issue and go overseas for tournaments or games, allowing their international student athletes to participate in NIL activities without running afoul of immigration laws. And as you said, at the Senate hearing this was a topic of interest. Senator Richard Blumenthal asked all the witnesses that were testifying if they would support a bill addressing international students' publicity rights. Again, they all agreed.

What was interesting was that immediately following the Senate hearing, Senators Blumenthal and Ricketts introduced a bipartisan bill that already had support from the senators' home states, Connecticut and Nebraska respectively. The proposed language says international students on F-1 visas, quote, "Shall be eligible for employment authorization for the purpose of

engagement in activities pursuant to an endorsement contract for the commercial use of the non-immigrant's name, image, or likeness." It's a two-page bill, quite different from all the other federal uniformity NIL legislation that has been proposed.

It has already bipartisan support. And I think it's easily digestible for stakeholders that are interested in NIL because it targets one sector of the student athlete population, international students. So I'm interested to see how this plays out because this is certainly an issue that is maybe not at the forefront of people's minds, but it's certainly an issue that we get asked about a lot as it relates to international students and their ability to be compensated for their name, image, and likeness.

Cal Stein:

Yeah, this is really one of those practical, everyday issues that comes up a lot and maybe wasn't something that was contemplated at the start of NIL, but has really become a sticky wicket for a lot of these schools. Let's pivot again slightly to another takeaway and another issue that came up during the hearing, that of Title IX.

Now, I was not surprised when the issue of Title IX came up during the hearing. But I was a little bit at least surprised how it came up and how the primary focus of the Title IX discussion was on the role of NIL collectives and how they impact Title IX compliance at schools. So Dani, talk to us a little bit about how this came up at the hearing and what was said.

Dani Clifford:

I completely agree, Cal. According to testimony at the Senate hearing, Title IX does not apply to collectives, which is resulting in a disproportionate percentage of collective dollars going to male athletes. Title IX requires schools to provide male student athletes and women student athletes with equal treatment and benefits. Some experts say that about 95% of collective dollars are going to men's sports. So how is this okay? Well, Title IX only applies to educational institutions receiving funds.

Currently, NCAA guidance disallows schools from being involved in NIL distributions. So collectives are free to distribute money as they see fit because the NCAA drew a line in the sand between the institution and the collective. A modification of state laws that blurs that line and allows schools to be more involved in NIL and the collective process raises flags for schools who must comply with Title IX. The more closely aligned the collective is with the institution, the greater the potential risk is under Title IX.

Cal Stein:

That's certainly an issue that's going to get a lot more attention in the coming days, and weeks, and months, and years. It'd be fascinating to see how that gets resolved, including perhaps by Congress one day.

Chris Brolley:

I think Dani makes a great point. And I think it's something that we've actually talked about and advised schools at length about is, how closely related are these collectives to the schools?

We've seen high-profile schools kind of what we call taking NIL in-house and then subsequently dropping it given an IRS memo that said these collectives would not be tax-exempt anymore. And I think the schools need to be careful with how closely related their collectives are to the actual schools to make sure, one, that they're complying with NCAA guidelines, but also that they're not being impacted by Title IX regulations.

Cal Stein:

It's a great point, Chris. Great addition. Thanks for jumping in with that. Let's now shift to our final takeaway from the hearing that we're going to talk about. And this is one that Chris actually previewed much earlier in the day when he said, "Might be a matter of be careful what you wish for," in the context of Charlie Baker and others openly lobbying Congress to pass federal laws about NIL and collegiate sports. To me, this was perhaps the most striking moment of the entire hearing.

In the middle of the hearing, John Kennedy, Senator from Louisiana, spoke directly to Charlie Baker about this and about what I've described I think accurately as his open lobbying for congressional legislation. In response to that lobbying Senator Kennedy had some very pointed words for Baker, the message being, be careful what you wish for. Here's what Senator Kennedy said. First, quote, "You may regret asking Congress to intervene here." Second, "All of a sudden you're going to be micromanaged," referring of course to the NCAA.

And third, "I'd be real careful before you invite Congress in to start micromanaging your business." This is something that I've said for a while now. It is downright unique for someone in Charlie Baker's position to be going to Congress and asking Congress to pass laws that will regulate his organization, here the NCAA. But these are uncommon times I suppose. Still, the sentiment was certainly not lost on Senator Kennedy. Pat, what do you make of all this?

Pat Zancolli:

Senator Kennedy clearly thinks that there's a need for balance in this space. On one hand, you have concerns over transparency, regulation, and fairness. On the other hand, you have the ideas of independence and self-governance. President Baker lobbying Congress for legislation indicates that the NCAA wants help with NIL and it feels it needs help.

But as Senator Kennedy notes, help from Congress will come with the cost that you alluded to. I don't think Senator Kennedy's concerns will change Baker's mind or his belief in the need for congressional action. But I do think if Congress does act, these comments may read differently in 5, 10, 15 years, depending on how well things play out.

Cal Stein:

Yeah, I must say I found this entire exchange to be genuinely fascinating. If Congress does step in and pass laws, there's no way right now to know whether Charlie Baker, Tony Petitti, Jack Swarbrick, or anyone else, is going to regret it. But for now, what we do know is that Charlie Baker and those others are nothing short of desperate for Congress to intervene and help them regulate NIL and other aspects of college athletics.

And I want to go back to something that Charlie Baker actually said at the beginning of the hearing. He said, "We want to partner with Congress to go further to curtail inducements and prevent collectives and other third parties from tampering with students." Tony Petitti, the Big Ten commissioner said that, "The NIL has resulted in a pay-for-play system primarily controlled by boosters and executed under the guise of NIL."

And, "That the management of college athletics is shifting away from the universities to collectives." And here's the key part, "Without action from Congress we will continue to lack the ability to manage collegiate athletics." These are strong words. They leave no doubt as to where these stakeholders stand on this unique scenario of asking Congress to come in and regulate them. Or to use Senator Kennedy's words, "To micromanage them."

Are they shortsighted words? Certainly Senator Kennedy seems to think so. Time will tell. But the desperate need is something that I absolutely took away from this and the interest on Congress to at least look into this. Whether they can actually pass something remains to be seen. With that, we're out of time here today, so I want to bring this really interesting discussion to a conclusion.

I want to thank Chris, Dani, and Pat for joining me on this podcast, and I also want to thank everyone for listening. 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](#). That webpage, which we update anytime there are changes in state laws and now federal NIL bills, that tracker can be accessed through the Highway to NIL webpage.

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