
Highway to NIL* Podcast: State AGs File NIL Antitrust Lawsuits*Host: Cal Stein****Guests: Tim Bado and Connor DeFilippis****Recorded 02/06/24****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 I 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 two of my colleagues, Tim Bado and Connor DeFilippis, to discuss some recent legal news affecting college athletics and ultimately, the NIL space. Ever since the Alston case, the Supreme Court ruling that kind of kicked off NIL, courts and lawsuits have played a big role in college sports bigger than arguably ever before. None bigger, perhaps, than some of the antitrust lawsuits that have been recently filed by various state attorneys general. These cases have gotten some publicity, particularly because of the timing with some coming right after the NCAA announced investigations of schools into allegations of improper NIL inducements.

Of course, only the AGs themselves know if that timing is causation or merely a correlation. But the substance of the lawsuits themselves stand to have the major impact and shape the immediate future of college sports. So today, we're going to examine these lawsuits. We're going to try to understand what they say, what they mean. Finally, we're going to talk about where we think we may be going. Where the suits and others like that might take college sports.

But before we do that, let's do some introductions. Tim and Connor, you guys want to introduce yourselves? Tim, you want to go first?

Tim Bado:

Yes, sure. Thanks, Cal for having us on today. I am a litigation associate out of the Atlanta office, and I do a lot of work in the state AG space, both representing clients and investigations, and also enforcement actions.

Cal Stein:

Thanks, Tim. Connor?

Connor DeFilippis:

Yes. Thanks, Cal. As you said, my name is Connor DeFilippis. I'm an associate seated in Philadelphia, with the firm's business litigation practice group. Part of my practice involves

representing and counseling institutions of higher education in a number of areas and including now, NIL.

Cal Stein:

Great. Well, thank you guys for joining here today. As I mentioned, we're going to be talking about the recent attorney general lawsuits. Now, attorney generals, of course, are for the most part elected state officials. And they have a number of roles. One of those roles is to enforce state laws, including state NIL laws for those states that have them.

Another role includes protecting consumers by enforcing consumer protection laws and antitrust laws, to protect state residents from unfair business practices and restraints of trade. Now, what is interesting is that in the NIL space, these state attorney generals that we're going to be talking about today seem to have taken the position that these two roles are in conflict of sorts, and they have set their sights on the NCAA as the culprit behind that.

So, let's get into the recent attorney general lawsuits and there's two we're going to talk about in particular. The first is Ohio v. NCAA, and this is an antitrust lawsuit, originally filed in federal court in West Virginia, on December 7, 2023. The parties that filed the lawsuit are the attorneys generals of Ohio, Colorado, Illinois, New York, North Carolina, Tennessee, and West Virginia. Since it was originally filed, the attorneys generals of the Commonwealth of Virginia, and Minnesota, and Mississippi, and the District of Columbia have joined, as well as importantly, the Department of Justice.

Connor, tell us a little bit about the substance of this lawsuit.

Connor DeFilippis:

Sure. So, the lawsuit really focuses on the NCAA's transfer eligibility rules. I'll just give you a brief overview. Specifically, we're talking about NCAA Bylaw 14.5.5.1. Essentially, what this rule requires is that undergraduate division one college athletes engage in a one-year waiting period after transferring institutions. During this waiting period, college athletes are allowed to engage in some sports-related activities, but they basically can't play on game day.

Now, the rule is not absolute. College athletes are normally exempted from this rule if it's their first time transferring schools, and they otherwise follow the rules with regard to the NCAA's transfer portal and transfer window. There's also a discretionary waiver process. However, as the name implies, this waiver is discretionary and will only be granted for certain reasons. For example, if the transfer was for reasons related to the college athlete's physical or mental health, waivers are not typically granted for academic or athletic reasons, like changes in a student's scholarship, or a coaching change. Basically, what this lawsuit says is that this transfer eligibility rule violates the federal antitrust laws, but I'll kick that back to, Cal, for a little bit more explanation.

Cal Stein:

Thanks, Connor. So really, according to the lawsuit, the NCAA's transfer rules unjustifiably restrain the ability of college athletes to engage in the market for their labor, as division one college athletes. As you noted, what that really means is that these transfer rules violate federal antitrust laws. As a result, the attorneys general who filed this suit have sought a temporary restraining order that would prohibit the NCAA from enforcing the transfer rule, as well as the rule of restitution, which allows the NCAA to punish college athletes and schools for actions taken according to a court order that are later revoked.

Now, the NCAA has agreed to suspend enforcement of the rules through the end of the 2023-2024 spring sports season, which of course, is only temporary, so we will have to see how this case shakes out.

All right, let's shift and talk about the other recent attorney general lawsuit and this one is called Tennessee v. NCAA. This one was filed in the Eastern District of Tennessee alleging that the NCAA's investigation into the University of Tennessee is an example of an unlawful restriction of the NCAA policy. This is the lawsuit I alluded to earlier, where the timing is at least worth mentioning, because this one came right on the heels of the NCAA announcing an NIL investigation into the University of Tennessee.

Now, this lawsuit, immediately drew support from the Tennessee Governor, Bill Lee. Once again, it alleged antitrust violations, and they pointed to the NCAA is shifting an opaque series of rules and guidelines around NIL. We can quibble or not with those adjectives. We've spent a lot of time talking about those rules and guidelines on this podcast. Ultimately, this case focuses on allegations about how the NCAA, NIL rules just are not clear or fair.

So, Tim, you have done a lot with state attorneys general and your work with our RISE practice group. Talk to us about the allegations here. Why does the Tennessee attorney general think these NIL rules aren't clear and aren't fair?

Tim Bado:

Sure. So, the Tennessee AGs office believes that NIL rules should permit student-athletes to be able to negotiate their own NIL deals prior to enrollment. So, current NCAA rules prohibit this. They say schools cannot use NIL as a recruiting inducement. What this means, again, is that athletes are prohibited from negotiating with NIL collectives prior to enrollment. They are unable to review NIL offers prior to enrollment, and as such, cannot consider the full scope of NIL-related services prior to enrollment. They say that this is fundamentally unfair and a violation of our federal antitrust rules.

As you pointed out, Cal, this lawsuit comes on the heels of very high-profile NCAA investigation into a particular member of Tennessee's football team who supposedly received a high seven-figure NIL deal, prior to coming to the University of Tennessee. Of course, now, the NCAA believes that this was done in violation of NIL rules because he agreed to the NIL deal prior to his enrollment with the University of Tennessee.

Cal Stein:

Yes. The timing certainly can't be ignored. Again, we don't know what the true motivation is behind the lawsuit. But the fact that the University of Tennessee is potentially facing multiple level one and level two violations related to NIL. Again, certainly can't be ignored.

All right. So, let's talk a little bit about what these lawsuits mean. We just talked about what they're about. Now, let's talk a bit about what they mean. Personally, my view is that these lawsuits are all about power and authority. The power and authority of states of the NCAA, of the schools.

Historically, the NCAA has had most, if not all of the power and authority. But the tide seems to be turning, or at least, schools and potentially these attorneys generals see an opening to turn the tide. These are, in my view, antitrust challenges to NCAA rules aimed at chipping away at the NCAA's power to regulate college athletics that it has had a monopoly on really since the beginning of college sports. The last major antitrust challenge was Alston, and that led to the NCAA's adoption of interim NIL rules. It also led to one Supreme Court Justice, Justice Kavanaugh, really excoriating the NCAA in a concurring opinion for not paying its labor and signaling what I believe is a clear indication of at least where he stands on the issue of student-athletes becoming employees.

But this is all to say that recent antitrust challenges to the NCAA have been somewhat successful to chip away at its authority. I interpret that as empowering and emboldening others to continue to do so, including state attorney generals in these lawsuits. Really, these lawsuits seem to me to be a logical continuation. The Alston decision led to interim NIL rules. Now, those rules are being challenged in the In re College Athlete NIL Litigation, as well as the Tennessee State AG Litigation.

The NCAA is being forced to fight a multi-front war, and you have to wonder if part of the strategy of these are the stakeholders as to wear the NCAA down. After all, the NCAA has shown the willingness to throw in the towel when it looks like defeat is coming. I think Kenny Rogers famously said, "You have to know when to hold them and know when to fold them", the NCAA folded regarding NIL after Alston. I wonder if the state AGs and others that are pursuing these cases against the NCAA are hoping for similar results. Tim, what about you? What do you think all this means?

Tim Bado:

I think you're exactly right, Cal. I mean, for a number of years, the NCAA essentially had unchecked power into enforcement of its own rules. Only recently have we seen state AGs get involved and they've taken the antitrust path as their way to get involved. Now, I think before we get into exactly why or how that's been the case, I think it's worth noting and taking a step back at a broader AG antitrust enforcement initiative, that really started under the Trump administration. When state AGs believe that the FTC or the DOJ who primarily enforce antitrust rules, believe that there would be very little enforcement under his administration.

So, AGs went out and beefed up their antitrust groups and typically how these offices were staffed was, there was a lawyer who would do some antitrust work, but was really part of the

Consumer Protection Division. They would monitor proposed mergers, things of that nature. But offices only recently have beefed up the antitrust space, and now they're wondering what should we do with all of this? The NCAA is a fun topic for everyone. It's politically popular for AGs to get into defend their state institutions.

Again, with the Alston decision, you're seeing state AGs now aggressively going after the NCAA, you've seen it through the transfer portal rule, now NIL, and you're going to see it through probably a number of other smaller recruiting type rules that the NCAA, excuse me, that AG office are going to argue, restrict an athlete's ability to choose where they want to enroll and to capitalize on their name, image, and likeness.

Cal Stein:

You raised some really good points there, Tim. The political component of this, I find fascinating. Take Tennessee, for example. I mean, we've got state AGs who are, as I noted, typically elected, so they are political positions. It's hard to imagine. There are a lot of voters in Tennessee, for example, who went to the University of Tennessee, who root for the volunteer football team. Hard to imagine a better approach to courting voters than to pursue litigation against the institution seeking to sanction that school. How much of this do you think is political? Is this really just speculation and correlation? Or do you really think there's some causation here?

Tim Bado:

I do think there's some causation here. As we've discussed at length, the NCAA's rules and their guidance are often contrary to state laws, and that's part of the crux of the issue here in Tennessee. I mean, I do think there is significant merit to the AGs lawsuit. As we discussed, the political aspect here is also very real, right? Again, it's easy to score points for an AG with very powerful member institutions, especially like University of Tennessee, or other big schools, where you have a number of donors who are going to donate to your campaign, and otherwise support you. I mean, it's very easy and important to do.

Ironically, actually, with the Tennessee example, though. I was doing some research prior to this and looking into the lawsuit, and Tennessee's attorney general is the only attorney general in the United States that is not elected. They're appointed by the Tennessee Supreme Court. So, there's obviously less political inducement, so to speak, here. However, if the attorney general wants to run for governor someday or has other political aspirations, I mean, again, this would make a lot of sense to do so.

Cal Stein:

Interesting. I'm glad you did the work to figure that out, so we're accurate here. But you made the point that I was just going to make, we all know that attorney generals often run for governor, often ascend to political positions. So, perhaps some foresight from the Tennessee attorney general. Either way, really interesting stuff.

All right. Let's shift now and talk about where this is all going. Connor, what happens if this litigation, if these AG suits are successful? Where does that leave us?

Connor DeFilippis:

Yes, I think one interesting point here, especially with *Ohio v. NCCA*, is that the plaintiffs, the state's Commonwealth, the DOJ are not seeking damages. Unlike the plaintiffs in the *In re College Athlete NIL Litigation*, and I think this is a really important distinction. Because we saw with *In re College Athlete NIL Litigation* that certification of a class, in that case, would force the NCAA to settle for potentially billions of dollars.

We've yet to see that actually happen, but that is at least the argument that the NCAA was making, partly against class certification. But here, the Commonwealth state's DOJ, they're only seeking declaratory and injunctive relief. They're not seeking damages. Now, it's possible if the states were to win this litigation, there could be some follow on where the NCAA would face monetary liability. But at least the present, no money's on the table. So, if the plaintiffs were successful, with regard to the *Ohio v. NCAA*, the NCAA wouldn't be facing the same consequences as some of the other litigation that it's currently involved in.

Besides that point, if this litigation were to be successful, and transfer restrictions, as we currently know them would be no more. This would have a significant impact on the NIL market for talent. The immediate impact would basically be that division one college athletes would be able to transfer schools, however often they please. This intersects nicely with NIL, and with the Tennessee AG suit, because we've seen NIL be involved in some major division one transfers in the past few years.

So basically, the market would be even more open than it is now. Again, intersecting with the Tennessee suit if prospective college athletes were able to do negotiate NIL deals prior to enrolling or matriculating at a school, again, it just opens up the market even more.

Cal Stein:

Interesting, really interesting stuff. Let's talk about another aspect of where this might be going. I'm just going to kind of talk here and open up the floor to both of you for some thoughts. What about other NCAA rules? If these lawsuits are successful, do we think there could be attorneys general challenges to others? Why, for example, would a state AG consider the NIL rules in antitrust violation, but not the limit on player eligibility? Is it crazy to think that some state AG could argue that the eligibility restriction impedes a student athlete's ability to make a career playing college sports, in violation of antitrust laws? What about the NIL rules that are already on the books in these states? Could we actually see state AG action going the other way, and enforcing those rules? What do you guys think?

Tim Bado:

Yes, I think that's a really great point. I think a number of rules could be coming under fire here soon. I think a lot of them are going to involve various recruiting rules. For example, certain windows where universities can or cannot talk to a player, national signing days, and funds that

can or cannot be used on a player's recruiting trip, for example. I mean, there are a significant number of rules surrounding that issue.

I think, as we move further from an amateur model and into more of a professional model, then I think those rules just don't make sense anymore. Why restricts the university's ability to recruit a student-athlete, when there are so many other rules such as NIL in place that just are contrary to that. Again, as we move from an amateur model, I don't think any of these rules are going to be just cast aside by state AGs. I think they're going to do an in-depth review of all of these.

To your second point, I do think that with the majority of states now having their own NIL laws, and as they get more complex, there has to be somebody to enforce them, and that's going to fall to state AGs. Now, as we discussed the political component. I mean, that's going to be very tricky as to how state AGs actually enforce their own state laws, but it's going to fall in their lap to do it. It's just a matter of whether or how much they actually decide to go ahead and enforce the laws.

Cal Stein:

Yes. I'll state the obvious here, that a lot of this could be addressed by uniform federal NIL legislation, which we know the NCAA is pushing for. We know there's a lot of interest in it in Congress, though, perhaps not very much consensus, which is why in our predictions podcast, we predicted that there isn't going to be any forthcoming federal NIL legislation, at least not in 2024. But that would cure a lot of this, right? I mean, Connor, what do you think about that?

Connor DeFilippis:

Yes. Federal legislation, I think, would provide the ultimate solution that the NCAA is looking for. I think, in the wake of Alston, there's so much litigation, and as you said, and as Tim said, I think any rule can really be on the chopping block. So, the NCAA needs something, a uniform set of NIL rules, antitrust exemption, and protections. And I think it's that latter piece that the NCAA is really focusing on when it comes to a federal legislative solution, so that they don't have to keep defending all of these actions. Alston and the Tennessee AG case, Ohio v. NCAA.

There's a lot of options. Right now, one recently released discussion draft of a bill would provide at least some of those antitrust protections that they are looking for. It's called the fairness accountability and integrity and representation of College Sports Act or the Fair College Sports Act. This discussion draft includes a limitation of liability provision, basically, protecting institutions, conferences, associations, that take NIL action in compliance with the Fair College Sports Act, or any rules of the US Intercollegiate Athletics Commission, which the Act would create to help regulate the NIL space.

But this is just a discussion draft. It's not even a proposed bill yet. I don't believe. It's one among seven or eight other discussion drafts or bills that would regulate this space to varying degrees. Importantly, not all of which contain antitrust protection. So, we are still ways away from a federal "solution" for the NCAA.

Cal Stein:

Yes. I think that's right. I think that's exactly right. That topic is one I suspect, we will be addressing on future episodes throughout 2024 and into 2025. But for now, we are out of time for our episode here today. So, I do want to bring this discussion to a close. I really want to thank you, Tim, and you, Connor, for joining me on the podcast. I also want to thank everyone for listening. If you have any thoughts or comments about this series, I invite you to contact me directly at callan.stein@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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