
Highway to NIL Podcast: The NCAA's Response to the NIL Recruitment Injunction**Host: Cal Stein****Guests: Mike Lowe, Howard Shire, and Connor DeFilippis****Recorded 3/5/24****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 three of my excellent colleagues, Mike Lowe, Howard Shire, and Connor DeFilippis, to discuss the fallout from the federal court case we discussed last episode, in which a federal court in Tennessee entered a preliminary injunction against the NCAA, finding that a subset of its NIL rules, those that prohibit third parties from having NIL discussions with student-athletes before they commit to a school, also known as the NIL recruiting ban, violated us antitrust laws.

Now, that decision came down on Friday, February 23rd. One week later on Friday, March 1st, the NCAA released a memo to all Division 1 schools providing some, I'm not sure I would call it guidance, so much as information about how it interprets the ruling and how it intends to go forward in light of it. As I alluded to, this document is chock full of interesting nuggets, which is why we are here today with this group to dissect and analyze it.

But before we get to the memo, I think some introductions are in order. Mike, why don't we start with you?

Michael Lowe:

Thanks, Cal. I've been a federal prosecutor for 25 years, both in Los Angeles and Philadelphia, before I joined Troutman Pepper. My practice here includes NIL investigation and enforcement, advice to institutions or organizations in the NIL space, as well as Federal False Claims Act litigation, internal government, and other investigations and product liability litigation. Happy to be on the program again.

Cal Stein:

Thanks, Mike. Howard?

Howard Shire:

Sure, Cal. I'm Howard Shire. I'm a part of the New York office of Troutman Pepper. I specialize in Trademark Copyright Law, Right of Publicity Law, and then I was obviously a subset of this

subset of Right of Publicity, limited, albeit to college athletes. I litigated also, give a lot of counseling advice in this area. Thanks, Cal.

Cal Stein:

Thanks, Howard. Connor?

Connor DeFilippis:

Sure. As you said, my name is Connor DeFilippis. I'm an associate in the firm's business litigation practice group seated in Philadelphia. Part of my practice includes counseling higher education institutions in a number of areas, including now, NIL.

Cal Stein:

Great. Thank you all very much. So, we have a lot to say about this NCAA memo, so I want to get right into it. I've read it, as I'm sure all of you have multiple times at this point. I think, the best way to understand it and talk about it is to break it up into pieces. Six pieces to be exact, each which I think, conveys in its own way, some discrete or interesting thing about the NCAA's reaction to the injunction order.

So, the way I think we're going to do this, is I'm actually going to read a piece of the memo and then we'll talk about it. Because not everyone has it in front of them right now. So, the memo starts as follows. It says NCAA staff have been working with the D1 board of directors, Board of Governors, and membership, since a federal judge entered a preliminary injunction in the case brought by Tennessee and Virginia attorneys generals. While we are eager to work with the attorneys generals who brought the suit to reach a common understanding, we must move forward and provide as much clarity and stability as possible right now.

Let's pause there. This is the NCAA talking to all its Division 1 members and expressing a quote, "Eagerness to work with the attorneys generals to reach a common understanding." I wonder right off the bat, well, what does this mean? It sounds to me like the NCAA is interested in perhaps resolving or settling this case to avoid more litigation, litigating this case to the end when a permanent injunction could be granted. But what incentive do the AGs have to settle the case right now after they won the permanent the preliminary injunction?

Howard Shire:

I don't think they have much right now, Cal. They might have some pressure brought to bear if the NCAA appeals the ruling, because they obviously face the possibility of a reversal on appeal. But right now, they don't have much incentive, it seems to me. They are not expending any money. The NCAA would have to expend money on attorney's fees if they go forward. But I think you're right, this is an overture of settlement by the NCAA and it's also reiterated later on in this memo.

Cal Stein:

So, it seems to me that given the entry of the preliminary injunction, the AGs probably wouldn't even entertain a settlement or resolution of this case that didn't include that injunction becoming permanent. Anyone have any thoughts on that?

Michael Lowe:

Yes, Cal, I agree with you. I think the next step here, and if you look at the playbook, the NCAA followed in the West Virginia litigation about the transfer portal, they stipulated to an injunction in that case. I think, if there's certainly an argument that could be made that that's what's going to happen here is that the NCAA is going to try to reach an agreement with the state AGs to get a permanent injunction in place, in this case, with the realization that this type of litigation is not going away. They've been getting hammered, and they've been losing, basically, on every front when it comes to the NIL litigation.

So ultimately, what we know is that President Baker wants to get some kind of a congressional, I don't know, a Hail Mary, maybe we'll call it that. He's looking for Congress to come in and set some sort of legislative framework that would let NCAA's student athletics model continue with some sort of modification. I don't know that that's going to happen. So, I think the NCAA realizes they're going to have to craft a solution in conjunction with the various stakeholders that works for everybody.

Cal Stein:

Let me ask this question, though, in terms of this litigation, let's say the NCAA does what it has done in the past and kind of rolls over and is looking to accept the permanent injunction on the NIL recruiting ban. If that's the case, what's the NCAA get out of a settlement here? Is it really just paving the way for potential congressional involvement or changes in rulemaking? Or is there something else?

Connor DeFilippis:

Well, I don't think they're at that point yet, right? Where they're just going to roll over and say, "Let's agree to a permanent injunction and get out of this." They do definitely have incentive to get out of this, to settle this case. For some context, if listeners are listening to this one for the first time, they are involved in heated litigation elsewhere, with other attorneys general in West Virginia, the In re College Athlete NIL Litigation. So, they are expending significant resources on other litigations, and especially with the one California. I mean, the damages could be in the billions of dollars. But I don't think they're at a point yet where they're just going to say, "Okay, let's agree to do a permanent injunction." I think this might be seen as a little bit of an overture to try and get the AGs to the table and say, "Listen, we need to figure out something that works here for the both of us. We can modify these rules. We can agree to a limited injunction." But yes, I don't think they're at the point where they're just going to roll over and say, "Okay, we give up."

Cal Stein:

The idea of a modified injunction is a good thought. I wonder what that might look like and I'm going to admit, this is kind of the first time I'm thinking about what a modified injunction as it relates to the NIL recruiting ban could look like. Because remember, in addition to the stakeholders and the AGs having to agree to it, that modified injunction would still have to comply with us antitrust laws. I think that could be tricky here.

Howard Shire:

I think that'd be very tricky, Cal. Plus, you also have to bear in mind there are 48 other state attorneys generals who arguably could bring a claim against the NCAA, just because settle with these two states doesn't necessarily mean the NCAA is out of the woods, especially given the pending litigation in West Virginia that we've talked about.

Cal Stein:

That's a fair point as well. All right, let's keep going through this memo because I really want to get to the meat of it, which I think starts in this next section. So, after that preliminary section, this is what the NCAA starts to say about enforcement. It says, "In response to this latest order, the Division 1 board of directors directed NCAA enforcement staff to pause and not begin investigations involving third-party participation in NIL-related activities. There will be no penalty for conduct that occurs consistent with the injunction while the injunction is in place. I agree with this decision, while the progress toward long-term solutions is underway and while we await discussions with the attorneys general. In circumstances that are less than ideal, this at least gives the membership notice of the board's direction related to enforcement."

So, I want to focus first on two specific words, well, or phrases, "pause" and "not begin". The NCAA is pausing and not beginning investigations involving third-party participation in NIL. I think, they chose those words very carefully. They could have said, "suspend", they could have said, "stop", but they didn't. They said, "pause" and "not begin". I'm going to open it up to the group. What's the significance of those words that the NCAA is using? And perhaps, what's the significance of the NCAA not using those other words like suspend or stop?

Connor DeFilippis: Well, they don't want to back themselves into a corner, I think, right? They want to have the ability, should they be vindicated later trial, on appeal, whatever it may be, if they agree to some sort of settlement. They want to be able to go back and say to schools, "Hey, we never agreed to just stop this enforcement action altogether. These rules, even if they're modified are still in place, you violated these rules, and it took us a while to get here, but we're back and we have the ability to enforce them."

Michael Lowe:

I mean, also keep in mind that we're looking at a date on which the rules effectively change, the date of the injunction. So, to say that we're basically stopping investigations would be a waiver by the NCAA of any prior violations that they've been undertaking investigations about. I don't think as – if you put yourself in NCAA shoes, how could they do that? How could they

essentially condone what would have been likely knowing violations of their policy at the time it existed without some kind of a sanction for that violation?

Then, I mean, I think also, it's pretty clear that you do need to preserve the ability to restart investigations if you reach a settlement, or if you prevail, whether on appeal, or at a trial on this matter.

Cal Stein: Yes. I mean, the word pause certainly suggests to me that they could be started again, right? That's what pause means. But now I want to focus on some other language that I just read, which is that the NCAA says, "There's not going to be any penalties for a conduct that occurs consistent with the injunction while the injunction is in place." And I think those words are actually very carefully chosen and important. Again, the NCAA, combine that with its use of the word, "pause". It's pausing investigations that could be restarted.

Well, any investigations that are underway, that are being paused, necessarily involve conduct that would have predated this injunction. So, what the NCAA is saying is, "Look, if there's conduct consistent with the injunction, while it's in place, there won't be any penalty for that." But to me, that expressly leaves open the possibility that there could be penalties in the future for conduct that either predated the injunction, or perhaps post-dated it, if it is ever withdrawn or reversed.

Howard Shire:

Yes. I think you're absolutely right, Cal. The NCAA is giving itself an out. It's not letting schools off the hook for what they did before the injunction issued. I think that's an appropriate response.

Cal Stein:

Well, let's talk about this then. What should institutions do with this? What should schools do with this idea that these investigations are currently paused, but maybe could come back? And maybe there could be penalties for conduct that predated the injunction? What should they do if they were either involved in one of these ongoing investigations that's now paused? Or if they had reason to believe they could become the subject of an investigation based on pre-injunction conduct?

Michael Lowe:

Cal, as somebody who works in this space, my advice would be if you're in the middle of an active investigation, then I would say, continue to see that investigation through, so you sort of know where you stand as an institution, what your potential liability is. If there's – I wouldn't start a new investigation, right? Because right now, the NCAA is not undertaking action. They've suspended. They have paused.

So, if there's a pause, and I think you wouldn't want to start a new investigation. But if you're already in the middle of an investigation, I would want to know, as the institution, what

happened? What potential liability there is? You'd want to have that so you could potentially negotiate a resolution when these this pause is removed. Because ultimately it will be removed.

Cal Stein:

Well, if it's removed. I mean, theoretically, the injunction could become permanent.

Michael Lowe:

I mean, the pause will eventually be removed, because once you have a final injunction, you're still going to have the issue of what happened for prior conduct. I mean, what does NCAA do? How do they treat prior conduct? That's going to be a decision NCAA makes. I mean, the member institutions can certainly try to have input into that decision. But I think if you're a member school facing an investigation has been ongoing and suddenly paused, you're still facing liability for that prior conduct.

Cal Stein:

Yes. I agree with what you're saying. I think, look, individual schools could come to different conclusions about whether they want to actually complete and bring an investigation to completion based, as you said, Mike, on where you are. If you're at the very beginning, maybe it makes less sense. If you're almost done, you might as well finish it.

One thing I think we can all agree on, though, is preservation. At the absolute minimum, I think institutions who are currently conducting an investigation, or currently responding to the NCAA, at the very least, if they're going to pause their investigation along with the pause enforcement action, they ought to take formal documented steps to preserve any evidence, or preserve what they've done so far. Because if this does come back in one form or another, you're going to want that.

Michael Lowe:

Yes, Cal. I mean, I think that's a great point. I would take it one step further and expand upon the point I made earlier. The danger with pausing an investigation when you're essentially – I'll place you in the role as the defendant. If you're a member institution, who's the subject of an investigation for an NIL violation. If you pause, you run the risk of spoliation of evidence, spoliation of evidence, right? What happens now to witnesses? Maybe a couple of years goes by, and suddenly, the people who were employees might not be employees anymore. You might not be able to get the same information that might be, whether exculpatory, or something that you could use in terms of making an equities argument. You might lose the ability to sort of capture that evidence, if you will.

So, these are all, as you pointed out, the risks that each institution would need to assess in light of the current status of their particular investigation. But I don't think you can just have a blanket, "Oh, hey, NCAA pause." So, we should pause too.

Cal Stein:

The spoliation concept is an interesting one, especially with respect to evidence that could exonerate a school. Text messages, other types of chat app messages on the phone. Those go away. If you lose it during a “pause”, you may not be able to get it back. Really interesting points there.

Okay. I want to go to the next section of Charlie Baker's memo, because I think this is really important. So, after talking about this pause in enforcement, Charlie Baker and the NCAA say this, “The judge's order also upheld three specific NCAA policies that remain in effect and will be enforced by NCAA staff. The prohibition on pay-for-play payment for specific athletics performance, the prohibition on direct institutional payment for NIL, the quid pro quo requirement. The proposals related to student-athlete protections adopted in January, remain on track for on August 1st effective date. Also, this injunction and the NCAA’s response are effective for all of division one.”

So, when I read the opinion on the injunction for the first time, this is what I refer to as a potential pivot point for the NCAA. The court absolutely ruled that the NIL recruiting ban is very likely to violate the Sherman Act. That's why they entered the injunction. However, the court specifically said it did not apply and they were not invalidating these three NIL-related requirements. In fact, the court said these NIL requirements may actually do a better job of furthering the NCAA goals than the recruiting them.

My thought initially was, NCAA investigations, those that are ongoing, and ones that could come in the future can and possibly should pivot to focusing on these NIL rules and enforcing these NIL rules, and that is exactly what the NCAA is saying here, when they say these rules remain, in effect, and “will be enforced by NCAA staff”. These are significant rules. I'll put this out to everyone as well. Which of these rules to you guys seems the most fertile ground that the NCAA could look to for enforcement actions related to NIL while this injunction is in place?

Connor DeFilippis:

I'll answer your question by not answering your question and saying the least likely to be fertile ground, to me at least, is the prohibition on direct institutional payment for NIL. The reason for that is because Charlie Baker in December, and then the NCAA Division 1 board of directors in January, recommended changes to NIL rules, including that institutions would be able to pay their student-athletes directly for NIL.

So, not to say that they can't bring enforcement actions until that rule is changed. But it looks like that rule is going to be changed. So, of those three, to me, that would be the least likely.

Howard Shire:

Yes, Cal. I think the most likely is probably the prohibition on pay-for-play payment for athletic performance. That's what I think has been going on beneath the surface where athletes are holding out for more mind deciding where to go to college. I also think there's a possible contradiction. On the one hand, the NCAA says they're going to enforce this prohibition, but

they're going to enforce it if boosters offer pay-for-play payment to athletes. Because in the prior section of the memo, and somebody says they're pausing and not beginning investigation involving third-party participation and NIL-related activities, and obviously, pay-for-play for student-athletes is an NIL-related activity. It was a question, to me, whether they'll enforce this rule against boosters.

Michael Lowe:

Cal, I would actually take the opposite position that Connor took about the prohibition on direct institutional payments. I think, if there's going to be enforcement action between now and the time that all this gets resolved, or the proposed rule takes effect, and the proposed rule is the one Connor talked about, and you'll recall, we had a podcast specifically on this. I think the rule right now is clear that member institutions cannot pay students directly for NIL. I think if there were a member institution that did that, they would get slapped down. And NCAA would not hesitate to conduct a quick and thorough investigation and to impose a pretty dramatic sanction, because failure to do that would effectively be tacit encouragement to every school right now that it is the Wild West, which we've said it's not the Wild West. Schools can't do this yet. And I think hesitating to enforce it would be allowing it.

The reason to hesitate to enact that kind of direct payment is the NCAA needs a framework. They don't want to just say, "All right, ready to go." Everybody can start paying whatever they want to student-athletes. So, there's been a proposal. It's likely to get approved. The rule will get changed. But it'll get changed in the context of other rulemaking that sets out parameters for that and for enforcement of violations.

Howard Shire: Interesting. Cal, of course, we are still, we are in the Wild West right now, because I think boosters are allowed to offer whatever money they want to student-athletes.

Cal Stein:

So, the boosters can. But let's be clear. These rules here do still apply to boosters. There still has to be a quid pro quo, and there still has to be – and there still cannot be pay for play. So, a booster cannot explicitly condition an NIL offer on a particular student-athlete attending a school or participating in a sport, or playing a certain number of games, or playing in a specific game, whatever that may be.

Now, practically speaking, when the Tennessee Federal Court has now allowed boosters to offer and make NIL deals prior to a student-athlete committing to a school, does the practical effect of that kind of eat away at the pay-for-play prohibition? It may. It may. But I think the point is, even the boosters still have to comply with these requirements, including the quid pro quo. And I wonder actually, whether the NCAA if they do pivot to start enforcing these rules, I wonder what they do with that quid pro quo requirement. Is it enough that there is just some quid pro quo? Or are we going to start to go towards things like fair market value, and making sure that the value being paid is at least defensible in some way or another outside of a pay-for-play arrangement like we have seen in enforcement of other statutes and rules like this?

Howard Shire:

Cal, my point is I question whether the NCAA will investigate at this time, a booster was doing pay-for-play offers. Because they've said that I can investigate third parties that engage in NIL activities, and that's exactly what pay-for-play is. I don't know that they'll react to boosters.

Michael Lowe: I hate to be the contrarian in the group. But I would say that when you look at an organization like NCAA, they've got a large staff of investigators. I mean, you'll recall, they hired like they literally beefed up an entire investigative arm. So, they've got all these employees on their payroll right now, and those of them that were investigating the NIL recruiting ban violations are now basically given a stop work order.

So, what do you do with that stuff that you're paying a lot of money to former federal agents, a lot of them? What do you do with them? Well, you're going to look at whatever other rules you still have that are on the books, and what evidence you have of potential violations of them, and you're going to turn them to those. You're going to say, "Okay, priority number one. I want you to go look at this or that. And we'll get back to the NIL recruiting ban violation potentials if and when we resolve this."

Cal Stein:

Yes. I don't think that's a contrarian view at all, Mike. I think that makes all the sense in the world. I do agree. I think we are going to see the NCAA pivoting their investigations to these three rules that are explicitly unimpacted by the injunction.

Okay. Let's go down to the next section of this memo. This is what the NCAA says next. "I realized pausing NIL-related enforcement, while these other bylaws are upheld by the injunction will raise significant questions on campuses. This is precisely why a D1 meeting room, not a courtroom, is the best place to change NCAA policy. This is the only practical response to the injunction at this time, and we hope the attorneys will work with us to clarify next steps."

Okay. I want to start with the beginning where they talk about the significant questions on campus and where a D1 meeting room, and not a courtroom is the place to change NCAA policy. To me, this seems to be a nod to the NCAA's argument in the Tennessee court case, which the court rejected, that doing away with the NIL recruiting ban would create "disarray". This also seems to me to be the NCAA almost begging, begging for no more litigation, because as Mike said, they've not been faring very well. What do you guys think?

Howard Shire:

I think it's a plea for a possible settlement, along with what we looked at earlier in Charlie Baker's memo. They want to try to get rid of this case, because I think we talked about it that this point in time, I don't know what leverage the NCAA has, aside from possibly pursuing an appeal.

Cal Stein:

So, they also say that this is the only “practical response to the injunction”. Now, that to me, suggests that maybe the NCAA is not fully on board with the decision to pause NIL recruiting-related investigations, but it's taking these steps really, because it has no choice. But I want to ask this. Is the NCAA right? Is this the only practical response? Wouldn't an appeal, for example, be practical, especially if it came with an injunction? Or is the NCAA just kind of covering itself here? Because it doesn't want to take an appeal and risk making more bad law if it fails?

Michael Lowe: Yes, Cal. I mean, I think you could do both, potentially. I mean, you could appeal and also pause your enforcement actions. I think pausing the enforcement actions makes logical sense in light of the injunction. I don't know what strategic considerations are underlying the ultimate decision on whether or not to appeal. But I do think that you really, if you're NCAA, there's no other realistic course of action open to you at this moment than to pause the enforcement actions that are specific to the injunction.

Cal Stein:

You used an interesting word there, realistic. That's actually probably a better word that Charlie Baker used here. I think this may be the only realistic response. I'm not sure if it's the only practical response, but it's the response we got, nonetheless. Let me keep reading because I think the next part may inform some of this. This is what the NCAA said next. “Additionally, the D1 board, NIL Working Group, and NCAA staff are fully aware of the need to bring about clarity for the role of institutions as soon as possible. In fact, the council introduced a proposal in January intended to clarify the role of schools in NIL matters. That proposal will be on the council and board agendas this April.”

So, we talked about this a moment ago. Connor reminded us exactly what was in that proposal.

Connor DeFilippis:

Yes. Basically, this January, the Division 1 board of directors tasked the Division 1 council with developing recommendations for a framework that addresses three key elements. The first being allowing schools to offer educational benefits, basically, at any level. The second, allowing schools to enter into NIL agreements with student athletes directly. The third, we should be establishing an entirely new subdivision within D1 that would allow schools to provide additional financial support to student-athletes and would also allow them to create rules that would differ from the rest of the D1 programs. Yes, that's basically it.

Cal Stein:

Yes. That is just a proposal right now. It hasn't been adopted. But Charlie Baker's words here that the proposal will be on the council and board agendas this April certainly suggests that he thinks there's a possibility it could be voted on and adopted as soon as April. Charlie Baker is a politician. He should know not to bring something for a vote unless you got the votes to pass it. What do you guys think? That would be a cataclysmic change, and it was a bold proposal when

it was first proposed, about a month ago. Do we think in April, we're going to have this passed by the council and board?

Howard Shire:

I would say, yes. I mean, I think we were taking the position that it was likely to pass before, and I think now in light of the Eastern District of Tennessee injunction, where boosters are allowed to pay, what logical distinction remains to prohibit schools themselves from negotiating with students and trying to recruit the best athletes? Because otherwise, it's essentially a fiction. You're abdicating that power to schools that have these large well-funded booster collectives, as opposed to allowing the athletic departments to identify candidates they want and go out of their way to try to get them.

Cal Stein:

Let me ask this question. There may not be any logical distinction between the boosters and the schools. But there might be a legal one, and that is found in Title IX. We've talked about this, if the schools can start paying NIL money directly to players, what does that do for Title IX? Because as we know, the men's football and men's basketball players are going to get the most amount of money, because those are the revenue-generating sports. So, will the NCAA need congressional action, either before, or in conjunction with passing this resolution, which I fully agree the NCAA wants to pass and maybe needs to pass right now? But what about the whole Title IX of it?

Howard Shire:

I think that's a good point, Cal, that a lot of you have not brought up. My own gut reaction is that it could be violation of Title IX, if you pay more money, let's say to men, than to women, which is the likely outcome of this proposal if it's adopted. Just because football players and men's college basketball players get more attention, will likely to get more money than the women's sports.

Cal Stein:

Well, we'll have to see what happens in April, because I do think they're going to need some way to address the Title IX aspect of it, and theoretically, that should come from Congress.

Michael Lowe: Well, and Cal, I mean, one other thing you got to throw in this mix here is the whole issue of the employee status or potential status of student-athletes, which is also an area that's being litigated at the moment, both in court and before the NLRB. So ultimately, if you have court decisions that treat student-athletes as employees that might remove the Title IX issues from, at least, as serious consideration in terms of payment, because now you can sort of make the argument in a free market-based economy. You're paying an employee, his or her worth based on the value that you obtain the financial value you obtain, and as a result of that employee's efforts.

But I think it's certainly clear that the Title IX issue is probably the next forefront of aggressive litigation by states and potentially by student-athletes. Because obviously, if the schools do exactly that, which is pay men more, then I would think female athletes are likely to initiate some kind of class action litigation in response.

Cal Stein:

Yes. Really good point. So, I want to now shift to the last paragraph of this memo, because I think what Mike just said, segues nicely. This is how Charlie Baker, ever the politician, ends his memo to all the Division 1 schools. He writes, "The reason I took this job is to work with all of you to bring about positive change for student-athletes. Guaranteed health care, guaranteed scholarships, guaranteed support, to complete a degree. Administrators and student-athletes made these positive changes reality in the last year. More needs to be done and that's why I propose to transfer the Division 1 model while delivering more benefits to student athletes. It's why the NIL Working Group and many other members are working on additional improvements. These are issues college sports leaders must resolve with student-athletes soon. And as NCAA president, I am committed to working with all stakeholders to find consensus and move forward."

All right, I opened that by doing a tongue-in-cheek reference to Charlie Baker being ever the politician. Because to me, that is pure political grandstanding at the end there. The part I want to focus on is the part where he talks about delivering more benefits to student-athletes. Is that really what we're talking about here? Ever the cynic, I look at this as the NCAA trying to maintain some level of control, some level of authority, some level of purpose over the schools and over the athletes and athletic events.

To your point, Mike, I think that's why the proposal to allow schools to do these NIL deals directly exists, because if they do become employees, like we all believe, probably one day they will, what purpose does the NCAA really serve anymore? So, I opened the question to everyone, what do we think of what he's saying here? Is any of this really about delivering more benefits to student-athletes? Or is it the more cynical view that there's something else going on here?

Connor DeFilippis:

I don't think they need to be treated as mutually exclusive. Perhaps I'm just a little less cynical. But I think the NCAA too, would benefit from not treating those two things as mutually exclusive. I think that they have read the tea leaves in the last few years, as Mike had mentioned before, with the various litigations against them, and seeing their authority chipped away slowly, but significantly. So, it's absolutely a little bit about self-preservation and maintaining relevancy in collegiate athletics, going forward. But it's a give and take. I think, Baker as a politician, recognizes that and you can't maintain the same level of rules that you've been maintaining in the last 100 years, and you need to start developing and charting a new path forward, which I think, fair is fair. I think they've been trying to do that and we saw that with the December and January proposals.

Howard Shire:

Yes. Cal, on that degree, I think you hit the nail on the head. This is sort of a cynical thing. It's an effort by the NCAA to try to maintain some sort of control. If he was really interested in bringing about positive change for student-athletes, he would remove any caps on compensation for student-athletes, let it be with the so-called Wild West. Let athletes realize whatever income they can gain from the free market model that everybody else plays by.

Michael Lowe:

Cal, I think what Howard and Connor both agree, which I agree with is that there's a tension between what the NCAA wants and what student-athletes and schools want. Charlie Baker is trying to straddle that tension. I mean, the reality is that if the rules are too restrictive, and schools feel that they can do better, without being part of the NCAA, they'll bail.

I mean, you've already got member schools, D1, that have massive programs that generate a significant amount of revenue, and they're now being told by courts that they can – whether they or their boosters can pay athletes directly to recruit top talent. So, that's a recognition on Baker's part that, look, if we don't start letting the schools have a say in this, they could just leave. I guarantee you if this rule, the proposed rule to eliminate direct payments by the institutions for NIL. If that rule didn't pass, that would be the next area of litigation by the state AGs and by member institutions, and they would lead to serious consideration of leaving NCAA. Because that's kind of point that what do you need them for? At a certain point, you can say, I think we'll do better. We'll schedule our own games with major opponents, and why should we be bound by all these rules?

Cal Stein:

Yes. I mean, I think you guys are zeroing in on the issue here. And I guess that's what my problem is. My visceral cynical reaction to what Charlie Baker says here. When he singles out delivering benefits for student-athletes, I believe in my bones, that's not what they're doing here. Now, they may be trying to deliver benefits to student-athletes, and schools, and the NCAA as a whole, but it's not just delivering benefits to student-athletes. If that's what they were trying to do, I think all of this would look very different.

Michael Lowe:

Cal, I just want to add to that thought, that there is an admirable goal that NCAA still has, and I think President Baker has it. They want to make sure the student-athletes aren't just paid money, but that they get a degree, that they get an education, and that they prepare themselves for life after college. Because the reality is, most student-athletes do not turn pro in whatever their chosen sport may be.

So, I think there is a place for a framework that allows an organization like NCAA to have requirements that will ultimately work towards the benefit of the student-athlete. So, I won't be as cynical, perhaps as you. I do think President Baker is still playing the political role and

straddling the fence. But I think ultimately, getting student-athletes more money, and still helping ensure that they get a college education and a degree are things he's concerned about.

Cal Stein:

Yes. Well said, Mike. Well said. I think that's a good place to end our discussion. So, I want to thank all three of you for joining this podcast to discuss this really interesting, and really important memo to all the Division 1 schools. I also want to thank everyone for listening. If anyone has thoughts or comments about this podcast series, or about this episode, 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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