Highway to NIL Podcast: NIL Recruitment Injunction
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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 on Monday, February 26, 2024, with my colleague Mike Lowe, to discuss a very important decision that came down late last Friday in the Tennessee and Virginia attorneys general's lawsuit against the NCAA, regarding NCAA's NIL guidance.

In short, in that lawsuit, the State AGs challenged certain NIL rules as violating US antitrust laws. And on Friday, the federal court in Tennessee agreed and entered an injunction against the NCAA. We will discuss the details in a moment. But first, Mike, do you want to introduce yourself?

Michael Lowe:

Thanks, Cal, for having me on the program again. Cal, as you know, I'm a former federal prosecutor. I was in the US Attorney's Offices in both Los Angeles and Philadelphia for almost 25 years. Here at Troutman Pepper, my practice includes white-collar criminal defense, internal investigations. I work a lot with our State AG team. I also am involved in internal investigations and advice and counseling in the NIL space. So, happy to be here. There's a lot to talk about.

Cal Stein:

Thanks, Mike. So, let's get a general overview of what happened on Friday and in this lawsuit. Let's start by going back to January 31st, which is when the Tennessee Attorney General and the Virginia Attorney General, filed a lawsuit challenging the NCAA's rules or certain NCAA rules regarding NIL, which they termed, "NIL recruiting ban". This ban, according to those attorneys generals, included NCAA guidance that prohibited boosters and collective from communicating with student-athletes about NIL opportunities before they commit to a particular school.

The two attorneys generals asserted that the NIL recruiting ban constitutes an illegal agreement to restrain and suppress competition within the relevant labor market and violation of Section 1 of the Sherman Antitrust Act. They define the relevant labor market as Division I athletics all over the country, which is an important piece.

Now, let's fast forward to last week. On February 23rd, United States District Judge Clifton Corker of the Eastern District of Tennessee issued an opinion and an order granting the Tennessee and Virginia attorneys generals' request for a preliminary injunction in joining the NCAA from enforcing its so-called NIL recruiting ban. This was the same court and the same judge that had previously denied a temporary restraining orders seeking the same thing.

However, at the preliminary injunction stage, the court found that the attorneys generals had established both a likelihood of success on the merits and irreparable harm that would occur absent the imposition of the requested preliminary injunction.

I want to first address those two components of the order individually, and then we'll talk about the impact of it. So, Mike, do you want to talk about the court's ruling on likelihood of success on the merits?

Michael Lowe:

Sure, Cal. I think it's important to note that at the outset, a preliminary injunction is not easy to get, right? I mean, this is something where you're going into a federal court and you're asking it to stop someone or some business or some entity from doing something before there's a final decision on what the lawsuit is really about.

So, in order to get that extreme relief, you have to show, as the moving party, that there's a likelihood of success on the merits. So it's important here to note that the court found that the plaintiffs, Tennessee and Virginia, had shown a likelihood that they would be able to prove that the NCAA's NIL recruiting ban violated the Sherman Antitrust Act.

Now, in order to do that the two states had to show and the court ultimately found that first the NCAA entered into an agreement, and second that it unreasonably restrain trade in the relevant market. As you pointed out, the relevant market here was Division I athletics. So, the way the court makes this analysis as it does something called a burden-shifting analysis under what's known as the rule of reason tests. This is a three-part burden shift where initially the moving party, which is here, the plaintiffs, the two states, have to demonstrate substantial anti-competitive effects that harm consumers in the relevant market. And what the court held was that the plaintiffs had met that, that they had, in fact, demonstrated that the NCAA's market power over Division I athletics was "undeniable".

Think about that for a minute. The district court in Tennessee found that it is "undeniable" that NCAA has market power over Division I athletics and the district court found that the challenge rules would quote, "likely harm competition, because they "suppress" the price competition by limiting negotiating leverage and as a result, knowledge of value." So, once that first test is met, once that first part of the three-part burden-shifting test is met, the burden shifts to the defendant, here the NCAA. And that now requires the NCAA to demonstrate a pro-competitive rationale for its rules.

What the NCAA argued here was that its NIL recruiting ban promotes the balance of academics and athletics, and also maintains a distinction between collegiate and professional athletics. However, the court found these justifications unpersuasive, noting that the NCAA had failed to

show how the timing of an NIL deal, that is an NIL deal entered prior to enrollment would destroy the goal of preserving amateurism in collegiate sports.

So, the second part of that test, I said, went to the NCAA. Now, assuming they had met their burden, it would have shifted back to the moving party, and it would have required them to show the moving party being Tennessee and Virginia, that the pro-competitive efficiencies would be reasonably achieved through less anti-competitive means.

Now there's a lot to this year. But essentially what the court was saying was that even if it accepted the arguments of the NCAA that the NIL recruiting ban was needed because it promoted the balance of academics and athletics, and it maintained the distinction between collegiate and professional sports. There were less anti-competitive means that could have accomplished the same objective. The court noted that these other less anti-competitive means included the fact that NCAA already has rules requiring student-athletes to maintain progress towards degrees, log minimum credit hours, and achieve minimum grade point averages.

Also, the NIL rule of the NCAA that athletic performance cannot be used as consideration for the NFL deal, and also that schools are prohibited from compensating student-athletes directly for their NIL. So, with respect to these other NIL rules, the court basically found that they may in fact, be more effective in achieving the NCAA's goals of preserving amateurism in the NIL recruiting ban.

So, to wrap up this point, there were other arguments the NCAA made, all of which the court rejected. Most notable was the NCAA argument that the NIL recruiting ban was necessary to spread athletic talent across member institutions. Think about that one for a minute. NCAA argues, "Look, we kind of want to spread the talent pool around here." And the court said, "No, spreading competition" – and this is a quote. "Spreading competition evenly across the member institutions by restraining trade is precisely the type of anti-competitive conduct the Sherman Act seeks to prevent."

Cal Stein:

Yes, Mike. I found that quote to be really, really powerful as well and was a little bit surprised that the NCAA actually advanced that particular argument. Now, with respect to the other NIL rules that the court cited and quoted and that you just summarized, I found that very interesting as well. I think we're going to turn back to that a little bit later. For now, though, let me turn and summarize the second component of the decision, which is that the court found irreparable harm and that the private-public factors weighed in favor of granting the preliminary injunction.

So, having established a likelihood of success on the merits, the plaintiffs, Tennessee and Virginia, were then required to show, and they did successfully show that they would suffer irreparable harm or harm that could not be quantified and compensated with damages if the preliminary injunction were denied. Actually, the court began first by concluding that the plaintiffs had not shown any irreparable harm, particularly the schools in the states had neither shown impending enforcement action, nor any proof that recruiting activities had been impeded.

However, the court went on and concluded that student-athletes, themselves though, faced irreparable harm, beyond strictly monetary loss from the continued enforcement of the NIL

recruiting them. Specifically, the court noted, “Without the give and take of a free market, student-athletes simply have no knowledge of their true NIL value.”

Now, this suppression of the student-athletes negotiating leverage and lack of knowledge as to their own value, the court found represented an irreparable and non-monetary injury to the student-athletes. And the court considered the facts of the collegiate recruiting and commitment process in reaching this conclusion. The court noted in particular, that the window of opportunity is small for recruitment, commitment and for transfers, and that these are the periods in which the student athletes have their highest negotiating leverage with NIL collective, and can therefore realize the most value for the NIL. As a result, the court held that the student-athletes faced irreparable harm in the absence of the requested injunction.

Now finally, the court held that neither the NCAA, nor any other entity or individual would face substantial harm if it granted the injunction. In doing so, the court rejected the NCAA's argument that imposing the injunction would cause “disarray in collegiate athletics”. Similarly, the court held that imposing the injunction would serve the public interest by preventing anti-competitive behavior and encouraging free and fair price competition in the NIL market.

Michael Lowe:

Can I jump in for a second, Cal?

Cal Stein:

Please.

Michael Lowe:

I think it's really important to expand upon this point a little bit. The plaintiffs here started out by trying to show that the states themselves and the schools in those states would suffer irreparable injury. And the court rejected that. The court said, “No, you can't show that. But you can and you have shown that the students who either attend schools in those states or live in those states and go to schools out of state, would suffer irreparable injury because they're the ones that are being harmed by withholding their knowledge of their real value as to the worth of their potential NIL.”

So, that's the basis for this entire irreparable injury finding. And I think it's also important to note that there was a Sixth Circuit opinion that the court had to distinguish in order to reach this argument. There was an opinion in the case of Bassett v. NCAA, and that was from 2008, where the Sixth Circuit held that Section 1 of the Sherman Act didn't apply to the NCAA’s rules prohibiting inducements because they were explicitly non-commercial. However, the Eastern District of Tennessee judge in this case, distinguished the Bassett case and said, “Bassett was decided before the Alston decision. Before the Supreme Court made clear that we're in a whole new world now and NIL is now in play.” So, Bassett is effectively, at least in the mind of this district judge, no longer controlling.

Cal Stein:

It's a great point, Mike. It really highlights how much this landscape has changed in just a few short years. I want to pick up on something else you said which is talking about the knowledge. Student athlete's knowledge of their own NIL value, and let's not mince words. Let's call a spade a spade what the court is talking about there is basically saying, "Look, student-athletes need to be able to go out and collect all the offers for their NIL that they can get before making the commitment. They need to be able to compare one school's offer to another. Or should I say, one collective's offer to another. That is exactly the type of conduct that is not permitted right now, which is why this is such an important decision.

I also want to talk about the rejection, the court's rejection of the NCAA's, for lack of a better word, plea, that a decision like this would throw everything into "disarray". I actually agree with the NCAA that that is very likely what is to happen here. I'm not sure the district court disagreed with the factual assertion, so much as it found, that's not a reason not to grant this preliminary injunction when all of the other things line up. But we shall see.

Michael Lowe:

Yes. Cal, you and I have both seen plenty of instances where courts just don't buy those kinds of arguments. Essentially, basically, that's your problem. Yes, I know this is going to create confusion, uncertainty, or to use the NCAA's word, disarray. But too bad. In fact, the court here even went a little bit further towards the end of the opinion, it noted that, look, these are some valid arguments the NCAA is making. But the problem is under the plain reach of the Sherman Act, and under the existing legal precedent, there's anti-competitive effect here, and there's an antitrust violation in all likelihood.

So, if you, NCAA, want to change, you got to go to Congress and ask them to change the law, because you're not exempted from the Sherman Act, and Congress can exempt businesses or leagues from the Sherman Act. So, this is setting up what we've been talking about all along, which is that this landscape is going to continue to evolve in this exact direction, in all likelihood, more and more rights for students, for collectives, for boosters, for schools, to essentially recruit talent through NIL deals, and the only way it's likely to change is when Congress acts.

Cal Stein:

Yes, that's exactly right. That's a good segue into what I want to talk about next, which are the practical impacts of this ruling, and we're going to get to federal legislation in a moment. But first, I want to talk about what specifically this decision applies to. Does it apply to all NIL guidance the NCAA has issued? Short answer is, absolutely not. It only applies to some. Really what the court took up here is the NIL recruiting ban, in the way that the two states defined it. And that is a focus on the NCAA rules that prohibit recruiting communications between boosters and collectives on the one hand, and student-athletes on the other hand, before they make their commitment to the school, either as a high school athlete, or as a transfer.

The court, as you noted, Mike, was very explicit that there are other NIL rules that the NCAA has put in place that are simply not part of this challenge. Those are all still in place. They may be challenged later, they may be challenged in another lawsuit. But for right now, they are not.

And those are things like the requirement that all NIL deals include a quid pro quo. That includes that athletic performance cannot be used as consideration for an NIL deal. And that includes schools being prohibited, and continuing to be prohibited, from compensating the athletes directly for their NIL.

So, what does all of this really mean for NIL enforcement? Which we've been saying is coming, has been ratcheted up, and is being ratcheted up right now, that we have seen firsthand. Well, the order does not prohibit the NCAA from enforcing those other NIL rules. But it does prohibit the NCAA from enforcing the NIL recruiting ban, which means any investigations or any enforcement actions that focus on those types of recruiting conversations and NIL conversations before commitment, those really don't have any legs to stand on right now.

So, what does that do for the NCAA? Do they just drop those investigations? Well, they might. They very well might. They might also pivot those enforcement actions or other enforcement actions to those that violate the other rules that the court made clear were not impacted. So, for example, instead of focusing on the timing of an NIL communication to prove an inducement, could we see the NCAA pivot and focus instead on NIL arrangements where there is no quid pro quo? Or no fair market value quid pro quo in certain states? Could we see the NCAA focus its investigations on instances where it believes the school is actually behind the NIL compensation, one way or another? Those enforcement actions and those investigations, I believe, could still very much be in play. And whether the NCAA pivots all of its enforcement activity to those, or whether it backs off enforcement completely, in light of this decision remains to be seen, that will depend and that will be very telling as to what the future of NIL enforcement looks like.

Mike, one other comment or one other question that we've had is, what really is the scope of this order? And what's the NCAA going to do in response to it? What are your thoughts on that?

Michael Lowe:

Well, in order to make that determination, you look at the order itself and here the order even though it's a Tennessee court or federal court in the Eastern District of Tennessee, practically speaking, it's really a nationwide injunction, because the relevant market here was defined as the NCAA Division I athletics. So basically, any member school that's part of D1 is now within the reach or covered by this order. So, it doesn't really matter if the school is located in California, New York, Tennessee or Virginia, the NCAA is enjoined from enforcing its NIL recruiting ban.

I mean, there are specific policies that are referenced in the order. The order says, and I'll quote it. The NCAA is “restrained and enjoined from enforcing the NCAA interim NIL policy, the NCAA bylaws, or any other authority to the extent such authority prohibits student-athletes from negotiating compensation for NIL with any third-party entity, including, but not limited to boosters, or a collective of boosters, until a full and final decision on the ‘merits’ in this case.”

So basically, you look at the order and it says to the NCAA, you cannot enforce these rules and any rules. You can't make new ones, you can't do anything to prohibit student-athletes from negotiating their NIL compensation prior to going to a school, which is what the NCAA was

seeking to do by its interim policy, its bylaws, and various guidance documents that it has issued.

So, that's what the order purports to do. Now, this leaves open the questions of whether this order is going to remain in effect, because obviously, NCAA has the potential ability to appeal it and to seek a stay of the injunction. I'm sure its counsel has had a busy weekend, trying to figure out exactly what to do. What we saw in the West Virginia case is they just basically stipulated to turn it into an injunction and didn't seek an appeal, where there was a TRO issued on their transfer restrictions. If you'll recall that, we have spoken about that previously. So, NCAA has got strategic decisions to make. Does is want to fight this? Does it want to save the fight for another day? Or does it want to take it to the mat and who knows what they're going to do? But unless and until this specific order is stayed, it is enforced. And right now, student-athletes are able to negotiate their NIL before making a decision.

Cal Stein:

Let me ask you this, Mike, and I agree with absolutely all of that. But let me ask you this. What about state laws? We know, and we have our state tracker where we know there are all these state laws out there, some of which prohibit exactly the conduct that this court said violates the Sherman Act. What about those state laws?

Michael Lowe:

That's a great question, Cal. You hit the nail on the head. So, in those states that do prohibit exactly what NCAA was trying to prohibit with its policies, the state law still will control, now it would control based on its reach, right? So, the court here, in fact, rejected NCAA's argument that Tennessee had a law on its books that was virtually identical to the NCAA's NIL recruiting ban. And the court said, "Well, that doesn't resolve the issue," because students in Tennessee might go to a school in another state that doesn't have that ban on his books. So, the student in Tennessee, if they're going to a school in, let's say, pick a state, Mississippi, and assuming Mississippi didn't have a rule prohibiting NIL as an inducement, then the student from Tennessee would be allowed to engage in that kind of conduct.

So, the schools in question are still going to be bound by the laws of the state in which they operate. Obviously, the boosters and collectives in those states seeking to induce athletes to those schools need to make sure they comply with state law.

You've also got to deal with the fact that the NCAA is now going to be, and has been making it clear that they want to see congressional action in the space. Right? President Baker has made it clear that he's got ideas he wants Congress to act. We've written about pending legislation before Congress, in different states. So, the landscape is completely up in the air right now. But what you got right now is an injunction, and NCAA has got no choice but to either comply or to appeal.

Cal Stein:

Yes. I wonder if we're going to start to see some state legislatures, perhaps repealing some of these laws in light of this decision. But that's perhaps for another day. Okay, before we wrap up the last topic I want to talk about here and it's really a question. And it's an open question for both of us. I'll give my thoughts first.

Mike, is this the end of NIL? Or is this the end of NIL as we know it? I actually think you can make the case both ways. I think you can make the case that this is the end, or at least the beginning of the end of the current NIL landscape. If collectors can contact recruits and make their offers, and if recruits can collect all the offers out there, and then decide where to go, it seems likely to me that we're just going to have a highest bidder scenario for many, if not most, of these high-profile recruits. That's exactly what the current and NIL rules were designed to prevent. But the court is clear that this is exactly the problem with the current NIL rules and the current NIL system, student athletes have to be able to collect and evaluate their options before committing.

Now, I could also make the case that the current NIL landscape will remain, it'll just kind of shift its focus. I talked a little bit earlier and we talked earlier about some of the NFL rules that are not impacted by this decision, and how the NCAA really could shift its enforcement and shift its focus to those rules to try to maintain some level of control here. Maybe even we'll see the NCAA trying to stretch some of those rules in a way that does not violate the Sherman Act, but would give them greater latitude. My point is some of the current NIL landscape remains intact, at least for now. So, I think you can argue it both ways. What do you think?

Michael Lowe:

I think you're right, that this is sort of the first step towards the demise of the current NIL landscape, or the current NIL regime, if you want to call it that. I don't know if you recall last podcast we did. I think one of my concluding remarks was that my prediction is ultimately, at some point, in some year down the road, we're going to get to a place where schools are allowed to directly recruit and pay for all intents and purposes, students, student-athletes, that they're going to, whether it's under the guise of NIL, or whether they are ultimately determined to be employees. I think, this entire world is now headed in that direction, unless Congress acts.

I think that's really the key here is that, we will see a steady progression of cases like this, where the NIL rules and NCAA tries to put in place get chipped away and chipped away and chipped away, in consideration of the student-athletes having their rights protected, their ability to harness their market value at a time when they have market value. Because let's be honest, most student-athletes don't turn pro. Most student-athletes don't become internet phenomenon. So, to allow them to maximize their earning potential when it is at its peak, when they have the leverage, that's where these decisions are pointing to. So, I think we'll continue to see that.

Cal Stein:

Yes. I think that makes a lot of sense, and you talked really, about the last remaining Rubicon of sorts for NIL, which is the prohibition that remains in place that the universities can't pay the players directly. They still can't do that. If and when we cross that Rubicon, then we truly will be

beyond the era, for lack of a better word of NIL, at least, as it's currently constituted. You also talked about a couple of things with federal legislation. We know this is something that a lot of people want. I think they're going to want it even more right now. We've postulated that we're not quite there yet, because there isn't enough consensus, and we've got this presidential election year. Are people really willing to put political capital into this? All of those things seem to still be there as obstacles to federal legislation.

But you mentioned something earlier that I think is an even bigger obstacle, which is now that we have this ruling, for the NCAA to continue, they really do need an antitrust exemption. The way that Congress has somewhat famously given to professional sports leagues. I don't know. Without that component, I'm not sure how effective federal legislation on this topic can really be. If we can't get consensus on the regulation of the current landscape, I'm not so sure how we're going to get consensus in Congress for that type of bolder step in the legislative process. But it remains to be seen.

With that we are out of time here today. So, I want to bring this discussion to a close. I really want to thank you, Mike, for joining me on this podcast. This is a really interesting topic, a really important topic, and I think it's great to have your expertise in the AG arena and from our RISE group to comment on this. I also want to thank everyone for listening. If you have any comments about this series or about this episode, I invite you to contact me at callan.stein@troutman.com. You can also reach out to Mike at michael.lowe@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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