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**Highway to NIL Podcast: Post-Injunction Enforcement****Host: Cal Stein****Guests: Mia Marko****Recorded: 3/26/24****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 am a litigation partner at Troutman Pepper. I come to you today with my excellent colleague, Mia Marko, to discuss even more fallout from the federal court case that we recently discussed on a prior 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, violate US antitrust laws.

As listeners know, that decision came down on February 23<sup>rd</sup>, so over a month ago. Earlier this month, the NCAA released a memo to its Division I schools providing some guidance, or information about how it will interpret that rule going forward. Today, we're going to talk about enforcement and what NCAA enforcement of NIL rules may look like going forward in light of this ruling and in light of what should be a very interesting transfer portal season, at least with respect to Division I football, and then a little bit later, basketball. Before we get into that, I think some introductions are in order. Mia, do you want to introduce yourself?

**Mia Marko:**

Hey, Cal. Yes. Thanks for having me. My name is Mia Marko, and I am an associate in Troutman's business litigation group in Philadelphia. I work on all different types of commercial litigation matters, but a large part of my practice is in the higher education space and involves providing litigation, counseling, and investigative services to colleges and universities, and more recently, involves advising institutions on NIL issues.

**Cal Stein:**

Thanks, Mia. Those counseling and investigation services, I think, are going to be very relevant to the discussion today, because as I noted, it is going to focus on enforcement and NCAA NIL enforcement, which is a topic that I don't think many people are talking about right now, because I think many who look at the Tennessee ruling consider it to be a significant blow to the NCAA and its NIL enforcement capabilities. While that may be, it is not the end of the road. There is still NCAA enforcement that we think is coming, and there are still NIL rules that can be enforced, and we think will be enforced by the NCAA. That's what we're going to talk about here today.

To frame up our discussion, I think we ought to do a little refresher on the Tennessee case that I've referenced a couple of times now, and the Tennessee court's order on the preliminary injunction. Mia, can you provide a little refresher for us on what happened in Tennessee that brought us to where we are right now?

**Mia Marko:**

Sure. As you mentioned, Cal, this is a recent decision. It's from a case in the Eastern District of Tennessee, in which the state of Tennessee and the Commonwealth of Virginia as plaintiffs sued the NCAA. In the case, they alleged that the NCAA's prohibition on third parties negotiating with student athletes during their recruiting process, or a transfer process violated federal antitrust laws. The court was asked recently to issue a preliminary injunction that would prohibit the NCAA from enforcing its rule, which has been called at the NIL recruiting ban.

As a quick refresher, this recruiting ban came from the NCAA's guidance that prohibited impermissible NIL recruiting inducements by either institutions, collectives, boosters, or any other third parties. The guidance basically prohibited all of these actors from guaranteeing, or promising an NIL agreement that would be contingent on either an initial enrollment, or continuing enrollment at a particular institution as part of the student athletes recruiting process.

On February 23<sup>rd</sup>, the court issued the preliminary injunction that prohibits the NIL recruiting ban by the NCAA. The impact of this decision is that now collectives, or boosters, not institutions, which we'll discuss a little later, but collectives and boosters can induce a student athlete to attend a particular institution in exchange for NIL opportunities, or NIL agreements.

While only Tennessee and Virginia are named plaintiffs, because student athletes from these states could attend institutions all over the United States, the practical effect, essentially, is that this decision impacts the NCAA's enforcement of this ban throughout the entire country.

**Cal Stein:**

Yes. Thanks, Mia. On the last episode, listeners will recall, we did talk about the impact of a nationwide injunction, which this, from the Tennessee court purports to be. Okay, so I want to focus on the rules here, the NIL rules. I want to start with the ones that this Tennessee preliminary injunction effectively eliminated. Mia explained that those are the rules that prohibited third parties, i.e. boosters and collectives from having NIL discussions with prospective student athletes before they enroll.

That was obviously a rule that was a major focus of the NCAA and its enforcement actions. We have seen letters, investigations, other enforcement actions against schools all over the country that focused on the timing, the timing of communications between prospective student athletes and a university's collective getting right at that rule. However, as Mia mentioned, that rule is no longer in effect. It cannot be enforced, and the NCAA is not enforcing it. But that is not the only NCAA NIL rule that is on the books. In fact, in eliminating the NIL recruiting ban, as it was called, the Tennessee court actually explicitly recognized three other NCAA NIL rules that are in effect and remain in effect.

As they remain in effect, they could, and we believe will, ultimately serve as the basis for NCAA NIL investigations and enforcement actions. Now, let me run through these pretty quickly. The

first rule that the Tennessee court mentioned is the rule that prohibits NIL agreements without any quid pro quo. Any agreement to pay a student athlete NIL compensation must be in exchange for something on the part of the student athlete. Typically, a service, some service that the student athlete is performing.

The NCAA has been clear that NIL agreements must include a quid pro quo and should include specific deliverables that the student athlete must perform in exchange for the agreed-upon compensation and that the student athlete may only be compensated for work he, or she actually performs. The second rule that the court in Tennessee identified as remaining in effect is the ban on pay for play arrangements, i.e. athletic performance as consideration for an NIL agreement. This rule is very straightforward. It's been one of the guardrails and one of the pillars of the NCAA's NIL policy from the beginning.

Institutions and collectives and boosters, nobody can pay a student athlete for their athletic performance, and that means for playing a particular sport, continuing to play a particular sport, playing in a particular game, or a tournament, things like that. The third rule that the Tennessee court identified as still being in effect has to do with compensation directly from member institutions. Again, the NCAA has long been clear on this that institutions cannot directly compensate student athletes for their NIL and this includes revenue sharing. In fact, that revenue sharing model is actually being litigated right now. The plaintiffs in that case have brought up similar antitrust allegations. We'll see what happens with that.

For now, those are the three rules that the Tennessee court specifically identified as remaining in effect and thus, could continue to serve as the basis for enforcement actions. But those aren't the only rules. Those are just the ones that the Tennessee court identified. Mia, let's talk now about some of the other NCAA NIL rules that we've spent a lot of time on this podcast talking about that are in effect and that could still be enforced by the NCAA.

**Mia Marko:**

Sure, Cal. One of the big rules that the NCAA could enforce still is actually the recruiting ban that was before the Tennessee court. That is because of the distinction I mentioned earlier between the impact of the decision on collectives and boosters versus on institutions. It's possible that the NCAA could read the court's opinion and argue that it could still enforce the recruiting ban against its member schools.

The interesting thing about this opinion is that the plaintiffs had asked the court to enjoin the NCAA's NIL recruiting ban in total, which under the NCAA guidance impacts both institutions and collectives and boosters. The court's opinion seems to suggest that the NCAA's enforcement of the recruiting ban only addressed collectives and boosters and that institutions would still be prohibited from using NIL as a recruiting inducement. This requires a more careful read of the court's opinion. On page 12, the court talks about how the opinion is narrowly tailored and says here, "The situation requires no more and no less than permitting student athletes to negotiate NIL deals with third parties prior to committing to a particular school."

What's notable is that the court says 'with third parties' and doesn't say specifically, with institutions. The court also discussed the concept of college recruiting more broadly when it discussed the potential harm to states and stated that, "There is also no proof that recruiting is

impeded by the challenge rules. No Division I school can use NIL to induce attendance.” That appears on page 10 of the opinion.

The impact of this ruling is that the NCAA could continue to decide to enforce NIL recruiting bans by targeting institutions and not collectives, or boosters, to the extent that they are not sufficiently separate or distinct from their booster, or their collective. The NCAA has previously talked about the close alignment between the institution and the collective, which could make the collective appear as an extension of the university and is focused on this close alignment in determining whether the school is acting appropriately, or inappropriately. One of the practical problems with this decision is that if the court is drawing this distinction between collectives and universities and saying that boosters can induce attendance, but colleges and universities can't, it's difficult to see in practice how this might work, because it's clear that student athletes, while they're being recruited by their institutions are necessarily in contact with those institutions at the same time that their collective, or their booster is persuading them with NIL money to attend that school.

Institutions are going to need to be very careful in distinguishing themselves from their collective, or their booster in order to avoid liability, until we get either further guidance from the NCAA, or an appeal from this preliminary injunction, or a final decision from the Tennessee court.

#### **Cal Stein:**

Thanks Mia. I want to talk about – I want to go way back actually now. I want to talk about another source of NIL rules and NIL guidance, and that's the October 2022 guidance that the NCAA released, much of which to Mia's point, remains in effect. I want to talk about that a little bit, because again, these are more rules that are on the books. They weren't necessarily identified at least specifically by the Tennessee court, but they're still on the books and they could still serve as the basis for an enforcement action.

I want to talk first about the big distinction that that guidance made and that was between permissible and impermissible institutional support for student athlete NIL activity. As listeners will recall, that guidance actually gave specific examples. It gave examples of things that are permissible. It gave examples of things that are impermissible. On the permissible side of the ledger, the NCAA identified things like, engaging in NIL entity to inform student athletes of NIL opportunities, providing information to student athletes about opportunities that the institution has become aware of, and providing student athletes with contact information to contact NIL entities.

All of those things, all of those facilitation type arrangements were things the NCAA said were permissible back in October 2022, among other things. Let's counteract that now with the things the NCAA said were impermissible back in October of 2022. I would suggest, remain impermissible today, at least as far as the NCAA is concerned, and at least as far as there's – until there's another court case that says they are not. There were obvious things that the NCAA said were impermissible. Things like, communicating with collectives directly about a specific student athlete and what his or her requests or demands for compensation were. Encouraging an NIL entity to fulfill a student athlete's request, or a demand for compensation. Things that crossed the line of facilitation and entered the realm of negotiation, perhaps. Those are the

types of things that were prohibited back then, and I think remain prohibited today and can serve as the basis for an investigation.

Similarly, in October 2022, the NCAA said that the institution, or the student athlete couldn't promote NIL activity while on call for athletically related activities, like practices, post-game activities, celebrations on the court, press conferences, things like that. Again, the connection to the institution was too close. Those types of things remain in effect from October of 2022. Mia, you recall that guidance. Was there anything else from that guidance that you think warrants mentioning?

**Mia Marko:**

Yes, Cal. Interestingly, in that guidance, the NCAA had listed some permissible and impermissible institutional support related to NIL entities and collectives, but in response to this Tennessee decision, it's possible that all of the NCAA's examples of permissible institutional support for NIL entities, or collectives could raise issues. Given that now, collectives can do things that institutions can't. When the NCAA was issuing this guidance in October of 2022, there wasn't this tension, because the conduct, or the misconduct between the institutions and the collectives were aligned. They both could not impermissibly induce attendance.

It's possible that the NCAA could take another look at these rules and issue some new guidance through the lens of ensuring that institutions do not induce a student athlete to attend their schools, while the collectives are doing so. On the flip side, maybe the NCAA sees the rating on their wall and eliminates the role altogether. Until then, the schools need to think twice about what they were previously doing with respect to collectives that they thought were permissible.

For example, in the guidance, the NCAA said that institutions could request a donor to provide funds to an NIL entity, so long as the institution wasn't directing funds to be used for a specific sport, or for a specific student athlete. This was okay when a collective also couldn't induce. Now, if an institution is making such a donor request, there could be risk that the NCAA may think that the institution is engaging in an impermissible inducement by having this relationship with the NIL entity. It's possible that we could see new guidance in the future that basically says, there can't be any permissible institutional support for collectives. We just don't know.

**Cal Stein:**

Yeah. It'll be interesting to see what happens with that. Okay, I want to actually shift now and talk a little bit about what I think is going to be a very unique transfer portal season for football and for basketball. I think by now, everybody knows what the transfer portal is for football, Division I football. We've got the transfer window opening up very soon in April. April 16<sup>th</sup> to April 30<sup>th</sup> is going to be the spring transfer window for football. The one for basketball, we're actually in it right now until May 1<sup>st</sup>. The reason I raise the transfer portal windows is because this is really going to be the first test of the new NIL landscape after the Tennessee ruling.

Now, because of the Tennessee ruling, what we know is collectives, third parties, as Mia has made clear, not the institutions, but third parties, collectives and boosters can talk to student athletes before they commit. In the transfer portal, what that means is any athlete, any student athlete who goes into the transfer portal can go and talk to any collectives, any boosters that

they want and collect offers for lack of a better word before choosing whether to stay at their current school, or go to another school.

What I'm getting at with this is in this transfer portal season, we may see exactly the type of bidding wars for student athletes that the NCAA sought to avoid when it began with its interim NIL policy way back when. We could also have, and I think we will also have, more students entering the portal to collect those offers and maximize their offers. How does this all relate to enforcement? Well, if you look at the current landscape and the possibilities that come with this transfer portal season, I think there is a scenario and a situation that is fertile ground for the NCAA to be looking at enforcement activity and conducting investigations.

For one, there are going to be more kids, more student athletes in the transfer portal talking to schools, so thus, more chances for NIL related violations. Second, I think it's a bad look for the NCAA, one that it really sought to prevent, the NIL being used as an inducement, albeit by third parties, albeit by collectives, it's still not what the NCAA wanted. It's now going to happen in broad daylight. I think it's a bad look for the NCAA, which leads to the third point I want to make, which is the NCAA is under fire right now. It's losing its power. It's losing its stature. I wonder if the NCAA is starting to feel the pressure to justify its own existence and its own authority. If so, will the spring transfer portal windows give them an opportunity to do so by initiating a number of new enforcement actions?

Okay, so what might these NCAA NIL enforcement actions look like in the wake of the Tennessee decision? Now we've talked about the still existing rules. Those are the ones that the NCAA must enforce, and it can really do it in two ways. It can conduct new investigations centered on those rules, or it can take investigations that are already in existence and pivot them away from discussions and timing of conversations with collectives to one of these existing rules. How could this play out? Well, there are a couple ways. Let's give a few examples.

The first example goes to the quid pro quo requirement that we talked about earlier. That requirement remains in effect. Let's now imagine, there are student athletes in the transfer portal and they're all collecting their offers from collectives all over the country. A student athlete picks one of those offers. Perhaps, he or she picks the highest bidder, perhaps not. All of that is above board now, thanks to the Tennessee ruling. Then it comes time for the student athlete to perform his or her NIL contract. As we've said, the Tennessee ruling didn't touch the quid pro quo requirement. His or her NIL deal will have to have a quid pro quo requirement. It will have to require that student athlete to do something in exchange for the NIL compensation being paid.

Well, what happens if the student athlete doesn't do what is required? What happens if the quid pro quo is minimal, or if the NCAA looks at it and says, "That's not bona fide in any way. That's not real. That's not legitimate." Given that these bidding wars are likely to take place, these deals are going to be out there and they're going to be known to some degree. I believe, we're going to see investigations by the NCAA into whether quid pro quo was included in the deal, whether the quid pro quo that was included is bona fide, is it real, is it justifiable quid pro quo? Then third, was the quid pro quo ultimately enforced? Was the student athlete required to perform the services he or she agreed to? Or did they get the compensation for essentially nothing?



If the answer to any of those questions is no, I think you could have a potential NIL rule violation. Those are the things, those are the investigations I would expect to see from the NCAA coming out of this portal season. Mia, what about you? You have any thoughts?

**Mia Marko:**

Yeah. I think the other scenario where we could see enforcement actions by the NCAA would be with respect to the prohibition on compensation from an institution to a student. I don't think we would expect to see situations where the school is paying the student athlete directly. I think those are just too obvious. In the scenario that you described, Cal, the student athlete and there's a portal, is collecting his or her NIL offers, picks one, signs this NIL agreement and then transfers to the school, all of the money that comes to the student athlete for that NIL agreement has to come from a third party, a collective or a booster. It can't come from the institution, whether that's directly or indirectly.

We could have a scenario where the NCAA is probing the institutional support for its collective or its booster, which would ultimately induce the student athlete to attend the school. You could envision a scenario where the school is offering tickets, or some type of unique pregame opportunity with the coach, or the team, or former players and offers that opportunity to a high-level donor. Now, the NCAA might look at the connection between the high-level donors, inducement of an NIL agreement with the student athlete and the donor's connection to the school. It wouldn't be direct payment from the school to the student athlete, but the NCAA could very well take the position that this is close enough to violate the rule.

**Cal Stein:**

Yeah. That's something I've thought about for a while now. What does direct mean? A direct payment by the institution? Certainly, that would encompass the institution giving cash, or something of value to a student athlete. But there are myriad ways that an institution could circumvent that if it were so inclined. I do think, as you note, Mia, that the NCAA may well look at those and say, "No. That's what we meant by direct. That's close enough. We'll have to see."

All right. Those are just two examples of the type of NCAA enforcement action. We think we could see and could see imminently, even with the Tennessee preliminary injunction in effect. As I noted earlier, with the NCAA's back up against the wall to some degree, I expect to see some of those efforts. Whether they'll be successful or not, I'm not sure, but I do know that the NCAA hired a lot of enforcement staff thinking they were going to be enforcing the NIL recruiting ban among other things. Those enforcement staff members aren't just going to be paid to sit around and do nothing. They're going to have to investigate. They're going to have to enforce. These are some examples of things that they could do.

Let's talk briefly about what schools can and I would suggest, should be doing in anticipation of this new wave, or this new type of NCAA NIL enforcement. Well, the first suggestion, I think, is an obvious one. It's to remain vigilant. I think it's a difficult one, though, because I think many institutions and compliance personnel, it's been very easy to relax the NIL compliance efforts in the wake of the Tennessee ruling. I would suggest that is a mistake and potentially a big mistake for schools.

The rules are still in place. We've talked about those. The separation between the school and the collective is still important, arguably more important now, because as Mia noted, the institutions still cannot induce, while the collective may be able to. Remaining vigilant is a critical piece here. The second thing goes hand in hand with that, which is I think institutions really need to consider how they are deploying their compliance resources. Schools that were the most committed to NIL compliance that we have come across devoted a lot of their time, a lot of their effort, a lot of their resources to training and monitoring collectives and coaches to make sure that the NIL conversations took place appropriately.

By that, I mean, after the athlete committed to the university. Now, of course, that's no longer necessary, because of the Tennessee ruling. Institutions can and should deploy those resources differently. They don't need to focus on the timing of those conversations anymore. Focus on something else. For example, monitoring. Monitoring is now very important. For example, schools that get copies of their student athlete NIL contracts either because they have an institutional policy, or a state law that requires it, those institutions should monitor and ensure appropriate quid pro quo exists in the agreements. They should consider monitoring for compliance thereafter. They should train their athletic staff and other institutional staff on proper and improper behavior towards donors to avoid crossing that direct compensation line. There are things that still need to be done, monitored and trained on. They're just different now.

Lastly, I would encourage schools to continue to encourage internal reporting. We've long said that a school's best defense to an NIL enforcement action or investigation is to get out ahead of it. Schools should continue to encourage internal reporting. Then when issues are reported internally, schools should continue to work with legal counsel to conduct privileged investigations, so that they can identify problems and fix them and do it importantly. Most importantly, they can do it under the cloak of privilege. This is arguably a more effective strategy now than it was before.

When the focus might have been on the contact between players and third parties, collectives, boosters. In those situations, the school doesn't have control over the third party. They don't have the ability to compel third-party information and there's certainly no privilege between the school and the third party. With the Tennessee ruling, now all the enforcement issues are going to focus on the internal. They're going to focus on the individuals, over whom the school does have control, does have influence, and who are within the school's privilege and thus, can conduct a privileged investigation to figure out what happened and potentially remedy it before the NCAA ever starts poking around.

With that, we are out of time here today. I want to bring this discussion to a conclusion. I really want to thank you, Mia, for joining me on this podcast. I also want to thank everyone for listening. If you have any thoughts, or any comments about this series, or about this episode, I invite you to contact me at [callan.stein@troutman.com](mailto: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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