
Highway to NIL Podcast: 2024 NIL Predictions**Host: Cal Stein****Guests: Howard Shire and Patrick Zancolli****Recorded 1/17/24****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 in early 2024 with two of my colleagues, Howard Shire and Pat Zancolli, to do something we've not yet done here on *Highway to NIL*, and that has offer up some predictions for the year to come and the world of NIL. As we all know, the world of NIL is developing rapidly, and 2023 was no exception. There's a lot going on right now that will shape NIL and college sports generally going forward, including the recent Division I council meeting and the NIL enforcement action that the NCAA just announced.

Given that we are still very early on in the year, we wanted to put on our prognosticating hats and offer up some predictions for what may and may not happen in the world of NIL during the 2024 calendar year. Before we get to those predictions, let's do some introductions. Howard, it's your first time on *Highway to NIL*. Do you want to introduce yourself?

Howard Shire:

Yes. Yes. Thank you, Cal. Thanks for having me. My name is Howard Shire. I'm a partner in the Intellectual Property Department at Troutman Pepper in our New York office. I've done a lot of write up publicity work in the past. One of my clients is LeBron James, Jr., who has probably been the biggest financial beneficiary of the NIL rules.

Cal Stein:

That's the story and a return that we're all watching and certainly hoping for. Pat, you want to introduce yourself?

Patrick Zancolli:

Hi, everyone. My name is Pat Zancolli. I'm a litigation associate here in the Philadelphia office. Really excited to join the team to take a look at our predictions for the NIL space here in 2024.

Cal Stein:

Great. Thanks, Pat. All right. Well, with that, let's get right into our predictions. The first one involves NIL enforcement, which is something that we've talked a lot about on this podcast. The prediction is that NCAA enforcement actions are going to be on the rise in 2024. We've long

talked about enforcement. When is it coming? What's it going to look like? Candidly, enforcement has been slow, very slow for a host of reasons. One of those reasons is not a lack of interest. NCAA President Charlie Baker has made clear that enforcement in the NIL space is coming. We've been waiting for them to make good on that promise.

Recently, the NCAA may have crossed a Rubicon of sorts with an enforcement action against Florida state involving NIL. Will this enforcement action open the floodgate, so to speak? Well, I'm not sure I'd go that far, but we certainly predict that enforcement is going to be on the rise in 2024. Howard and Pat, what do you guys think about this?

Howard Shire:

Yeah. I would agree with you, Cal. I mean, in the first two plus years of NIL, there was really no enforcement by the NCAA. There was one matter involving the University of Miami women's basketball team, but that was really, really minor.

I think that this is a harbinger of things to come, especially because there's really been nobody else enforcing the NIL rules. For example, there were state laws, but as far as I know, no state attorney generals ever tried to enforce a state NIL rule.

Patrick Zancolli:

Yeah, I would agree with Howard. I think we've been eyeing this space for some years now and we've been following, as he's alluded to, what states are permitting and not permitting, as well as what the NCAA is looking to curb down on. As that time develops, it would make sense that we were looking at the space and saying that some of these rules and some of these restrictions didn't have a lot of teeth. Now that we're two years or so into this era, it makes sense to me that the NCAA is finally looking at what they're saying is not permitted, as well as what is actually happening and taking some enforcement action as it relates to those rules and restrictions.

Howard Shire:

Right, plus the NCAA has got to send a message that it's serious about enforcing its rules, otherwise schools and boosters, collectives may violate them with impunity.

Cal Stein:

Yeah. I mean, we've been building to this for some time, I think. We've talked a lot about it on this podcast. The NCAA has long said, they're hiring more enforcement staff. Then they switched the charging standard to make it easier to charge NIL violations based on circumstantial evidence. Then Charlie Baker made comments about collectives and boosters and wanting to target them. Now, recently, we've got new disclosure rules even, that the Division One Council is considering, requiring students to actually, has adopted a proposal that requires students to disclose their NIL deals to their schools and have those schools report them up to the NCAA.

All of these things to me signal more and more enforcement coming. Schools, I think, would be very wise to get out in front of it in terms of making sure they have compliance programs in

place, making sure that they are monitoring their personnel and also, to the extent they can, third-parties, like boosters and collectives. All of this, I do think, is going to come to a head in 2024 and beyond.

Howard Shire:

Yeah. Cal, we may even see some more self-reporting, as it's done with the colleges sometimes due for violations of other NCAA rules to mitigate the penalties, which has been successfully done in the past.

Cal Stein:

Yeah, I think that's right.

Okay, let's talk about our second prediction for 2024, which involves transfers and the transfer portal. It's hard to argue that recent developments in college sports have greatly impacted transfers. We're seeing more than ever, and NIL has been a very large part of that. On the one hand, an increase in transfers are good for student athletes, but on the other hand, it does make it a lot more difficult for schools and coaches to keep their teams together, particularly in the revenue sports.

Well, we believe one thing is for certain, that as long as NIL is around, student athletes are going to continue to try to maximize their value, including by transferring when that is necessary and desirable. Some people have said that the increase in transfers has led to professional sports style free agency at the college level. Again, I'm not sure I'd go that far, but we do predict for 2024 that NIL opportunities will continue to result in more and more student athlete transfers and more than we've ever seen before.

Howard Shire:

Yeah. Cal, I think that's right. I think we see in the numbers of athletes who are entering the portal. I mean, the rules are, you're not supposed to offer NIL money as an inducement to transfer, but the reality is student athletes will explore this. It's only a factor. Look, there are other factors involved in transferring, such as playing time you're getting at your current school, versus what you might get at the future school. But NIL opportunities are definitely an issue. It's not too far below the surface. I think the number of transfers will continue to increase and/or due to NIL opportunities.

Patrick Zancolli:

You certainly can't blame student athletes that are exploring these opportunities. I mean, with the growth of NIL over the past couple of years, if you're a student athlete, I think it'd be pretty surprising to me if you're not thinking about any way to capitalize on that opportunity, as well as with the transferring rules being lessened over the past couple of years.

I mean, you have this most recent transfer portal that was opened last month. 1,900 athletes entering that transfer portal. I think based on just that alone, knowing that there will be more transfer portals this year, we'd be pretty hard pressed to disagree with the role that NIL will have on this transfer process and any increased amount of transfer we will see this year.

Cal Stein:

Yeah. One thing I think is really interesting is, I think one of the things we've seen with this is as NIL has developed, and as we have more time under the current rules, you're seeing more and more schools get better organized with NIL and more and more collectives, I should say, becoming more organized with NIL, even those that some of the smaller schools, some of the non-power five conference schools. What that is doing is it's creating additional opportunities for student athletes at some of the bigger, larger schools who maybe are backups at that school. They can drop down and go to a lesser school, perhaps, and still take advantage of NIL opportunities.

We've seen this a lot in college football, in big time college football, where a major school will recruit three blue chip quarterbacks. Well, only one of them can play. The other two start looking around, maybe not getting the NIL opportunities they want at their current school, but a school in a lower conference, or a lower division would be very happy to have them. That opens up opportunities now that they have collectives and they have NIL opportunities to offer.

Howard Shire:

Right. But the schools obviously have to be careful what they say to the potential transferee, because they can't offer them NIL money, but the transferee can certainly investigate it on his or her own.

Cal Stein:

Yeah, that's exactly right. That goes to the first prediction, right, which is enforcement. Enforcement is coming and it's certainly going to target the transfer portal. You're exactly right, Howard. The more student athletes who are in the portal, the more opportunities there are to transfer, the more transfers that are going to take place, the more smoke there is for the NCAA, or potentially, a state attorney general to conduct an investigation to see if there were any inducements.

Okay, let's shift now to the next prediction, which talks about federal legislation. This is something that we've spent a lot of time on this podcast talking about, and in the state and federal law tracker that we have on our website. Everybody who's involved in NIL seems to want federal legislation on it. Even the US Congress itself seems to be interested in the topic, but there's been no legislation yet.

Now, we all know, given the makeup of Congress, it's been difficult to get much of anything done there these days. In 2024, at least, we do not see that changing with respect to NIL. There are a bunch of pending NIL bills, and we think that those are going to continue to work their way through the system. But the prediction is that the NCAA and its member institutions are going to have to wait at least another year without any meaningful federal NIL legislation.

Howard Shire:

I think that's certainly true, especially with this being a presidential election year and Congress, quite frankly, has I think more important things to deal with, such as keeping the government

open. I just don't see in the scheme of things that NIL legislation is going to bubble to the top in terms of whatever legislation Congress enacts this year.

There have been calls for years to have uniform right of publicity law that have really gone nowhere. I'm not optimistic about this year for federal NIL legislation.

Patrick Zancolli:

It's a dream to me that Congress clearly does have the interest in it, given how many hearings and proceedings they've had on this in recent years. I mean, Charlie Baker is up there today on January 17th in another hearing. As it relates to the various bills, we're tracking at least eight of them. There's a lot of action that's happening here. It's just for the various points that we've already detailed, it doesn't seem very likely that any of these developments amount to any meaningful federal legislation this year.

Cal Stein:

Yeah. I think clearly, there's interest, right? I think one of the obstacles we're seeing is there is interest, but a lack of consensus. There is even some lack of consensus among NCAA member institutions. I do think that Congress is likely going to want to see what the NCAA and its institutions can agree on and what proposals it can enact and see where all of that lands really before wading in with federal legislation on the topic. That's going to take some time as well.

Okay, let's move on to the fourth prediction, which is somewhat related. Let's talk about here, the Supreme Court and the Supreme Court and college sports. As we know, the US Supreme Court kicked off this whole NIL thing with the Alston decision, which in my view, spooked the NCAA enough for it to enact these changes to its longstanding rules on amateurism and allow its student athletes to earn NIL. But we don't believe the Supreme Court is done. We think in 2024, the Supreme Court is going to take up the all-important issue of whether student athletes are, or should be considered employees of the schools.

Of course, if we're right and the Supreme Court takes up this issue and rules on it, the implications will just be beginning at schools who are then going to have to learn how to navigate whatever that ruling is. The first step is the Supreme Court getting a case and agreeing to take up this issue. We believe that could happen as early as 2024.

Howard Shire:

Yeah. I'm going to agree with you, Cal. I mean, this is not really an NIL issue directly. There are cases percolating in the circuit courts that raise this issue. There's a possibility of a circuit split. I mean, the seventh and the ninth circuit have already said that student athletes are not employees of the universities, or there's a case pending at the third circuit, which could come out differently. If it does, then you'll have a circuit split, which could result in the Supreme Court granting cert to a case later this year.

Patrick Zancolli:

Yeah. I think this is interesting. I mean, we're talking about a lot of overlapping topics and a lot of overlapping and different stakeholders here. You have the NCAA who's interested in NIL and

this student athlete-employee issue. You have Congress. Then we're seeing that the Supreme Court is very interested in this issue as well. As seen in Alston, I think if the third circuit is to come out in favor of student athletes being employees, obviously, we will have that circuit split. It would be very surprising if the Supreme Court weren't to take up the issue from there and decide this issue once and for all, which will have, as you've said, Cal, implications for schools, definitely implications for the NIL space, as well as student athletes themselves.

Cal Stein:

Yeah. I mean, I think I keep coming back to that Alston decision. In particular, I come back to what Justice Kavanaugh said in his concurring opinion with the decision. I'm going to read his quote, because this is the quote that I believe spooked the NCAA. He wrote, "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate." I mean, that is a direct attack on the amateurism model that the NCAA has utilized forever.

If that is not an indication that at least Justice Kavanaugh is itching to make this decision, I don't know what is. We'll have to see if the case actually makes its way up there. I think we know at least what one judge, one justice is going to say about it.

Howard Shire:

Yeah. Cal, answer this question. If the Supreme Court rules, as I personally think they should that the student athletes are employees, what do you think the implications would be for the NIL space?

Cal Stein:

Well, it's an interesting question. NIL might go away altogether at that point. Because if the schools are able to pay their athletes a salary, a wage, well then, we've really got essentially the pro sports model. Certainly, there would likely be some guardrails put in place on that. I don't think we're going to have the kinds of contracts being handed out the way they are in pro sports. But the devil will be in the details there. It may be that NIL goes away altogether. It may be that it is a way to supplement some minimum salary, or minimum wages that these athletes receive.

Cal Stein:

Okay, let's flip now to our fifth and final prediction for 2024, which involves collectives and boosters. I don't think it's controversial to say that collectives and boosters have become the true power brokers in college sports right now, particularly for the revenue sports. I also don't think it's all that controversial to say that this is probably not the NCAA's preference, or the school's preference, or maybe even the student athletes' preference.

As a result of all of these, we believe that 2024 is going to see a concerted effort by the NCAA very likely with their member institutions backing to start raining in collectives and boosters and to try to change the balance of power, at least in the NIL world, away from them. How exactly this may happen is an open question. But everything that we've seen and heard from the NCAA seems to be lining up for the NCAA and the schools to try to take back some power from the

boosters and collectives. For that reason, we think that in 2024, those collectives and those boosters are going to have less direct influence over NIL and student athletes.

Howard Shire:

Yeah. Cal, I'm sure the NCAA would like to take back the influence of the collectives, the boosters. But I don't know if legally they can do that. If collectives want to present NIL opportunities to student athletes, I think it should be up to the athletes to decide whether or not to do it. I don't know that the NCAA can lawfully restrict the collectives. I mean, under the proposal, that's under consideration at the NCAA level, I mean, collectors are not going to be outlawed. I don't think they could be lawfully outlawed. I just think that their influence may continue, much to dismay, perhaps of the NCAA and perhaps, some member institutions.

If you want to look at something that might be considered analogous at the top college football level, a lot of head coaches are paid not just by the university, but by boosters. We might see an analogous thing at the student athlete level.

Patrick Zancolli:

Yeah, I think this is interesting. When NIL kicked off at first, the way the rules were set up and the landscape required collectives to really be the main power player here. I think it's interesting to just look back a little bit and look how things have changed and how the NCAA has gotten involved to change that landscape a little bit and change those rules in a way that as we've said, some of this NIL work that has traditionally been done by collectives might be able to be brought into the university, which although the collectives would still have some impact, would give universities some power that would inevitably, probably have to move away from the collectives.

Cal Stein:

Yeah. I mean, I think that's all right. We've certainly talked a lot about the concept of bringing NIL "in-house," right? I think the NCAA might like that. I think schools might like that. Hasn't happened yet. Howard, I agree with you, the collectives and the boosters, they're not going anywhere. They're not going to just cease to exist. However, I do think the NCAA is going to make a play to try to exert more control over them. We've already seen that a little bit in some of the new rules that have been proposed and the recent enforcement action, where one of the penalties was disassociation with a collective.

In a way, that may be the most that the NCAA can do, because they really don't have authority, or jurisdiction over third parties. But to the extent, the NCAA is willing to flex its muscles and require its member institutions over which it does have authority to disassociate with particular boosters, or with collectives altogether, that could certainly be a significant development in 2024 and beyond.

Howard Shire:

Yeah, I agree. Then they could flex their muscles, but as you said, I don't know the collectives are going away.

Cal Stein:

Yeah. At least not until the Supreme Court rules, perhaps.

Howard Shire:

Right.

Cal Stein:

That might be the thing that could do it. Now we're really getting over our keys here in 2024 predictions.

Howard Shire:

That may be a 2025 prediction.

Cal Stein:

Right.

Patrick Zancolli:

I was thinking the same thing.

Cal Stein:

Right. Well, I'll tell you what? We'll all meet back up in January of 2025 and see where we stand. With that, we're out of time here today about our predictions for 2024. I want to bring this really interesting discussion to a close. I want to thank you, Howard, and I want to thank you, Pat, for joining me on the 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 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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