

Highway to NIL Podcast: NCAA Settlement**Host: Cal Stein****Guests: Chris Brolley****Recorded: 5/30/24****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 the *Highway to NIL* OG himself, Chris Brolley, to discuss one of the most monumental developments in the world of NIL and really in the world of college sports generally in quite some time. I am talking, of course, about the recent settlement the NCAA announced it had reached to resolve multiple antitrust cases that had been filed against it. This settlement puts an end to those pieces of high-profile litigation, but it actually does far more than that. It creates and sets the foundation for the future of college sports, a future that will involve for the first time schools paying student-athletes and the NCAA moving away from the amateurism model that it has clung to for, well, really since its inception.

To state it simply, this is major news, and we are here at *Highway to NIL* to discuss it. But we're going to do more than that today. Yes, what happened is important, and we're going to go through that. But we think what is even more important is what is now going to happen. Chris and I are going to spend some time talking about that as well. But before we do, I know all of you *Highway to NIL* listeners know Chris. Since it's been some time, Chris, why not introduce yourself once again?

Chris Brolley:

Thanks, Cal. I'm happy to be back on the podcast. I'm a litigation associate in our firm's Philadelphia office, and my practice primarily focuses on products liability defense and investigations. Like you, I also advise colleges and universities on NIL, particularly regarding compliance with state laws, NCAA bylaws, and other NCAA policies regarding NIL activities.

Cal Stein:

Great. Thanks for being here, Chris. I mean, I think there's some symmetry here. We were the first ones at the firm and in our group to really be following this stuff. It's almost poetic that we're the ones here on this podcast when this monumental settlement comes out to discuss it. But before we get to the settlement itself, let's take a step back, and let's talk about the main case that led to this settlement which is the *House* case. Chris, I'm hoping you can give us a little primer on the *House* case; what it is, who are the parties, what are the allegations that were so substantial that they led to this paradigm-altering settlement.

Chris Brolley:

Yes. I have a little discussion about this case. But for background purposes, the *House* case effectively involves three separate antitrust cases; the *House v. NCAA*, which is what we'll discuss at length, *Hubbard v. NCAA*, and *Carter v. NCAA*. All coming from athletes claiming that the NCAA violates antitrust laws. For purposes of our discussion, I'll focus specifically on the *House* case and the claims brought by plaintiffs in the Northern District of California before The Honorable Claudia Wilken, which longtime listeners of this podcast and people who have focused on NIL may recognize that name as she is judge who presided over the O'Bannon and Alston cases as well.

In 2020, former Arizona State swimmer, Grant House, and TCU and Oregon basketball player, Sedona Prince, sued the NCAA for barring NIL payments for athletes prior to 2021, which as we all know, it's when the NCAA implemented its interim NIL policy. The parties in *House* also challenged the rules that prohibit the NCAA and its member conferences from sharing the revenue they make from their broadcasting contracts with networks, marketing contracts with companies that make sports apparel, social media sponsorships, and other commercial activities that involve the use of student-athletes NIL.

I should note that while the case was filed before the NCAA's interim rules were implemented, the plaintiffs in *House* ultimately supplemented their claims and argued that the interim policy still failed to adequately address the inherently anti-competitive nature of the NCAA's rules. In *House*, plaintiffs alleged that the conference has worked together with the NCAA to exploit student-athlete labor without legal representation and limited the compensation athletes could receive.

They further claimed that the NCAA's restrictions on NIL and control of TV markets prevented athletes from profiting on their true market value, which they argued is more than scholarships and education funding, which student-athletes were receiving prior to the NCAA's NIL interim rules. The plaintiffs in *House* made these allegations on behalf of three proposed classes and subclasses known as the injunctive-relief class, the social-media damages subclass, and the group-licensing damages subclass. I'll go into what each consisted of.

The injunctive-relief class is comprised of all current and former student-athletes who compete on or competed on an NCAA Division I team any time between four years prior to the filing of the complaint or 2016 and the date of judgment. The social-media damages subclass is comprised of all current and former student-athletes who compete on or competed on an NCAA Division I team at a school that is a member of one of the Power Five conferences during that same time period discussed above. The group-licensing damages subclass is comprised of all current and former student-athletes who compete on or competed on an NCAA Division I Men's or Women's Basketball team or a Football Bowl Subdivision team at a school that is a member of one of the Power Five conferences during that same time period discussed above.

What these classes ultimately sought, in addition to injunctive relief, was back pay to compensate for lost NIL revenues which included lost NIL broadcast revenues, lost NIL video game revenues, and lost revenues resulting from third-party NIL deals that have been taking place since July 2021 or when the interim rules were implemented, as well as those that would have occurred four years prior to the filing of the complaint, if not for the NCAA's prior rules. Late last year, Judge Wilken certified the injunctive-relief class which made up about 184

student-athletes, effectively paving the way for the case to proceed and ultimately reach the point we're at today with the proposed settlement and tentative agreement.

Cal Stein:

Great. Thank you, Chris. Now, let's talk about the settlement, and let's start with what we know is included in it. There are three components I want to talk about here. The first component is probably the most obvious. It's the damages component. Pursuant to this proposed settlement, there will be nearly \$2.8 billion in damages paid out over 10 years for what we'll call back pay. Those are the approximately 14,000 claims from the student-athletes that go back to 2016, as Chris mentioned.

Now, the exact amount that each athlete will get is yet to be determined, but we do have some insight into how that figure will be paid. The NCAA itself is going to cover just over 40% of the total settlement in this proposal. Another 24% will be covered by the largest Division I conferences. Those are sometimes called the Power Five conferences. The other conferences that participate in NCAA football will cover 10% with the remaining dollars coming from lower-tier Division I football conferences and non-football conferences. That's how the damages are proposed to break down.

The second component that we know about in this proposed settlement is revenue-sharing. This is really where we get into a big-ticket item in terms of changing the paradigm of NCAA sports. The new system proposed by this settlement will allow schools to commit up to \$21 million per year or 22% of the average annual athletic department revenue to be paid directly to student-athletes. If you add this figure to the damages that I just discussed, we're talking about approximately \$300 million per school over the next 10 years.

The third component of the settlement are additional financial benefits to student-athletes. The settlement also proposes a framework that would switch away from the current model that limits roster sizes based on scholarships. Instead what they're proposing is that NCAA sports rosters would have a numerical cap. That would be the way to determine how many student-athletes a school can have for a particular sport. Now, some have criticized or at least observed that this proposal will likely allow wealthier schools to provide financial benefits to more athletes and possibly gain a competitive advantage. It remains to be seen whether the final settlement, if approved, will change that component.

Let's be clear. This is merely a framework. It is a proposed settlement. It has not yet been approved, and it's worth repeating. This has not yet been approved. The settlement has been submitted to the judge in the Northern District of California for preliminary approval. But overall, there does seem to be some level of confidence that it will be approved, and it will be executed at least largely in the format that it is being proposed right now. Today, we're going to talk about the settlement and the settlement framework as if we're assuming it does get executed. That's how we'll talk about what we think the consequences of this settlement could or will be.

Chris, we've been bombarded with questions about this settlement and about what is going to happen if and when this settlement is executed. Really, we keep getting some of the same questions or mostly the same questions over and over and over again. I think what's going to make some sense is to ask those questions and then answer them right here as best we can. Let me start with a big kind of overarching philosophical question that we've gotten a lot, which

is does this settlement mark the end of amateurism, and is the NCAA based basically going to become a professional sports league? Chris, what do you say about that?

Chris Brolley:

Yes. I think some will say no. But if we're really being honest, I think the answers to both of these questions, is this the end of amateurism and is the NCAA becoming professional sports, I think the answers are really yes and yes to both questions. If we take a look at amateurism, amateurism is essentially the participation in a sport on an unpaid rather than paid professional basis.

In college, instead of being paid, the student-athletes, as we know, receive a scholarship and related benefits. This has essentially been the standard for the NCAA since it was founded in 1906 and is also the model or standard that Supreme Court Justice Kavanaugh criticized the NCAA for in *Alston* when he said, and I quote, "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." That theory he referenced is amateurism, which after scores of litigation now looks to be dead, especially after the \$21 million pool that schools are required to pay its players from.

Now that amateurism is effectively dead, I think the question on everyone's mind is are college sports now a water-down version of professional sports instead of the free labor pipeline to the professional leagues that it used to be? I would argue that, yes, college sports, at least for the major conferences and revenue-generating sports, has already shifted or will shift to a professional model. If you look at a few of the main major sports, you take a look at college football. I think this has long been a professional sport already or at least a minor league to the NFL. The *House* settlement just solidifies this as football players at major universities are expected to command the overwhelming majority of the \$21 million pool.

I think the same can be said for men's college basketball, which to a lesser degree is as popular as college football. It may be if you look at women's college basketball as well. At some schools, this will absolutely change. I think this is coming at an interesting time for women's basketball as the sport is becoming increasingly popular in the WNBA and in the college ranks, especially now that the NCAA back in 2021 has finally allowed the women's basketball tournament to use the name March Madness for its phrasing and branding.

If we look at other non-traditional sports, maybe to a lesser degree college hockey, college baseball, the perennial College World series participants would likely benefit. But I don't think it would shock anybody if these schools allocated money to the baseball programs as well.

Cal Stein:

Completely agree, Chris. I think anyone who fights the notion that amateurism is dead and college sports aren't becoming professionalized is really fighting an uphill battle. All right, let's go to the next question that I think we've got asked quite a bit, which is what about NIL, and what about collective? What does this settlement do to NIL and to collective?

Let's be clear on something. In my view, NIL is not going anywhere, at least not based on this settlement. It's just that NIL will no longer be the only or perhaps even the primary way that

student-athletes can earn money. As everyone knows, currently, schools cannot make payments directly to student-athletes. That may change in the settlement. But right now, they cannot. Student-athletes can earn money through NIL deals with third parties. What that means is that NIL is currently the only source of revenue for student-athletes. If this settlement goes through, that will change with the schools being able to pay up to \$21 million indirect payments to student-athletes every year.

That revenue-sharing really doesn't impact NIL. NIL, it seems, will remain allowed, and it will remain something that schools utilize to funnel more and more money to the best student-athletes, and that those student-athletes will be able to supplement whatever money they get from their school with NIL deals. Those just aren't going anywhere. What about NIL rules? The NCAA has all these rules. Some of which have been attacked. Some of which have been invalidated. What's going to happen with those?

Well, we don't really know what future NIL rules are going to look like or how the NCAA will get around future antitrust challenges to those rules if they seek to implement them. But if the NCAA does try to limit, for example, the amount that a school can pay athletes to the \$21 million or some other number, there have to be rules about NIL or else it virtually invite schools to circumvent that cap through NIL. We're going to have to come back to this and talk more about this a little bit later but also in the coming weeks months and years as this issue gets worked out.

Let's shift now and talk about collective. What is going to happen with collective? Well, as you may imagine, since NIL is not going anywhere, at least not right now, collectives aren't going anywhere either, at least not yet. There is a general belief out there that, eventually, the NCAA is going to allow what we call in *House* NIL, which is essentially allowing the schools to pay NIL deals to the players, in addition to whatever revenue-sharing payments get arranged. But we don't have that yet. If and when that happens, collectives will likely become marginalized. Maybe they'll even be rendered moot, but we're just not there yet. Until that happens, collective will continue to be the entities through which the student-athletes supplement their revenue-sharing money that they get directly from the schools with NIL deals.

All right, let's talk now about the next question that we get all the time, which is what about athletes becoming employees of school? Chris, what do you think?

Chris Brolley:

As it relates to the *House* settlement, no, at least for the time being. The *House* settlement does not address student-athletes as employees. While we don't know how these payments from the schools to their student-athletes will be made or characterized, the *House* settlement is between the parties named in litigation. I think that's important to recognize. Neither the parties to the litigation nor the terms of the settlement agreement have the authority or power to make all student-athletes employees.

I think as we have seen throughout the last year, the issue of student-athletes as employees will be legislated by either the NCAA, Congress, the states, or more likely a combination of all three. While unclear at the moment, it seems like likely, if not inevitable, that student-athletes will actually become employees in some form but not as a result of the settlement in *House*. I think

it's fair to say that the settlement, however, will speed up the process for student-athletes to become employees.

Given the money that will be changing hands, at some point soon, schools are going to want some of the things that come with employment relationships, namely employment contracts. Right now, student-athletes are allowed unlimited transfers. Nothing is tying a student-athlete to a given school. Schools are going to be recruiting these student-athletes, coaching these student-athletes, and now paying these student-athletes, with the student-athlete being able to transfer out whenever they want.

I think it's fair to say or to think that schools are going to want some more control and/or some way to make sure they get a return on their investment. One solution that we've thought of is maybe the schools draft employment contracts with certain transfer limitations or requirements that the student-athlete be enrolled at the school for two, three, or even four years.

Cal Stein:

Now, let's talk about another question we get all the time, which is what about the Title IX of it all. This is a question we get all the time. Unfortunately, it has the most unfulfilling answer, which is really we don't know how Title IX and this settlement are going to interact and how and what the resolution is going to look like. There's really no question that if this settlement goes through, it will mark a new day for Title IX.

Now, everyone knows Title IX is the federal law that prohibits sex-based discrimination at colleges and universities that receive federal funding. Specifically, in practice, it requires schools to pay out scholarships and other benefits in equal proportion to women that they do for men. How do we reconcile this settlement with Title IX? On the one hand, Title IX hasn't gone anywhere for it to be amended, much less eliminated. I'm certainly not suggesting that will be the case. But for anything like that to happen, it would take an act of Congress, US Congress in Washington. We don't have that yet. We don't have anything close to that yet.

From that perspective, one could argue that this new paradigm of college sports that could emerge from this settlement will have to fit itself into Title IX and not the other way around. On the other hand, that just isn't really all that realistic, is it? If schools now have, let's say, \$21 million in revenue-sharing money to pay student-athletes, I don't think it's all that realistic that a major school with a major college football or basketball program, for example, is going to devote \$10.5 million to male athletes and \$10.5 million to female athletes. That simply cannot be what the NCAA and the Power conferences, which let's be honest, are called the Power conferences because they have major college football which is exclusively a men's sport. That just can't be what they envisioned when they proposed this settlement.

Where does that leave us? Well, I think schools are likely going to make the determination for themselves about how Title IX applies to these revenue-sharing payments to student-athletes. What that means is really, altogether now, more litigation. It seems very likely to me that if this settlement goes through, it's going to lead to Title IX litigation about whether and to what extent schools must pay out that \$21 million, for example, equally to men and to women. That's something we're going to have to really, really follow in the coming weeks, months, and years.

All right, shifting from Title IX back to the NCAA as an institution, another question we get, Chris, is what about the NCAA generally? Will this settlement save the NCAA which has become more and more marginalized recently? What do you think? I think for now, yes, it will. I think the NCAA is certainly facing an existential crisis. One question we've been getting is why the NCAA would roll over and accept the settlement, but the NCAA really had no choice for several reasons, several main reasons.

There are many, many ongoing lawsuits against the NCAA, and this settlement will not resolve all of them. The NCAA was losing many of these cases. In reality, it was just a matter of time before schools realized they didn't need the NCAA anymore, as there been discussions around some of the power conferences breaking off and forming their own sports leagues without the NCAA's involvement. At bottom, the NCAA needs schools more than schools need the NCAA. That is why I think or we think the NCAA agreed to this. It's a path forward where the NCAA continues to exist and have some role, albeit a more limited one, in the administration of college sports.

These conferences could still break off and form their own sports league. However, the NCAA for now gets to stay at the forefront of college athletics. This is why we at *Highway to NIL* have been talking and beating the drum for over a year now about NIL enforcement by the NCAA. We'll continue to talk about it because the NCAA now more than ever needs to justify its existence. It still has rules in place which will remain in place until it codifies new rules. But as long as the NCAA exists, it will have rules to enforce.

Cal Stein:

Yes, quite right, Chris. We've talked a lot about how the NCAA really staffed up. They hired all these investigators. They hired all this enforcement personnel. Not really sure what they've been doing, but they got to do something, and they will. All right, let's talk now about the last kind of big question that we get asked about this settlement which is, is this settlement the end of the NCAA's legal issues?

As you mentioned, Chris, the NCAA has been besieged by litigation. Candidly, it's been getting crushed in court over and over again. This is actually the question that we've asked today that is the easiest to answer. The answer is, no, this is not the end of the NCAA's legal issues, not by a long shot. We just talked about how Title IX litigation is likely coming. That's probably just going to be the tip of the iceberg. We've identified, I think, at least a few categories of legal challenges that are almost certainly going to face the NCAA, even if they execute on the settlement.

The first category, I think, are more antitrust litigation. Crazy, right? I mean, the whole point of this settlement is to resolve antitrust issues, but here I am saying that it's going to actually pave the way for more antitrust challenges to the NCAA. But I don't see any real way around that. What jumps out right away is the \$21 million revenue-sharing pool. Another word for that \$21 million is a cap, perhaps a salary cap one day, for lack of a better term. The settlement proposes that cap on the payments a school can make to the athletes.

First, that figure is, if I'm being honest, probably a little bit low. In professional sports, for example, players get approximately 50% of the revenue, not the 22% maximum that is proposed in this settlement. This is all to say it just seems like a matter of time if this settlement

goes through that student-athletes look at the figure and think, "Boy, we should be getting more."

If we've learned nothing from the past year or so, it's that they're likely to claim the cap is an antitrust violation or, in other words, collusion by the schools and the NCAA to artificially keep payments to them low. That argument has some logic to it, and it's also arguably consistent with the antitrust victories student-athletes have been racking up against the NCAA in these class action litigations recently. Unfortunately, for the NCAA, even if the settlement goes through, we might be right back here before too long, unless there is some other shoe that is to drop.

The next category of legal action, I think, involves the NLRB and unions that is likely coming for the NCAA, regardless of the settlement. Chris, talk about that.

Chris Brolley:

I think this is an interesting aspect of the entire settlement. Early this year, I think we all know the issue around the Dartmouth men's basketball team, and they voted to unionize by a vote of 13 to 2, which was then approved by the regional NLRB, which will remain a major issue but for now for different reasons. If we look at the professional sports leagues, these leagues share revenue that the owners and players agree on by way of a collective bargaining agreement. Those, we'll call them CBAs, provide legal protections to the teams from lawsuits by athletes over the terms of their compensation or related rules. I think we see a lot of this with Major League Baseball, with the National Football League, and the National Basketball Association.

Of course, as discussed earlier, pro-athletes are employees, while student-athletes are not employees. There's no collective bargaining agreement or no collective bargaining opportunities for the student-athletes yet. However, I think this may raise another issue, and it's something you touched on earlier is the possibility of an antitrust exemption. The NCAA has been lobbying Congress for several months and years to give it an antitrust exemption the way that the professional sports leagues famously have it. I don't think this is something that the NCAA would like to have. I think it's something the NCAA needs. I think such an exemption is really the best if not only way the NCAA can avoid the antitrust issues it's currently facing and may certainly face again in the future with the discussion of the \$21 million cap that we've discussed earlier.

Take, for example, the Tennessee Attorney General's suit against the NCAA, the one that famously resulted in the Tennessee Federal Court issuing an injunction that essentially gutted the NIL restrictions. When asked about the settlement, the *House* settlement, the Tennessee Attorney General released a statement that was clear his NIL lawsuit was going to continue, even if the *House* settlement went through. He said, and I quote, "The NCAA's behavior has been illegal and unfair, which is why we filed our suit and why a federal judge ruled in our favor and issued a preliminary injunction to stop the NCAA's illegal behavior. We will run every legal play in the book to protect Tennessee's student-athletes."

Essentially, if the NCAA really wants to get out from under the thumb of the United States' antitrust laws, and by that I mean the NCAA wants to be able to regulate things like name, image, and likeness and impose things like a revenue-sharing cap without fear of facing antitrust litigation, the NCAA needs this antitrust exemption.

Cal Stein:

Now, let me address what I think is a third category of legal issues that may be coming for the NCAA, regardless of this settlement. It's a little bit of an indirect issue but one that I think is worth mentioning nonetheless. These are what I'm going to term NIL lawsuits, for lack of a better term. This hasn't really materialized yet, but it is, oh, oh, so close. What I'm really talking about here are student-athletes who bring law suits to recover NIL money that was promised to them but not paid for whatever reason. We raise this because very recently we've seen what I would call the bellwether case in this category, the case brought by a highly touted college football prospect, Jaden Rashada, about his recruiting.

I do want to note at the outset, look, his lawsuit is not against the NCAA. It's against one of the schools that recruited him and certain individuals who were involved in his recruitment. But I want to talk about why this lawsuit is important nonetheless to the legal future and litigation future of the NCAA. It goes back to the Tennessee Attorney General lawsuit and the preliminary injunction that the Tennessee Court issued that Chris just mentioned. That preliminary injunction, as we know, eliminated what's called the NIL recruiting ban, which prohibited collectives from offering NIL deals to student-athletes before the student-athlete committed to a school. Essentially, it was to prevent collective from inducing student-athletes to come to a particular school by engaging in a bidding war.

The lawsuit by Jaden Rashada alleges, essentially, that a school sought to induce him to come through a collective offering an NIL deal. This would have been a clear violation of the NIL recruiting ban. But since the Tennessee Court struck that ban down, it's no longer a concern, and the Tennessee preliminary injunction paved the way for this suit and what I believe are going to be many other suits just like it.

Now, will a student-athlete who feels jilted by his or her recruiting process and that they lost out on money, will one of those student-athletes eventually bring one of these suits that reaches the NCAA itself, in addition to a school and personnel and coaches and collectives? Maybe, maybe not. It would probably take some creative pleading by an attorney to get the NCAA as a party. But the bigger issue is more that these suits against schools, against coaches, against athletic department personnel, they're almost certainly coming. More of them are coming. Whether the NCAA, the organization is named as a party or not, could very well become a secondary issue to public perception.

That's something we're going to have to look at, and that is something that I think is ultimately why we are headed for in *House* NIL because these collectives, at least in this situation, have been accused of making a promise they couldn't keep. We know there are likely other people out there who are going to make similar allegations.

Okay, with that, we are out of time here today. So I want to bring this discussion about the *House* settlement to a conclusion. Chris, I really want to thank you for joining this podcast. I also want to thank everyone for listening. If you have any thoughts or any comments or any questions about this series or about this episode in particular, I invite you to contact me 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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