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***Highway to NIL* Podcast: *Johnson* Case's Potential Impact on Colleges, NIL, and College Athletics**

**Host: Cal Stein**

**Guests: Mike Lowe and Tim Bado**

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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 to discuss a recent decision by the Third Circuit Court of Appeals that shed some light on at least one appellate court's view of whether student-athletes could ever be considered employees of a university. I'm talking, of course, about the *Johnson* case, which has been percolating for a few years. This is one of the cases that we have been waiting to be decided. And I do want to be clear, the decision by the Third Circuit did not decide that all student-athletes are in fact employees or even that the subset of student-athletes who brought the case were employees. It merely discussed and decided that it is possible, in some circumstances, as between a student-athlete and a university, it is possible for that student-athlete to be considered an employee for purposes of federal laws.

There is, of course, a major employment law angle to this decision, and we at Troutman Pepper have a litany of wonderful employment attorneys who are focusing on those aspects. But we're going to stay in our lane on *Highway to NIL* and focus on the impact or the potential impact of this decision on colleges, on universities, on NIL, and on college athletics generally from a practical perspective. But before we get into all that, I do want to introduce my two colleagues who are joining us here today, Mike Lowe and Tim Bado.

Mike, you want to introduce yourself first?

**Michael Lowe:**

Thanks, Cal. And once again, a pleasure to join you on the program. For those who don't know me, I'm also a partner at Troutman Pepper. Prior to joining the firm, I was a federal prosecutor for about 25 years, and my practice here at the firm includes not only providing advice to entities involved in college athletics, but also conducting internal investigations for such entities and for employers, corporations, and representing other individuals in connection with various government investigations. I'm happy to be here once again, Cal. Thanks.

**Cal Stein:**

Thanks for joining us again, Mike. Tim.

**Tim Bado:**

Thanks for having me, Cal. My name is Tim Bado. I'm an associate at Troutman Pepper in our Atlanta office, and my practice primarily focuses on government investigations and a litany of white collar litigation including state attorneys general investigations, which we have followed closely with all of the antitrust and employment concerns that have been raised against the NCAA.

**Cal Stein:**

Thanks for joining us, Tim, and thanks for joining, Mike.

Okay, so let's start with a little brief overview of what this *Johnson* case is all about. I'm going to take a moment to just recap it very briefly and I want to actually start with the issue, what the Third Circuit was tasked with deciding. And I'm just going to read right from the opinion because the Third Circuit very succinctly stated the issue before it. And they stated it as whether college athletes by nature of their so-called amateur status are precluded from ever bringing an FLSA claim. That's the issue as stated by the Third Circuit. Okay, so now let's work backwards. Let's talk about what this case actually is in very brief and summary terms. The case was brought way back in 2019 by student-athletes at several Division I schools. They filed a complaint against both the NCAA and the schools themselves alleging violations of the Fair Labor Standards Act, which is a federal law, as well as some various state law claims.

Their argument is that they, as student-athletes, are entitled to minimum wage for the time they spent representing their schools in athletic competition. The schools, on the other hand, moved to dismiss the complaint, arguing ostensibly that student-athletes are amateurs and amateurs have historically never been considered employees. The district court that first heard the case denied the motion to dismiss, and the NCAA and the schools appealed that decision, which brought it to the Third Circuit, which brought it to the decision we're here to talk about today. That is the backdrop of this case, which makes it nominally an employment case. They're talking about things like employee status, federal labor laws, state wage laws. But if you dig in, what this case is really about, at least in my opinion, is amateurism. The NCAA and the schools, their primary argument is that student-athletes are amateurs and amateurs are not employees. And really, that is what the court spent a lot of time evaluating in reaching its conclusion.

So I want to flesh that out a bit and I want to start with the NCAA and the school's arguments, their positions before the Third Circuit. Tim, can you flesh that out for us a little bit?

**Tim Bado:**

At a high level, the athletes are saying that, look, the NCAA and the member institutions significantly, in a lot of cases, profit off of the student-athletes themselves and their efforts in their sporting events. But the NCAA has bylaws that prohibit the member institutions from offering wages or any kind of benefit to the student-athletes, and they forbid student-athletes from accepting any of these benefits. And in fact, the NCAA goes further by having bylaws to enforce these rules, and they even prescribe sanctions for violating the bylaws, which are pretty significant. They include a suspension or a termination of the student-athlete, a suspension of the coaching staff, and a disqualification from team activities. So these are severe sanctions that the NCAA can hand down to student-athletes.

Now, the school's position in the NCAA take the approach that while they do not earn wages, the student-athletes do still confer some benefit to this, which includes increased discipline, a stronger work ethic, improved strategic thinking, time management, leadership skills, and so on and so forth. But I think what the athletes also allege is that, look, these are soft skills that don't come anywhere near adequately compensating the student-athletes for their services.

**Cal Stein:**

Thanks, Tim. Those are the battle lines, right? Those are the different arguments that were advanced before the Third Circuit. And again, I think it's worth repeating that the decision by the district court in the Third Circuit is not whether these particular athletes or any particular athletes are in fact employees, but merely whether they could ever be, whether circumstances could exist that they would be employees because the schools and the NCAA's position is, no, because they're amateurs, they can never be employees. And as we know, ultimately, the Third Circuit determined that it could be possible for them to be employees under certain circumstances. We'll get to that in a little bit.

So let's talk now about the decision that the Third Circuit reached, and again, we're not going to focus too much on the minutia of the employment law on which the court relied. We're going to focus mostly on the practical aspects of the ruling for schools. And Mike, the first thing that the Third Circuit wrestled with in this case was determining employment status of college athletes. And really, this was perhaps a harder than expected question for the court because it really identified some tricky issues like whether an athlete's participation in sports is sui generis or done purely for pleasure such that it doesn't even qualify as "work". Talk to us a little bit about how the court raised and then analyzed that issue.

**Michael Lowe:**

Cal, the first thing that jumped out at me when I read this was the majority opinion's complete rejection of the term student-athlete. And that's a term that people who practice in this space, you and I and Tim, for example, use that term on a daily basis. And in fact, I was listening to Tim and he used it several times in his discussion of the arguments, and yet the opinion makes clear they're not going to use that term, and they rejected the term because of the history. Judge Restrepo's majority opinion laid out how it really was the NCAA who came up with the term student-athlete, and he looked at it as a marketing invention designed to conjure the nobility of amateurism, which he believes or the majority opinion believes the NCAA uses as a means of controlling the status of these students to prevent them from being employees.

That, right away, was a big signal to me. And as Tim and you mentioned, there really is this focus on the entire amateurism model. And as I read the majority opinion, it was a rejection of that amateurism model that the NCAA has been advocating in pretty much all of the litigation that we've seen. So from the perspective of the NCAA, that's obviously problematic, right? And in terms of reaching its decision, as you pointed out at the outset, this is a very fact-specific ruling in a sense. What the Third Circuit did was essentially say it really is going to depend. College athletes can be employees, but they're not necessarily employees, and it's going to depend upon the facts of the particular individual's relationship with the school, with the sport.

There were some specific legal rulings like rejecting the *Glatt* factors. *Glatt* was a Second Circuit case analyzing whether interns are employees and the district court here had used the *Glatt*

factors and the Third Circuit majority opinion said, "No, we're not going to use those factors." And it came up with a whole set of other considerations that should be looked at. But ultimately, when you strip it down to its essence, what this opinion says is that college athletes can be employees under the Fair Labor Standards Act under certain circumstances, and those were when they perform services for another party necessarily and primarily for the other party's benefit under that party's control or right of control and in return for express or implied compensation or in-kind benefits.

What does that mean? To me what that means is this is getting kicked back to the district court and in order for a student to demonstrate that they were actually an employee, it's going to be a fact-specific showing that they are required to make individually, at least that would be the position I think the schools and the NCAA will take.

**Cal Stein:**

Yeah, I agree with that and I'm glad you mentioned the four specific factors that the Third Circuit identified. And once again, they are, one, whether the student performs services for another party, two, whether necessarily and primarily for the other party's benefit. Three, whether they're under that party's control or right of control. And four, whether they're in return for express or implied compensation or in-kind benefits. And what I found interesting is that, sure, like in many of these cases, the Third Circuit identified these factors and said, "Look, if they're present, if you can prove them, then yes, maybe you could be considered an employee." But the converse I think is also true, which means if these factors are not present, if a school or the NCAA could structure a relationship or demonstrate through evidence that one or more of these factors were not present and the kind of cumulative circumstances weighed in their favor, this could be helpful guidance for schools and the NCAA in terms of how to avoid the characterization, the classification of students or student-athletes, whatever you want to call them, as employees.

**Michael Lowe:**

Yeah, Cal, I agree with you there. And there was a specific sentence towards the end of the majority opinion where it stated that really what this come down to is that there's a need for an economic realities framework that distinguishes college athletes who play sports for predominantly recreational or non-commercial reasons from those whose play crosses the legal line into work protected by the FLSA. As I read that, and as I think Judge Porter's concurring opinion reads that is that you're going to have very different results depending upon who the athlete is. For example, as Judge Porter pointed out, if you're talking about the starting quarterback from a power four conference football team versus someone who's playing on the bowling team for a D-I school, their intentions, their motivations and the nature of their relationship is not going to be one-size-fits-all. It's going to be different.

And I think from the perspective of what can schools and NCAA take away from this that will allow them to have some means of contesting this sort of broad approach that plaintiffs want to take, it's that, it's that not every student, even under the *Johnson* ruling as currently written, would qualify as an employee, some may.

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**Cal Stein:**

I like that concept of one size does not fit all here, and I fully agree that Judge Porter's concurring opinion puts a fine point on that. We're going to talk about that concurrence in a little bit. But before we do, I want to pick up on something else you said, Mike, which was the majority opinion of the Third Circuit's complete rejection of the notion of amateurism and that as a justification for the schools and the NCAA claiming these student-athletes can never be employees. Now, we've talked about the first part of the opinion where the Third Circuit held that they could be employees under certain circumstances.

And candidly, the Third Circuit could have, and I thought might have ended the decision there or pretty close to there, but it didn't. It has an entirely separate section of the opinion, which I think can only fairly be described as a takedown of the NCAA's argument about amateurism and how the history of amateurism really doesn't have any bearing on the decision here. And much of this section, at least I believe, comes directly as a result of the Supreme Court's decision and the language of its decision in the *Alston* case. And that includes the Third Circuit here directly quoting Justice Kavanaugh's concurrence, which we have quoted extensively on this podcast.

So Tim, talk to us a little bit about this section of the decision on amateurism and some of the takeaways that you had.

**Tim Bado:**

I think this was probably the most interesting section of the entire opinion, at least from my perspective, because as you pointed out, Cal, the court could have stopped and it decided to move forward and just continue kind of a withering analysis of the NCAA's amateur model as we've discussed. And I think what you've properly pointed out was that they immediately go to the Supreme Court and specifically Justice Kavanaugh's concurrence opinion. And look, they make a couple of really interesting points here too. They acknowledge that, look, the NCAA's power to limit athletes compensation is not absolute. That was said in *Alston*, and they're reiterating it again here.

The Third Circuit also cites to the Board of Regents' decision from 1984 that the NCAA has relied heavily on for its amateurism arguments over the years. And they say that case did not expressly approve of every NCAA limit on athlete compensation. They point out that there's been no definition of amateurism and they refuse to elevate the amateur status as part of the legal test that Mike discussed. And I think that is really interesting as well. That analysis of the concurrence, I think, was a huge point and kind of a roadmap for these cases moving forward.

**Cal Stein:**

Yeah, I think the reliance and the quoting of Justice Kavanaugh was probably the least surprising component of that section of this opinion. But as you, and as I noted, the mere fact that the Third Circuit took it upon itself to continue this attack on the notion of amateurism is certainly meaningful in and of itself. So that's the majority opinion, relatively straightforward, the two components that we talked about. Now, I want to talk about the concurrence by Judge Porter, which Mike mentioned, and which I think is critical for any school or institution to read and understand. We've all been to law school, we all know that sometimes you read the majority and you can bypass the concurrences and dissents, at least for the time being. I would

encourage everyone to read Judge Porter's concurring opinion here because it is really interesting. And even though it is a concurring opinion, it only concurs in the ultimate decision, only in the judgment. It doesn't adopt or agree with all of the reasoning of the majority.

It actually makes clear that Judge Porter believes there are some real issues with the reasoning and the ultimate decision by the majority that these students could in fact be employees under certain circumstances. And that's why I think it's so important for schools to pay attention to it.

I want to pose a rhetorical question to both of you, which is, does this concurrence give a roadmap of sorts to schools for how they can at least try to structure these relationships with their students and student-athletes going forward to avoid or mitigate the risk that they will be considered employees one day? And within the context of that rhetorical question, I want to go through the different issues that Judge Porter identified. I'll introduce them and then open it up to both you, Mike, and you, Tim, for some thoughts.

The first issue that Judge Porter identifies in his concurrence is his own rhetorical question, which is, is playing sports work. Should playing sports be considered work? And this is what Porter wrote. He said, "Plaintiffs alleged that their college athletic experiences constitute work, but that allegation has not been proven. And unlike the independent contractor and intern cases, it is not a given here."

Mike, Tim, what do you guys think about this?

**Michael Lowe:**

I talked about the difference between the starting quarterback of a large football team, right, and the member of the bowling team. First of all, I bowl so I don't mean to disparage bowlers.

**Cal Stein:**

You're a good bowler.

**Michael Lowe:**

Thank you. But the reality here, as we've discussed in the NIL space, the type of NIL money that you're going to see getting paid to the star quarterback versus someone on the bowling team, if there is even any money going to someone on the bowling team, it's not apples and apples, right? You're comparing apples to oranges. And I think that is the major takeaway here. In the grand scheme of things, I think the opinion, as well as the concurrence, does provide a roadmap of sorts for schools to try to navigate the distinction between their athletes as to who might be considered an employee and who might not.

**Cal Stein:**

Yeah, and I think you're raising a point about the question Judge Porter asks, is play work? Well, what's the play? It may differ from one sport to another, from one level of competition to another, and I think that's a very good and important observation here. Let's talk about the next issue that Judge Porter identified, which is, are athletics services? Arguably, that is related to the question of whether they're work and the answer may be the same, but this is what he

writes here. He says, "The majority's test immediately raises, but does not clarify, the critical distinction between service labor or work as distinguished from player sport. Student athletes serve the teams for which they play, but one's contribution in the service of teamwork does not necessarily create an employment relationship."

Again, we're reaching this distinction between service, labor, work on the one hand and playing sports on the other. And maybe it goes back to the point that Mike made, which is, well, it depends what sport you are playing. It depends what level of competition you are participating in.

Tim, what do you think?

**Tim Bado:**

I completely agree with that, Cal. But I think the interesting part of the concurrence here really focuses on definition of agency and how that's been viewed in the past. And it talks about a servant is a person employed to perform services for another with respect to physical conduct. Performance of the services is subject to another, and here's the other part that I think is important, subject to the other's control or right to control.

So I do think as we've discussed here at length now that it's not an apples to apples analysis. It's going to be very case-specific and sport-specific, but I think there's certainly an argument that can be made that playing athletics is considered a service.

**Cal Stein:**

All right, let's move on to the next issue that Judge Porter identified, which is when he asks whether playing sports is "necessarily and primarily for the university's benefit." And this is what he said about that. He said, "Student-athletes play or provide athletic services for the benefit of their team just as Division II, Division III, and high school. Athletes play or provide athletic services for the benefit of their respective teams. But something more is required to convert the majority's university as a beneficiary factor into a useful indicia of employment."

Interesting stuff there. And I think drawing out the comparison between Division I athletes to Division II to Division III to high school raises some interesting questions. Mike, Tim, any thoughts on that?

**Michael Lowe:**

Yeah, Cal, I think this really does come back to, when you strip everything away. In all of these cases, it's all about money, right? We're talking about when you have sports that are big business, revenue generators for schools, the athletes that participate in them want a piece of the pie. And as a result, we've had the evolution of the entire NIL model to provide a means for those athletes to get some compensation off of their name, image, and likeness. I think that if, and I'm going to I guess repeat this over and over again because I think big win, if you want to view it as such, is that there was no blanket rule laid down by the Third Circuit. This was not a ruling where all college NCAA athletes are employees. It is a fact-specific question. And ultimately, I think what will happen in the long term is that the more you find student-athletes

being deemed employees in non-revenue generating sports, the more likely it is those schools drop those sports as NCAA school sports and they become club teams.

You cannot make this argument for a club team, obviously, and a lot of schools have a lot of club teams. My son plays ice hockey. He's looking at some schools where he's thinking maybe he'll play club hockey. There's no chance that he's going to be deemed an employee if he decides on his own with his free time to play on a club sports team. And I think the further you take this down that line, that's where this winds up unless you can have some sort of resolution, which we've talked about, maybe congressional action or some kind of a global settlement. But ultimately, I think it all comes down to money and which sports are making money for the schools. And I agree 100% that not every sport is necessarily being played by a student for the school's benefit, 100%.

**Cal Stein:**

I'm glad you raised this because this segues beautifully into the last issue that Judge Porter identified, which is whether student-athletes are actually playing sports to receive in-kind benefits, to receive money, to receive compensation. And he raises here, I think, a really interesting question that gets at exactly the distinction you were just making, Mike, using club sports as an example. Judge Porter says, "What if an alleged employment relationship is voluntary and truly implicates no compensation arrangement or wage-like benefits for work in a commercial setting?" He then posits that "the Fair Labor Standards Act was obviously not intended to classify all such persons as employees, otherwise all students would be employees of the school or college they attended."

And it is in this part of the discussion that Judge Porter gets to the critical distinction between revenue-generating student-athletes, or I should say student-athletes who play revenue-generating sports and student-athletes who do not play revenue-generating sports. And this is what he says about that. He asks rhetorically, "How is the economic reality of a non-revenue student-athlete's relationship with his university different from that of a musician who's performing arts scholarship is conditioned on her time-consuming participation in a band or orchestra?" That I thought was a really interesting rhetorical question and one that gets right at a lot of the distinctions that we have been making here.

Tim, Mike, any thoughts on that?

**Tim Bado:**

I think it's a good question, a good point that was raised about the distinction between the non-revenue student-athletes relationship and how that's different from the musician. But that goes directly to, I think, Mike's point. It's all about money and the musician who's performing or someone who's there on an art scholarship, that is most likely not bringing in any money to the institution. And I think that is a critical distinction and factor that universities are going to have to grapple with moving forward.

**Michael Lowe:**

And Cal, going back to my whole club sports analogy, the reality is even students who participate in club sports wear jerseys with the name of their school and school team on their

jerseys. In a way they're representing the school in sort of an unofficial capacity, and they play oftentimes in leagues against other schools, and they're trying to win, and they're trying to win that league and get the championship and give some kind of, if you want to call it glory, to their school, which in a way, could be a benefit to the school. There have been club sports that have done so well that the school ultimately turns it into an NCAA team. I say that because if you're just looking at benefit, pretty much everything a student does that is positive to the school in some way can be said to inure to the benefit of the school. Same way, if they do something negative, it can be a detriment to the school. So I think there's a lot of questions ultimately here, and not a lot of answers, but it could have been a lot worse, is what I'll say.

**Cal Stein:**

It's a very interesting question and one that probably warrants some deeper discussion another time, because we are out of time here today, so I do want to bring this discussion to a conclusion. Mike, Tim, thank you for joining this podcast to discuss the *Johnson* decision. I want to thank you everyone for listening. If anyone has any thoughts or any comments or any questions about this series, about this episode, I invite you to contact any of us. You could 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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