
Highway to NIL Podcast: NCAA Settlement Hearing**Host: Cal Stein****Guests: Tim Bado and Pat Zancolli****Recorded: 9/10/24****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 two of *Highway to NIL* regulars, Tim Bado and Pat Zancolli. Recently, the NIL world has been waiting ever so patiently for resolution of the *House* litigation, which, as we have discussed in detail on a prior episode, is an antitrust case against the NCAA and power conferences among others. The parties to that case have actually reached a proposed settlement that would have upended the landscape of college athletics, including setting forth a proposal by which schools would pay student athletes directly on a go-forward basis.

In short, the proposed *House* settlement would have done nothing short of completely resetting the entire structure of college sports, including putting an end to the NCAA long-touted amateurism model in favor of something far more akin to professional sports. For this reason, quite literally, the entire college sports world, from schools, to conferences, to student athletes, to TV networks, literally everyone has been waiting with bated breath for the judge in the *House* case to weigh in on the proposed settlement.

Just last week, she did, though not exactly in the way that most people expected. We, here at *Highway to NIL* certainly expected that Judge Wilken would approve the settlement, thus paving the way for this brave new world of college sports, but that's not what happened. To the contrary, Judge Wilken, in a hearing last week expressed some concern over certain aspects of the settlement, and she declined to approve it as currently constructed. This, of course, does not mean the settlement ultimately won't be approved at some point in the future. But it does mean that the NCAA and the other parties have some work to do right now.

Today, we are going to discuss Judge Wilken's somewhat surprising comments and her concerns about the settlement, and we'll also look into the future a bit to talk about what those concerns mean for the NCAA and its member institutions. But before we dive in, let's do our introductions. Tim, you want to start us off?

Tim Bado:

Yes, sure. Thanks, Cal. My name is Tim Bado. I am an associate in our Atlanta office, and my practice focuses on civil and criminal government investigations and white-collar litigation.

Cal Stein:

Thanks, Tim. Pat?

Pat Zancolli:

Hi, everyone. My name is Pat Zancolli, and I'm a litigation associate in the Philadelphia office.

Cal Stein:

Great. Tim, Pat, awesome to have you guys here. Let's get right into it. So, let's start with a little bit of background on the hearing. Now, this hearing was held last week on Thursday, September 5th, and it was before U.S. District Judge Claudia Wilken. The purpose of the hearing was to decide whether Judge Wilken would, in fact, grant preliminary approval for the settlement that the parties had reached in the *House* case. Now, as we've discussed a proposed settlement between the NCAA, and its power five conferences, and the class of former division one athletes had been negotiated and presented to Judge Wilken.

Now, the structure of the proposed settlement is, again, by way of reminder as follows. First, the NCAA and the conference has agreed to pay roughly \$2.7 billion in backpay damages to former student athletes who argued that their earning potential was illegally restrained by the NCAA rulings during their college career. That essentially means that they were not allowed to get NIL when they played collegiate sports. Second, the parties also agreed to a revenue sharing system between schools and student athletes on a go-forward basis, that would allow schools to pay directly to student athletes up to a certain limit, something in the \$20 to \$23 million range per school going forward. Third, the structure of the settlement would have eliminated the traditional scholarship model for collegiate athletics in favor of a roster limit model.

Now, it's worth noting that this proposed settlement Did Not Address collectives and the role that they would or would not play going forward in collegiate sports. Though, we, here at *Highway to NIL* have hypothesized that collectives would remain and will continue to pay NIL deals to student athletes as a supplement, even if the *House* settlement is ultimately approved and revenue sharing between the schools and the student athletes goes into effect. So, the settlement proposal went before Judge Wilken, who declined at this hearing to grant preliminary approval of it, and she expressed a number of concerns with the proposed settlement, which we're going to talk about in a moment.

But what was somewhat surprising, at least for me, was her comment that the parties needed to kind of go back to the drawing board. While that may be the sentiment that Judge Wilken expressed, I'm not really sure that it's actually all that dramatic. It does seem clear to me that a deal between the parties can still be reached if the issues identified by Judge Wilken are addressed over the next few weeks. Still, NCAA President Charlie Baker expressed disappointment over the outcome of the hearing, saying, "It did not go as we hoped."

That's what happened. Let's now get in and talk about the concerns that Judge Wilken raised. Going into this hearing, there were certainly no shortage of parties who had raised objections to the proposed settlement. Though, many of those objections were financially driven by schools

and by conferences who were concerned about the economic fallout on their institutions by the proposed deal. While there's no question that those grades may be valid for those schools and conferences, they really weren't the focus of the criticism that Judge Wilken expressed.

Tim and Pat, why don't you guys take us through what Judge Wilken did say and what criticisms and issues she did raise. Pat, you want to start us off?

Pat Zancolli:

Yes. Thanks, Cal. I think, first and foremost, Judge Wilken was concerned about the relief itself that's offered in the settlement agreement as written. One thing I took away is that, she recognizes that student athletes have the opportunity to make a lot of money for their NIL rights in the current landscape. She doesn't want them to be worked off as a result of the settlement agreement. Another thing is, she recognizes that this settlement agreement not only needs to compensate student athletes for the issues. But also, needs to cover non-monetary relief, recognizing that there's going to be, like you said, a new era of college sports that we'll be moving into, and wanting to make sure that the rights and responsibility of student athletes and schools are adequately spelled out moving forward.

Then lastly, what I found to be maybe the most interesting on this concern is just some skepticism in terms of how the damages will be paid out and who will receive them. So, she raised to the parties. How is this money going to be paid out? Will student athletes receive checks? Will it go through Venmo? How will those who are entitled to relief be notified that they're entitled to that relief? The parties currently have proposed a system with postcards and a website, but I think she believes that that system might be insufficient to adequately notify those who are entitled to the damages to actually receive them.

Cal Stein:

Yes. Thanks very much, Pat. Tim, what else? What were some of the other concerns?

Tim Bado:

Yes, my takeaway from the hearing was Judge Wilken's concern about the impact on NIL rights. Specifically, she raised concern over a clause requiring any money boosters provided to athletes to be for a valid business purpose. Which to me was unclear why the parties attempted to distinguish pay for play as prohibited form of payment when the settlement explicitly calls for colleges to pay student athletes for media rights, ticket sales, sponsorships, and NIL.

So, I think the concerns that this would deprive student athletes of NIL opportunities and actually make them worse off as part of the settlement than they otherwise would have been. Another concern Judge Wilken raised was that the agreement should not allow NIL deals over \$600,000 to be blocked if a third party deems them to be above fair market value. Her quote was something to the effect of, "Taking things away from people is not very popular." I think that certainly is going to be true. Also, I think an issue raised is going to be, what is fair market value. I mean, that's going to be very difficult to assess in the NIL space. Finally, the terms may

not be enforceable legally anyways, given that the definition of the word booster is very unclear. So, there's just a lot of ambiguity still at the future of NIL rights.

Cal Stein:

Yes, certainly, that those issues have been a little bit unclear, and Judge Wilken believes they remain unclear. Maybe we'll get some clarity coming out of this. Pat, what about the question we always get, which I think Judge Wilken asked as well. What about the Title IX of it all? What did she say about that?

Pat Zancolli:

Yes, Cal. It's no surprise that Title IX came up amongst her concerns. I think she recognizes that the interplay of Title IX and NIL in the future of compensation for college sports is a bit unclear at this point. I think she looked at the terms of the settlement agreement itself and the revenue sharing model that would exist there within. And is a bit concerned on how women student athletes would largely be treated less fairly, perhaps, than some of their male colleagues.

I think some of the current figures that we're looking at is men's football players would get 75% of the settlement proceeds, while 20% would go to men's and women's basketball, and then 5% for other athletes. So, you can sort of see where some of those fairness concerns might arise, specifically as it relates to women student athletes. I think another thing that she is looking at, maybe more towards the future, is that this model that we seem to be moving towards will probably lead to some sort of related litigation. She wants to make sure that the terms of the settlement agreement doesn't protect schools from any sort of Title IX claim if and when that does occur.

Cal Stein:

That's something we've talked a lot about on this podcast, how this big settlement seems like it should be the end of the NCAA legal wolves. But probably just the beginning, because it will spur a lot more litigation, including over Title IX. Tim, let me ask you about one other thing. There was some criticism that Judge Wilken had about, or some observations perhaps, about the future college student athletes and how this settlement would impact them, and the NCAA. Talk to us a little bit about that.

Tim Bado:

Yes. Judge Wilken's primary concern there was that, future student athletes are going to be restricted, so to speak, by the terms of this 10 year-long settlement. So, before they even begin their college career, there are going to be restrictions in place. Now, the lead plaintiff's lawyer responded, and I think fairly that, if future student athletes believe that the revenue agreement is an unfair restriction on trade and they can always file a new antitrust lawsuit once they begin their own career.

I think one of the issues or examples that Judge Wilken raised there was, this perceived cap on student athlete earning potential, and how that could possibly raise new antitrust issues. She also said that, the settlement agreement should not let the NCAA off the hook for future challenges, the same in the Title IX context that Pat just talked about. Who will represent these student athletes and potential challenges moving forward? So, there are just a number of questions, and again, more ambiguity as to the future of student athletes.

Cal Stein:

Yes. Twice, Judge Wilken made specific comments about not wanting to let the NCAA off the hook for future litigation. When you really dig in, maybe it's a little easier to see why Charlie Baker was so, "disappointed" with the way that this went. Those are the primary concerns that Judge Wilken raised. She said, "Look, it's back to the drawing board." But she also said that, maybe the parties could still reach a resolution by working through these issues. So, let's now ask the million-dollar question, or perhaps the multibillion-dollar question as it were. What happens next?

Now, per Judge Wilken, the parties are now required to confer regarding the proposed settlement agreement and either clean up, or remove, or revise the language that she took issue with. The attorneys for the parties now have three weeks to rewrite those portions of the settlement agreement and then present a revised version to Judge Wilken. The next hearing will take place on Thursday, September 26th, which is actually my birthday. Maybe we'll get a birthday present of a *House* settlement on that day. When that happens, Judge Wilken will either approve the revised agreement or she can again decline to do so. In which case, the case would actually move a little bit closer to trial.

Now, overall, I think there remains cautious optimism that a deal will, in fact, get done. One way to view Judge Wilken's comments is that of something of an endorsement of the overall, general structure of the settlement. Because the comments largely focused on details, we'll call them, one could interpret her comments as approving generally the high-level structure of the settlement, and just wanting to clean up a few details. If that's the case, that would absolutely lead to optimism that a revised settlement could be reached. But another view is that, and I'm not withstanding her lack of criticism of the overall structure. The details that she has picked on have a significant enough impact on the overall structure to cause some real concern about whether the parties are going to be able to reach a revised settlement.

For example, and we talked about a moment ago, Judge Wilken picked right up on the title nine implications of the proposed settlement. This is something that we've questioned for some time, because the revenue sharing approach of the settlement does not really match with strict application of Title IX, and we've actually questioned whether Congress would have to step in and amend Title IX, unlikely. Or, whether the issues would have to be resolved by private litigation, far more likely.

In that sense, perhaps critics of the settlement have an opening to believe that the deal will fall apart, based on Judge Wilken's comments. Now, my view here at *Highway to NIL* is that a deal is still likely to get done. They may need more than three weeks. They may need more than one set of revisions here. But overall, the NCAA seems to me very motivated to get this deal done. So, one way or another, it will probably happen.

With that, let's talk now about what schools can and arguably should be doing, or at least thinking about doing right now, while the settlement. and really the future of college sports is in this limbo state. Pat, let me just put the question out there to you, and then to Tim. What should schools be doing? What's one thing schools should be doing or thinking about doing right now?

Pat Zancolli:

I think, big picture schools should brace themselves for, as what you've said, could be a long road from the current amateurism model in college sports to one that will be likely eventually based on revenue sharing. As you alluded, there's still general optimism that the parties will negotiate revisions to the settlement and address our concerns. So, schools should continue to keep an eye out for that. As you've mentioned, the hearing next will be on September 26. So, they should monitor that case and see how the parties respond to Judge Wilken's concerns.

As you've also alluded to, it seems likely that the overall terms and settlement structure will remain in place as is, with some changes to the details. So, schools should continue to pay attention to how the terms of the proposed revised agreement will affect them. We don't see this necessarily as a situation where parties have been directed to go back completely to square one. So, any school thinking that some of the prep work and thinking that they've been doing based on the proposed settlement will likely be mistaken. The NCAA's council was clear that a continued prohibition on pay for play must be part of the final settlement. As we look towards this next part of the hearing, that will very likely be in there, which will indicate that the next set of the proposed terms will unlikely to be materially different.

Cal Stein:

Yes. I think that's generally right. The details are going to change. But if there's a deal to be reached here, the overall structure probably likely to remain the same. So, the work schools have done to date, preparing for the settlement probably still going to be really useful going forward. What do you say, Tim?

Tim Bado:

Yes. I think that's right. I mean, if the parties aren't able to come to an agreement, or at least come to an agreement, soon, schools are going to continue to have to operate within the current NIL landscape. Again, particularly, as the case plays out, which as we know, could include a trial. But with the perspective long term, the shift to a revenue sharing model is just over the horizon. Another thing this would mean, if parties could not come to an agreement, would be the continued enforcement of the injunction from the Tennessee and Virginia lawsuit. That's still in place as well.

As we have discussed on this podcast a couple of times, the injunction in many ways gutted the NCAA rules on NIL, particularly those related to the prohibition on using NIL in recruiting. However, many other NCAA rules regarding NIL remain unaffected by the injunction. So, if the settlement is not reached, we still do expect that the NCAA will shift its enforcement focus to those rules. However, many other NCAA rules regarding NIL remain unaffected by the injunction, and if settlement is not reached, we do, however, expect the NCAA to shift its enforcement focus to those rules. Something that schools should be prepared for if settlement falls through.

Cal Stein:

Well, lots to think about here and lots to pay attention to. September 26th will be here before we know it, and we will have even more information on the future of the settlement. With that, we are out of time here today, so I do want to bring this discussion to a conclusion. I want to thank you, Tim, and you Pat for joining me on this podcast. I also want to thank everyone for listening.

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