Highway to NIL Podcast: NCAA Settlement Update
Host: Cal Stein
Guests: Tim Bado and Pat Zancolli
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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 1 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 *Highway to NIL* regulars, Tim Bado and Pat Zancolli. About a month ago, we did an episode on *Highway to NIL* discussing the *House* settlement, in particular the criticisms that US District Court Judge Claudia Wilken had about some of its terms. During a much publicized hearing, Judge Wilken offered her criticisms and then told the parties that it was "back to the drawing board", giving them several weeks to negotiate and revise the settlement terms to address her concerns.

In my view, while Judge Wilken did have some real and specific issues with the settlement, it was actually far from back to the drawing board. Instead I believe the parties would take the time she gave them to renegotiate and revise some of the details of the settlement, and that is exactly what the parties did. Last week, the parties submitted their revisions to Judge Wilken in the hopes that she will now approve the settlement, and that is what we are going to talk about here today. But before we do, let's do our introductions. Let's start with you, Tim.

Tim Bado:

Thanks, Cal. I'm happy to be back. My name is Tim Bado, and I'm a litigation associate in Troutman Pepper's Atlanta office.

Cal Stein:

Thanks, Tim. Pat?

Pat Zancolli:

Hey, everyone. Good to be back. My name is Pat Zancolli, and I'm a litigation associate in the firm's Philadelphia office.

Cal Stein:

Okay, great. Let's start with just some brief background on where we are and how we got here in the *House* case. As I think most people know, attorneys in *House v. NCAA* submitted revised settlement documents to the US District Court last Thursday, September 26th. This submission occurred after Judge Claudia Wilken had previously requested that the parties go back to the

drawing board at a preliminary approval hearing held on September 5th due to concerns with the settlement agreement documents as they were drafted at that time.

As we discussed during our last podcast on this, even though those are the words Judge Wilken used, in our view, her actual criticisms of the settlement could fairly be described as secondary to the main points. At least in my view, it was hardly back to the drawing board, and there was always a good chance and at least guarded optimism that the settlement would still get done. Last week, on September 26th, the plaintiff submitted their amended settlement terms, providing redline edits to the agreement's language and terms, as well as an accompanying brief to the court regarding the settlement distribution plan and claim form.

This is where we're going to start today because this is the document where the parties outlined the changes to which they agreed in the time since the last hearing before Judge Wilken. I want to start by commenting on the overall structure of the settlement, and this is an area on which Judge Wilken really did not have many concerns during the last hearing.

The revised agreement still prohibits NIL collectives and boosters from entering into agreements with athletes, unless they can prove compensation as fair market value. It also requires non-institution third-party NIL deals with athletes to be approved by a clearing house if they are $600 or more. If the clearing house doesn't approve, a third-party arbitrator can deem a student-athlete ineligible or impose fines on the school. Conversely, student-athletes or institutions can challenge NCAA enforcement. The arbitrator sides with enforcement. The student-athlete can nix the NIL agreement to avoid risking eligibility. That's a topic we'll talk about a little bit later.

Overall, the structure hasn't changed all that much, if at all, in the interim period. But there were some things that really did change, and I want to talk about those here right now. Tim, start us off by talking us through the revisions that focus on NCAA enforcement authority.

Tim Bado:

Thanks, Cal. I think one thing to note here is we want to focus on the language that was changed from booster to now it's associated entity or individual. The intent here was to clarify the scope of the NCAA's enforcement authority, right? Now, booster was first defined as in the NCAA’s bylaws, which is a representative of athletic interests, and that is too broad.

This associated entity term is defined as an entity that is or was or should have been known to an athletic department of a university that exists for the purpose of promoting or supporting a particular school's athletics program or was treated or identified NIL opportunities solely for a particular school student-athletes. I mean, the individuals that can fall under this associated entity term as well are those who are members, employees, directors of any of these associated entities.

Interestingly as well, anyone who contributes $50,000 either directly or through an affiliated entity will also now fall under the NCAA’s enforcement authority. There were a couple of other examples as well such as an individual or entity that's been directed or requested by a school for the purpose of recruiting a student-athlete. Again, there were about five examples that fall under this associated entity term that really I think helps narrow the scope and further clarify this issue, as opposed to the overly broad booster term that first appeared in the proposed settlement terms.

Cal Stein:

Okay. Thanks, Tim. Pat, the other area of revisions that we see was to the distribution plan. Take us through those revisions.

Pat Zancolli:

Yes. Thanks, Cal. If you remember correctly from last hearing, the judge expressed some discontent with the plaintiff's distribution plan and claim form. She wasn't certain that as the plan was set out prior, student-athletes that were entitled to compensation would be sufficiently notified of their right to compensation and actually receive that compensation. In addition to the revised settlement agreement, the plaintiff's attorney submitted a brief that set forth this revised distribution plan and a simplified claim form. On the revised distribution plan, this addressed Judge Wilken's concerns by providing direct payments to Power 5 and Big East basketball students who plaintiffs' attorneys have identified would have received Alston Awards but for the NCAA's rules prohibiting that.

The second piece which was respect to the claim form, it simplified to allow those other student-athletes who are not within the Power 5 or Big East basketball students to seek settlement payment by requiring they only answer three questions to seat this payment. The claim asks, "Does the schools you attended between 2019 and 2020 offer Alston Awards? If yes, please state the criteria your school uses to determine eligibility for Alston Awards, and please check the boxes for each academic year that you can affirm you met your school's eligibility criteria listed above." These revisions are just to make sure that the money that is part of the settlement agreement is able to get into the hands of those student-athletes who are entitled to it.

Cal Stein:

Yes. To me, this was really the most interesting thing that came out of the filings last week. It remains to be seen what Judge Wilken thought about it, but I found it very interesting. Really, to me, it looks like there are two goals here from the plaintiffs. Number one, they want to simplify the process. That's a direct result of one of the comments Judge Wilken made about the complexity of the distribution plan as it was drafted earlier in September.

The second, as you noted, Pat, is to kind of maximize. Get more money to past student-athletes who would have had these NIL deals. Looking through the brief they submitted, this is what's jumped out to me as the key line in the brief. The plaintiffs wrote, Most Power 5 athletes and Big East basketball players would have received awards absent the NCAA's rules prohibiting them." Look, credit where credit is due, this, to me, is a big swing at simplifying things by the plaintiffs. Candidly, it's one that, I think, is probably relatively fair with one potentially big exception, which I'll discuss in a minute.

I want to talk about the impact of these revisions on the distribution plan. I mean, there are winners, and there are losers here within the class of student-athletes. I mean, the winners, I think, are obvious. It's the Power 5 and Big East basketball student-athletes. These revisions to the plan really benefit you. It's set forth right in that statement I just made where the plaintiffs think most of them would have received NIL money and given what we've seen that's probably fairly accurate.

Who are the losers? I mean, I think the losers in these revisions are probably the group of five and lower conference student-athletes, particularly the really good ones. Let me get now to that exception that I mentioned a moment ago. One of the things we've seen a lot of recently in this NIL world are lower-tiered student-athletes, particularly football players, being lured up to the Power 5 level with NIL offers.

Let's take for a minute, let's just take a look at the current football top 25 as it sits right at the beginning of October 2024. Just anecdotally, take a look. The number eight team in the country is an undefeated ACC team who has a quarterback who two years ago was playing FCS football. The number 23 team is an undefeated Big 10 team, off to one of its best starts in years. Again, they are starting a quarterback who was in the Mid-American Conference last year, a lower level group of five team.

These, of course, are just anecdotal examples, but they're in reality a lot more. These are just the ones that I can come up with by looking off the top of my head and scanning the top 25. These are just the highest profile examples because they're quarterbacks. If you do your research, you will find a lot more examples of lower-tier players at other positions jumping up into the Power 5 to play critical roles in their last or second to last year of eligibility.

We see the exact same thing in basketball, and therein lies a potential gap or a potential hole in this distribution plan, at least in my opinion. I'm not sure that this distribution plan that the plaintiffs have put forth captures this particular phenomenon and compensates properly the non-Power athletes who probably would have enjoyed some of this NIL money to be lured up to the Power 5, had it been allowed at the time they were playing. But, of course, nothing is perfect. We'll see what Judge Wilken says about this, if anything.

We've talked about the changes that the party made. Again, whether they were the back to the drawing board type changes, to use Judge Wilken's words, is I think up for some debate, but let's put that aside. The changes are what the changes are, and we have outlined them. What now? What happens next? Well, just like last time, Judge Wilken is going to review the party's new filing. But interestingly, she didn't hold the hearing this time and has not scheduled another hearing just yet. We're in a bit of a holding pattern, at least at the moment.

Since the language of the revised agreement is not so different from the original, I think Judge Wilken will likely need to schedule another hearing at some point to discuss and respond to it, but we don't know when that will be. So what do schools do? Well, last time, we talked about the *House* settlement. We were in a similar holding pattern where the court had yet to approve the settlement. We discussed some things that schools really ought to be doing right now. Again, since we're in the same position, Pat and Tim, what's changed now? What should schools be doing during this holding pattern?

Pat Zancolli:

Well, thanks, Cal. Because, as you said, we are still in a little bit of a holding pattern, I think we would recommend that schools do continue to stay the course in terms of monitoring the case and preparing for any changes that might occur in response to that. They will want to be able to ensure they're able to document and comply with the clearing house requirement that you had mentioned for third-party NIL deals over $600. They'll want to ensure that they have the infrastructure in place to participate in the third-party arbitration process that you raised in the

event that there is any sort of challenge to a third-party NIL deal in the future. Again, educating student-athletes and athletic departments will be very crucial to preventing enforcement issues from arising in the first place, as we do look forward in the future.

Tim Bado:

Yes. I think on top of that, too, schools should consider and understand how if this agreement is entered how the associated entity or individual versus the booster language will provide them with greater flexibility and facilitating NIL deals with student-athletes. A more narrowly tailored definition, which is what we have in this proposed set, is going to provide schools with more leeway working with these third parties to try and secure NIL money.

I mean, one of the examples, one of the [inaudible 00:14:37] there was that public corporations were cut out of this. For example, a school or an individual could negotiate with somebody like Nike and get NIL funds through that. NCAA enforcement or, excuse me, the NCAA isn't going to enforce those types of deals or review those types of deals, as they're exempt from this term.

Then second, I mean, a more limited NCAA enforcement scope is going to require schools to engage in a more robust self-monitoring process to ensure that currently prohibited conduct such as pay-for-play still doesn't occur. Schools are going to have to take it upon themselves a little bit to police these NIL deals as they continue to roll over time.

Cal Stein:

Those are some really good suggestions. There are things that schools can and should be thinking about, while we're waiting for this to get finalized. Before we end, let me put both of you on the spot for a minute. I'll go first, and then I'll turn to you, Pat, and then you, Tim. What do we think is going to happen here? Do you think this is going to get done, that this case is going to get settled? Perhaps more immediately important, do you think Judge Wilken is going to have more comments and criticisms, and send the parties back to negotiate further?

Like I said, I'll go first. I do think this is going to get done. I think it probably could have gotten done already. But I also think Judge Wilken is going to call him them and then send them back. I think she's going to have more comments. I think there are things that she referenced the first time that had been revised. I'm not sure if it'll be to her satisfaction, but she seems pretty dialed in here. I do think she's going to have some more comments, so we could have a whole other round of this back and forth.

Pat, what do you think?

Pat Zancolli:

Yes. I mean, I would have to agree that the attorneys definitely went back and made changes. But if you do look at them, we've talked about the major ones, there's not that many. Although they have responded to her concerns, I agree with you. I'm not certain it's going to be to her satisfaction. Just following the hearing the last time and seeing her response, I could imagine she'll have some more concerns to raise and some continued pushes for the attorneys in this case.

Tim Bado:

I agree with that. I think a deal is still going to get done. I mean, there's just too much litigation risk and particularly for the NCAA if this were to go to trial. Actually, I was watching a show on this last weekend where they were discussing this. Somebody commented that the NCAA is over a million in these lawsuits. I think they know that this needs to get done. I do agree that I think Judge Wilken is going to come back.

As you pointed out, Cal, she's very much dialed in, and I think she understands the gravity that this settlement is going to have across a major landscape and a very important one to a lot of people. I think she wants to make sure that this really gets done right.

Cal Stein:

Yes. That's a great point. I mean, we really can't overstate the gravity of this, not just on past student-athletes but on the entire future of this many multi-billion-dollar industry that so many student-athletes get to participate in. She should be taking her time. She should be giving it the attention that she is. Credit to her for doing so, even if it leaves us all in limbo for a little bit longer.

With that, we are out of time here today, so I'm going to bring this discussion to a conclusion. I really want to thank Tim and Pat for joining me on this podcast. I want to thank everyone for listening. If you have any thoughts or any comments about this series, 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.