***Highway to NIL* Podcast — NIL News: End of Year Roundup**
Hosts: Cal Stein and Chris Brolley
Guest: Tim Bado and Howard Shire
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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 One 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 Locke. I come to you today with three *Highway to NIL* regulars, Chris Brolley, Tim Bado, and Howard Shire. It has been a while since our last *Highway to NIL* episode, but that does not mean that the news cycles have been slow. Quite the opposite actually. Just about every week there has been some news story or report about the future of college sports often involving NIL. And we here at *Highway to NIL* have been following those stories closely.

Now we all know that 2025 is going to be a big year in terms of shaping what college sports look like for the foreseeable future. 2025 should bring us answers to some of the major questions that we have been discussing for some time now, including what major college sports are going to look like after the *House* settlement? What rules or guardrails the NCAA might try to implement to rein in NIL? And many, many more. But before we get too deep into 2025 and before those answers start coming at us fast and furious, we thought we should take a moment and recap some of the big stories that may have gotten lost in the holiday and New Year's shuffle. And that's what we're going to do here today with something of a quick hit format to this episode where we cover a bunch of different topics. But before we get to those stories, let's do our introductions. Chris, do you want to start us off?

Chris Brolley:

Yeah. Thanks, Cal. Happy to be back with the team as part of our new firm, Troutman Pepper Locke. As you said, my name is Chris Brolley. I am a litigation associate in Troutman's Philadelphia office. My practice primarily focuses on product liability defense, and like many in this group, I also advise higher education institutions on NIL matters, particularly regarding compliance with state laws, NCAA bylaws and NCAA NIL policies.

Cal Stein:

Great. Welcome Chris. Tim.

Tim Bado:

Thanks, Cal. I'm happy to be back. I am a litigation associate in our Atlanta office and my practice focuses on white collar, civil and criminal government investigations along with NIL compliance matters.

Cal Stein:

Great. And Howard, do you want to introduce yourself?

Howard Shire:

Sure. Thanks, Cal. I'm Howard Shire. I'm a partner at the New York office. My practice is mainly in the intellectual property area, including right of publicity, NIL trademarks and copyrights, and unfair competition.

Cal Stein:

Thanks, Howard. Well welcome everybody. Happy New Year. And as Chris mentioned and I alluded to, happy new firm, Troutman Pepper Locke. We're all happy to be here. Okay, so where else could we start this recap episode then with the case that we have spent so much time on here at *Highway to NIL*? That is of course the *House* case. Look, as we all know things, we thought at least, were in something of a holding pattern with the settlement unless and until the court finally approves it, which we all expect to happen later this year. But December brought some news about the *House* case in the form of a settlement update and also a new Q&A guidance document released by the NCAA. So, let's start with the settlement update. Chris, walk us through it.

Chris Brolley:

Yeah. And without going into what we've already discussed at length, as you, Tim and Mike Lowe have discussed throughout the last several months. To start, as most listeners of this podcast know, there's a fairness hearing set for April 7th, 2025. And the court also set a date certain for people who wanted to opt out of the settlement as well as to object to any aspects of the settlement. The court set this date for January 31st, 2025, which is only a few short weeks away. And to date, the last couple of months, several student athletes have objected, arguing that implementing the *House* settlement would eliminate most of the smaller sports which could not survive if *House* is implemented, or they would be losing their roster spots without athletic department revenue that will likely go to the football and basketball student athletes. For example, members of the swim team from a notable Power Four conference submitted letters of objection, arguing that they would lose their roster spots.

Other student athletes have objected to the application of the broadcast NIL damages and to whom it applies. For instance, these dollar amounts, or these damages would go to scholarship student athletes or AKA those receiving full grant in a scholarships, which would ostensibly exclude walk-on athletes. Also, there has been some pushback on the lack of collective bargaining between the student athletes and the NCAA schools, as I'm sure this podcast has

discussed. For example, the former National Basketball Players Association executive Michelle Roberts is considering objecting to the *House* settlement as a non-party with approval from the court because, as we've noted, much of the deal, including the cap on revenue sharing, she argues should be collectively bargained and not part of settlement negotiations. Roberts also questioned whether the class representatives adequately speak for the interests of the student athletes who have the most to gain or lose financially, which would be the football and basketball players.

This podcast and other CLEs that we have done have discussed the implications of not collectively bargaining these issues and the potential for continued litigation as a result. What we've also seen in the last couple months are collectives from high-profile schools shutting down or closing because of the potential for the *House* settlement to be approved. And many of these schools are bringing these collectives or fundraising efforts in-house, that's what we've called in the past, bringing NIL in-house. Also, even if *House* is approved, we expect, and I know we'll discuss later in this episode, that there is more of a likelihood of litigation. For example, there is a fair market value analysis that we will be discussing in a minute and what happens if this fair market value analysis finds against a student athlete? There could be scores of litigation that we may see in the coming months, even after the *House* is approved.

And so Cal, I'm going to move to now those Q&A documents that you addressed at the beginning of the podcast. On December 9th, the NCAA issued an amended Q&A, which included about 15 to 20 questions and answers regarding the House settlement. The NCAA also issued another Q&A on December 23rd regarding the impact of the proposed settlement on current student athletes. And while I won't go through all the questions, I'm going to raise one of the main, I think, misconceptions as we'll call it in the media regarding that fair market value analysis. So, if we look at question six, and I'll read it here, may student athletes sign an NIL agreement with anyone? Yes, student athletes may sign an NIL agreement with anyone. However, there are certain factors that depend on who the agreement is entered into with. For example, as I've noted, fair market value analysis. In this Q&A document, the NCAA has noted that fair market value analysis applies only to deals with associated entities or individuals, otherwise known as boosters and collectives.

All other deals with collectives do not require a fair market value. Therefore, it will be important to understand and to determine who the associated entities or individuals are. As I said, if not an associated entity or individual, no fair market value analysis of these deals are required, as discussed or addressed in question seven of this Q&A document. According to question eight of this December 23rd Q&A document, the fair market value will be analyzed by a designated enforcement entity. There's been much discussion about what this enforcement agency will be, who it will be, and in that December 9th Q&A, Deloitte was identified as the designated enforcement agency. However, the NCAA backtracked on this and said, Deloitte will not be the designated enforcement agency and they're still working or efforting to find an agency. So, I think there's going to be some clarification needed on that. However, I think the main point is that not all of these deals entered into with student athletes will require an analysis of fair market value.

Cal Stein:

Thanks, Chris. Before we move to the next topic, I want to make a couple comments about the *House* settlement update. To me, I think the most interesting thing there was the comment you made about the need for collective bargaining. As you noted, we here at *Highway to NIL* have long identified that as a potential issue with the *House* settlement. And we have wondered whether the *House* settlement, which the whole point of it is to spare the NCAA from the legal challenges it's currently facing, we've wondered whether the result is going to be even more antitrust challenges to things like the revenue cap. We of course don't know for sure what's going to happen but hearing that concern from Michelle Roberts certainly does not do anything to dispel the notion that further antitrust troubles could be on the horizon for the NCAA.

One other thing I want to mention is you talked about the impact of the *House* settlement on some of these collectives which are closing up for lack of a better term. This is an area that really hits close to home for us because we have been providing advice to schools on this very issue, specifically with these collectives perhaps being marginalized, perhaps closing, what can a school be doing right now before the *House* settlement has been approved to get ready for in-house NIL if indeed it is approved? We've had questions, can schools start collecting donations right now to be used for NIL? If so, what can they tell donors? More importantly, what can't they tell donors?

These are not easy questions, and they are not a one-size-fits-all question. The answers are going to depend on things like risk tolerance and individual state laws and even individual university policy. But many schools have begun to take that plunge and many schools are right now collecting money from donors with the intent to use it to pay their student athletes when the *House* settlement is finalized. Those decisions are not without risk and all schools really should be discussing their plans right now with legal counsel so that appropriate and tailored risk mitigation can be put in place.

Chris Brolley:

And Cal, to piggyback off that, specifically question 11 from that December 23rd Q&A asks, are there any other restrictions on schools that student athletes should be aware of? And as you noted, while schools can start collecting money from donors, collectives and boosters, no payments can be made prior to the July 1, 2025, date and are contingent upon final approval of the settlement. So schools should be aware of this current restriction.

Cal Stein:

Absolutely. Much that can be done right now, but the payments do have to wait. Okay. Let's shift now to the next topic. And this was one that was really all over the news. It involved a fairly high profile Division One quarterback named Diego Pavia who was a former junior college student athlete. Tim, tell us about what happened.

Tim Bado:

Yeah. So, he sued the NCAA in November of 2024 claiming that the NCAA's rule that counts a players junior college time toward their overall eligibility as an antitrust violation because it limits a student athlete's ability to profit from their NIL. Specifically in junior college, there is no TV exposure, there are no lucrative deals to be had just because of the smaller nature of the junior college environment. And so, the quarterback sought an injunction that would allow him to play an additional year at Vanderbilt. And he argued that the NCAA violated antitrust laws by unduly restraining trade in the labor market for college players. So again, that just goes back to what we said earlier, that it limits his ability to profit from NIL. And the court agreed, finding that the NCAA's eligibility rules have a substantial anti-competitive effect in the labor market. So, on December 18, Judge William Campbell, the middle district of Tennessee, entered a preliminary injunction which allows Pavia to play another season at Vanderbilt. And this will be his sixth in college football. He played two in junior college, two at New Mexico State, and now one at Vanderbilt.

Now it's important to note here as well that a preliminary injunction is obviously not a ruling on the merits, but it does indicate that it is likely that he will succeed if the case were to proceed. Another interesting fact about this injunction was that it was limited to Pavia himself and did not allow other athletes to have this same sort of relief. And so in light of this, the NCAA recognized that if they didn't issue some kind of waiver or change this rule, there would just be a flood of these same kinds of lawsuits. So, they did issue a waiver that allows similarly situated junior college players such as Pavia an additional year of eligibility in 2025 and 2026. Now you notice that it only goes for this one season because the NCAA still does plan to file an appeal of the injunction. And so it'll be interesting to see what happens and whether there'll be additional waivers or whether this rule will be changed in light of the appellate court's ruling on the injunction.

Cal Stein:

Let's talk about that injunction for a minute because as we know and as we've discussed, the NCAA has really racked up loss after loss after loss in federal court all over the country recently. I find it hard to believe that the NCAA really thinks this is going to be different at the circuit court level. And the real issue here comes back to, you guessed it NIL. So, in the past, the NCAA has been able to argue that its eligibility rules, like this one at question regarding junior college, that those rules are largely academic focused, not commercially focused, which would cause it to run afoul of antitrust laws. But here, as the court ruled, the increase and development of NIL has pushed those rules from the realm of academic to the realm of commercial. And there may be no going back here. I wonder if the NCAA actually goes through with this appeal what the consequences of that ruling could look like and how seismic they would be if the NCAA were to lose again.

If the circuit court here upholds the district court's ruling that the junior college eligibility rule is not academic now, but is commercial due to NIL, I think you might see others try to seize on that ruling and expand on that ruling in other eligibility settings. I, for one, have long hypothesized that we may see student athletes look to eliminate or challenge the four or even five-year eligibility rules and argue that they should be permitted to continue to play college sports and collect NIL money as long as they are enrolled in a school and earning a degree, any degree,

no matter what it is. Is this appeal going to end up being the first step down the slippery path to career college athletes?

Given some of the NIL numbers we have seen thrown around, particularly at football players, particularly at quarterbacks, it's really not that hard to imagine certain players wanting to continue to earn millions of dollars a year to play college football or college basketball while earning a series of graduate degrees. And these rulings may well open the door for that. So, I wonder if the NCAA really is going to pursue the appeal here. Okay. That discussion dovetails nicely with our next topic, which also addresses eligibility, specifically it addresses a potential NCAA rule change that would give every athlete a fifth year of eligibility. Chris, tell us about this.

Chris Brolley:

Yeah, I think this is, like you said, a direct result of the Pavia lawsuit and preliminary injunction. Right now, the NCAA, and this is very preliminary, is weighing whether to allow student athletes five years to compete collegiately. The current rules dictate that student athletes have a five-year window to compete in four collegiate seasons. Specifically, NCAA's bylaw 12.8.1 limits the eligibility to five years with certain exceptions for military service, religious missions and national pandemics. And as we know, COVID-19 flipped these rules on their head, and I know we see a lot of instances where players or student athletes are competing at the collegiate level, four, five, six, seven, sometimes even nine years because of injury. However, this upcoming 2024, 2025 season is the last time this exception could be utilized as the freshmen in the 2020, 2021 season or school year would now be in their fifth year.

The potential change would remove the additional redshirt year that we're all familiar with and allow student athletes five full seasons to participate in college athletics or provide student athletes a six-year window to play five seasons. As noted, this proposed rule change, which is very preliminary, comes after the Diego Pavia lawsuit and the court now allowing him to compete in 2025 despite having exhausted his eligibility because of his JUCO season, as Tim noted. There is a current case that was filed in the Southern District of Mississippi that involves former basketball player at a mid-level school, his name is John Wade III, and he is looking to resume his basketball career after exhausting his five-year eligibility period.

His argument, similar to Pavia's, is that the eligibility restrictions violate the antitrust laws that we've talked about because they restrict student athlete opportunities through eligibility, denying them the chance to improve their, "Economic opportunity, personal growth and well-being with NIL opportunities." In response, the NCAA has argued that the five-year eligibility window defines the NCAA by differentiating its product from the pro sports leagues. And one benefit of this limitation, as argued by the NCAA, is that limiting this window allows for new student athletes to compete in Division One.

Cal Stein:

Interesting, Chris. As I mentioned earlier, we've done a lot of speculating on this podcast about the NCAA's eligibility rules and whether they could eventually come under attack from players looking to stay in school, continue to play sports, and now continue to earn lucrative NIL money. If we look at the NCAA and how it has addressed issues in the past, particularly the last five, six years or so, the NCAA has tended to be very reactive. It was reactive to the Supreme Court

decision in *Alston* and reacted by allowing NIL. It reacted to the Diego Pavia decision, that Tim just discussed, by agreeing to grant all student athletes situated like Mr. Pavia the same result. I wonder if this potential rule is just the latest reaction from the NCAA and whether the NCAA believes it sees the writing on the wall that its eligibility rules may not be long for this new world of college sports. And whether the NCAA is banking on this expansion, granting a fifth year of eligibility as a way to stave off the inevitable, at least temporarily, and of course time will tell.

The other thing you mentioned that I think warrants some discussion is the impact that this rule and potentially other changes to eligibility rules are going to have on college sports. For one, it's really hard to see how granting student athletes a fifth year of eligibility would not result in fewer high school athletes matriculating to college and participating in college athletics. It's a simple numbers game. The more upperclassmen that are available for rosters, the fewer spots there are going to be for incoming high school seniors. Similarly, I also wonder what this rule will do to help or hurt the perception that college sports are becoming more like pro sports with free agency. And I know the NCAA has tried to paint its eligibility rules as a differentiating factor, but we are already seeing upperclassmen and graduate students transferring with great frequency to maximize both their NIL earning potential and their playing time. We see this most in football and basketball, but other sports as well.

Giving every student athlete a fifth year of eligibility is just going to keep, you could argue, that game of musical chairs going even longer and resulting in even more transfers. That can be a good thing for students who can, as I said, maximize NIL and maximize playing time. But it can be a bad thing for coaches, and it can be a bad thing for others who want to differentiate the NCAA athletic game from professionals. And I wonder if it will push more coaches, administrators, and even fans away from the college game. Okay, let's shift to our next topic, which has been making some news, and this one actually involves NIL-related lawsuits directly, the type of which we at Highway to NIL have been concerned about for some time. Tim, can you give us an update on what's been going on first with the UNLV quarterback that we discussed and then also a new lawsuit involving Florida State.

Tim Bado:

Those two lawsuits are the two primary drivers of the issues that, exactly what you said, that we've been concerned about this entire time. UNLV's quarterback Matthew Sluka, as we know, he was their starting quarterback, he was a star transfer and just abruptly, at least outwardly, left the team after they were 3 and O, over the fact that he was not paid, at least allegedly, $100,000 that he was supposed to receive from the university. And now he was a high profile transfer from Holy Cross and he entered into, this is the key part here, a verbal agreement with the university to receive $100,000. And it's interesting too, as Chris alluded to with the eligibility rules, it's likely that he left after three games because he could still redshirt under the NCAA's current rules allowing people to appear in four games without waiving that eligibility. So the timing is interesting as well.

But he alleged that, again, he did not receive $100,000 from the verbal agreement, but the university said that he was paid everything he was owed and he simply just wanted more. In fact, the university even alleged that Sluka's agent made financial demands that would've violated NCAA's current pay for play rules and Nevada law. And so far from what I've been reading through the pleadings and everything, we haven't seen any evidence of that. But these

back-and-forth allegations are really interesting and just are the exact example that we see with these types of issues.

And it's very similar for the Florida State lawsuit. That was filed right at the end of the year, and it was filed by six former Florida state basketball players who sued their head coach, he's an individual defendant here, over an alleged failure to fulfill promises to get each of these players, in this case, $250,000 in NIL money. And the players alleged that the money was supposed to come from the head coach's business partners. Now who those are or what that looks like isn't clear. But this situation got so severe that these Florida state players walked out of practice, and they threatened to boycott a game against Duke over these missed payments.

Now, they ended up not boycotting the game and I, out of interest, looked at the stats and they got hammered by Duke that game. But it sounds like they had a lot of other things on their minds. But Florida State is conducting its own investigation. They haven't made any public comments to date. And interestingly, and not surprisingly, none of these six players who are the plaintiffs in these lawsuits are still with the team. Two exhausted their eligibility and the remaining four have transferred to various universities. But I think what we're seeing here, these two lawsuits have these same issues with NIL enforceability and transparency. And in the case of Matt Sluka, the fact that he has no written contract here is going to prevent significant legal hurdles for him. But unfortunately, I think this is something that we're going to continue to see in waves here, at least in the next year until things can potentially become more concrete.

Cal Stein:

Yeah, there's a lot to unpack here. Let me start with some comments on the Sluka situation. This one to me is really unfortunate for a bunch of reasons. I do really feel for this kid. He had one year to maximize his football earning power. He literally moved across the country for a job and then whatever happened, and we may never truly know what happened, he ends up having to make the difficult decision to sit out the remainder of the year to preserve his eligibility. It's just a series of unfortunate events no matter how you slice it, no matter who is ultimately responsible. But it's a series of unfortunate events, the exact type of which I believe have led Charlie Baker to want what he has called a consumer protection system for student athletes and their families. And when you see something like this, it's hard not to agree with Charlie Baker that something needs to be done to ensure that kids and schools are both protected in these situations.

I mean, one obvious solution of course is the execution of contracts, written contracts, not the type of verbal contract that you mentioned Sluka has. But look, until NIL is allowed in-house, any contracts would have to be made with third parties who are outside the grasp of the NCAA. That more than anything may well be the best argument for bringing NIL in-house. And Sluka more than anybody may ultimately end up being the poster boy for making that happen. The counterpoint to all of that though is unfortunately the Florida State lawsuit. On the one hand it's easy to look at the Sluka situation and say, "Well, the school should have done more," or "Look, this never would've happened if the school could have been more directly involved with the NIL negotiation and payment." Heck, I may have said those things the first time we talked about it, and Charlie Baker sure seems to believe them.

But then you see a very similar situation playing out, at least allegedly playing out, at Florida State where the allegations are that the school and the coach are the ones not fulfilling an NIL promise. This is not necessarily being blamed on some unscrupulous collective. This is the school and this is the coach who recruited these players. Now, look, we do not know what the truth is, at least not yet. But one thing does seem clear to me, which is that given the amount of money at issue in these NIL deals, this is likely to become the new normal. We are going to see a lot more of these lawsuits. This has become business. It has become big business. And in big business, parties sue each other all of the time for breaching contracts, whether they're written, verbal or otherwise. This is going to happen more and more, and schools need to be prepared for it.

There are myriad things schools can do to mitigate litigation risk and the PR hits that come with them. Schools really need to be working with legal counsel right now to be anticipating and mitigating litigation risk just as any business would. NIL is big money. And we may see a new cottage industry of lawyers pop up overnight looking to take on contingency fee cases against schools and against coaches and against other parties for alleged unfulfilled NIL promises. And schools really need to be prepared for this. Okay, let's shift now to our final topic. Howard, you're going to talk to us a little bit about an NIL lawsuit brought by Terrelle Pryor.

Howard Shire:

Yes. This is a little different from the other NIL lawsuits we've been talking about. It doesn't involve college eligibility. It does not involve breach of contract concerning NIL payments. In October 2024, Terrelle Pryor, a star former quarterback for Ohio State University, sued Ohio State, the NCAA, the Big 10, and a media rights licensing company named Learfield Communications, a proposed class action that claimed that the defendants were engaged in an anti-competitive conspiracy under the Clayton Act to monopolize profits on athletes' NIL. So, this law suit was filed in October. Among other things, Pryor's lawsuit asserted that all the defendants conspired to keep college players from profiting off their own NIL by punishing them for trying to do so, even for such things that seemed trivial. Such as that Pryor alleged that he and some of his teammates were suspended after they traded autographed memorabilia in exchange for tattoos.

On January 3rd, all four defendants filed a motion to dismiss the complaint, and it really falls into two categories. The Big 10 and the NCAA asserted similar grounds for dismissal, namely statute of limitations. They claimed that Pryor left college football at least 14 years ago, which is well outside the Clayton Act's four-year statute of limitations for federal antitrust claims. Therefore, they said his suit fails even if all the allegations he made in his complaint were accurate. The other two defendants, Ohio State and Learfield, asserted different grounds for dismissal. Ohio State's motion to dismiss argued that it was immune from the lawsuit under the 11th Amendment to the Constitution, which provides sovereign immunity to state governments. Ohio State claims that it's an arm of the state of Ohio and Pryor is not an Ohio resident, so the case should be dismissed on that grounds. A public university, they claim, an instrumentality of the state of Ohio, and that the plaintiff is a citizen of Pennsylvania, so under the express terms, the 11th Amendment to the Constitution, he cannot bring this lawsuit.

Learfield, the media rights company, basically piggybacked on Ohio State's sovereign immunity claim. They argued that all they're accused of doing here, there are certain allegations about

their exploitation of the players' names, images, and likenesses. But these are rights they were given by Ohio State University, therefore they are also protected just as Ohio State is under the 11th Amendment to the Constitution. Basically, all Learfield says they did was market and manage and profit from the multimedia marketing rights that were granted to them by Ohio State. There are also other defenses that were asserted, but these are the primary ones. So the defendants filed a motion to dismiss just on January 3rd. Pryor has not yet filed anything in response, but he undoubtedly will. And we'll see what happens. It strikes me that the statute of limitations defense is a good one, but we'll see what exceptions Pryor might assert to that. Any statute of limitations defense does have certain exceptions. So, we'll just wait to see how Pryor responds to the motion to dismiss.

Cal Stein:

Yeah, we'll have to keep an eye on that one. Really interesting stuff, Howard. We'll have to have you back on to give us an update when we have more information.

Howard Shire:

Sure.

Cal Stein:

And with that, we are now out of time here today, so I want to bring this discussion to a conclusion. I really want to thank Chris and Tim and Howard for joining me on this podcast. I also want to thank everyone for listening. If you have any thoughts or any comments about this series or about this episode, please feel free to contact me directly at callan.stein@troutman.com or you can contact any of us. You can subscribe and listen to other Troutman Pepper Locke podcasts, wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you for listening and stay safe.