
***Highway to NIL* — House Final Settlement Hearing: Key Insights and Future Implications for NIL**

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[0:00:00] 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. And in this podcast series, we delve deep into the current NIL rules impacting colleges and universities and their compliance department.

My name is Cal Stein and I'm a litigation partner at Troutman Pepper Lock. I come to you today with the *Highway to NIL* OG himself, Chris Brolley, and we are of course going to be discussing what else but the House settlement. Because yesterday, on April 7th, Judge Wilken held the final settlement hearing to approve or deny the proposed settlement in the House litigation. And we here at *Highway to NIL* have, of course, been following the House case very closely and with great interest, and yesterday's marathon hearing was no exception.

Chris and I are here ready to take you through the highlights and, depending on your perspective, the low lights of the hearing. But before we do, Chris, I know everyone knows you already, but why don't you do a quick introduction?

[0:01:26] Chris Brolley:

Thanks, Cal. Good to be back, as always. As you said, my name is Chris Brolley, and I'm a litigation associate in our firm's Philadelphia office. My practice primarily focuses on products liability, defense, and investigations. And like you, I also advise colleges and universities on NIL, particularly regarding compliance with state laws, NCAA laws, and other NCAA policies regarding NIL activities.

[0:01:49] Cal Stein:

Well, thanks for being here, Chris. I mean, really, who else could be here with me to talk about the House case that we have been following so closely and really has been the most momentous and important thing in this space for some time? Before we get into the actual hearing that took place yesterday, and there is plenty to talk about, let's just first do a quick recap of the settlement terms being proposed so everyone who's listening can be reminded of the gravity and importance of this settlement. Chris, can you take us through a quick recap?

[0:02:24] Chris Brolley:

Yeah, quick recap, which mostly focuses on the basis of Judge Wilkens' comments during the hearing yesterday. But, essentially, they're broken down into two main points. The first one is that the terms of the settlement will require schools to pay damages of about 2.8 billion to Division I athletes dating back about eight years, which reflects lost NIL, video game, and broadcasting opportunities on account of eligibility rules.

And also, and the big-ticket item that everyone talks about, is that the terms of the settlement will also implement a structure that will allow colleges to share up to 22% of the average power conference athletic media ticket and sponsorship revenue with their athletes, which some have predicted to be about 20.5 million of the initial pool to be distributed.

[0:03:14] Cal Stein:

That's what's at stake here. And we've had a long and winding road in this settlement to get to this final approval hearing. And I think there was some hope that Judge Wilken would rule from the bench approving the settlement. Now, we're not going to bury the lead, she did not do that. She did not issue an approval of the settlement, nor did she issue a disapproval of the settlement. She noted at the end of the hearing that she thinks it's a good settlement. In fact, this is the quote from her, "Basically, I think this is a good settlement, and I think it is worth pursuing. Don't quote me on that. But I think some of these issues can be fixed if people would take the time to fix them."

Look, we were hoping she would rule. She clearly sees the value and the benefit in the hearing. But as she noted in that quote I just read, she obviously had some issues with the settlement, some things that she wanted the parties to go back and "fix." And she did that. And we'll talk about the next steps towards the end of this podcast. But very briefly, she didn't approve, she didn't issue a ruling, she has ordered the attorneys to kind of go back, talk a little bit more, and submit a letter addressing some issues in one week on April 14th. And her hope is that the letter will propose the "fixes" to the issues that were raised by objectors and by her or that will provide her with law that will allow her to overrule the objections if the letter that is submitted doesn't fix everything and there is some redrafting of the settlement that's required. She's going to set a new deadline for that, but it really seems like the parties are going to work hard to avoid that. And it seems like she wants them to work hard to avoid that given her comments about the settlement being good and valuable.

Okay, so now that we know what happened, let's talk about what her concerns were, okay? Just because she said it was a good settlement did not mean that she didn't have any concerns. She absolutely did. Let's talk about the two main concerns she had in some detail, the first of which had to do with the impact of the settlement and its injunctive class on future student-athletes. Chris, talk to us a little bit about what Judge Wilkens' concern was here.

[0:05:50] Chris Brolley:

Yeah, essentially student-athletes that are not currently in college. And I think they refer to them as the kids on the asphalt currently, 10, 12, 13, 14-year-old kids right now that they're not – obviously, because they're not in college. However, they are automatically part of that 10-year

settlement's injunctive class. What this does is that it releases any future legal claims that these, for lack of a better term, kids, children will have later on.

The judge really put a focus on an emphasis on what she called the due process for their future plaintiffs and the release of these claims. What she did is she had an issue with this, but, like you said, the parties have about a week to send in a letter. And she essentially asked the parties for more precise language in the settlement so that future student-athletes are only part of the injunctive class once they are provided an opportunity to object to the deal after joining a Division I athletic program.

The NCAA and Power Conference counsel, the defendants, pushed back a little bit and said that the 10-year injunctive class was necessary for stability. And without it, there would be no deal. Interesting words and comments from the NCAA and the power conferences. However, Judge Wilken was pretty steadfast in her request that the parties not go back to the drawing board, but do provide some more precise language and a better explanation, because this was one of her main concerns during the hearing.

[0:07:16] Cal Stein:

Yeah, it's interesting, Chris. You call it a request from Judge Wilken. I would call it an instruction. She did tell them, "You got to go back and give us more precise language on this." And I suspect that the parties will. And, look, to me, this was a concern that really seemed to strike a chord with Judge Wilken. It was something that we had seen in objections that we had talked about.

And Chris, you made a reference to kids, the kid on the asphalt. This is the quote that she had on this issue, which I think is going to become a real sound bite coming out of this hearing. She said, "How will the 10-year-old on the asphalt be aware of this settlement?" Look, clearly, this was something that was on her mind, not just for current student-athletes, not just for student-athletes in high school who are about to matriculate to college next year or the year after, but the kids. As you said, Chris, the literal kids who are many, many years away from even high school, let alone college, and how they are going to be impacted by this settlement. That, more than anything, is why I think she asked the parties or directed the parties to fix this issue. And I don't think the kids have really gotten the attention in the lead up to this hearing that the current student-athletes and even the high school student-athletes have gotten. It was on the one hand a little surprising to see her fixate on this topic so much. But at the same time, perhaps not so surprising because it hasn't gotten the attention to date.

[0:08:49] Chris Brolley:

And I think that does make sense. You noted just now that how can kids be made aware of a settlement that they're not even a party to? And so I think that was her biggest concern. How can we allow a release of all claims for individuals who are not even a party to the litigation, but not even remotely considering college at the time that this would likely impact them given the 10-year scope of the injunctive class?

[0:09:15] Cal Stein:

Exactly. Okay. Let's talk about the other primary concern that I think she raised during the hearing which had to do with the proposed settlement's impact on roster spots and the loss of roster spots with a changeover that the settlement proposes from the traditional scholarship model to a roster limit model. And, look, this of course is a more complex and difficult to understand issue. The old scholarship limits were expanded with formal roster limitations to be imposed going forward which would limit the number of student-athletes on a particular team.

For example, cross-country teams keep more than 30 runners on a roster, but the new roster limit would limit them to only 17. And that is 13 student-athletes who would no longer have a roster spot on that team. That was the issue. Chris, what did Judge Wilken have to say about this?

[0:10:18] Chris Brolley:

Unlike the impact of the settlement's injunctive class that we just discussed that wasn't really addressed or even written about in the lead-up of this final approval hearing, the loss of the roster spots was actually something that was discussed at length. And if anyone was following on the docket, there were countless number of objectors filing letters arguing that their roster spots would be taken away if this settlement were to be approved.

Like you noted, it's complex and difficult to understand. There were old scholarship limits that were expanded and former roster limitations were imposed. The judge noted that she was concerned with the current student-athletes losing roster spots. And I believe she noted that it's kind of competitive nature for student-athletes that are enrolling or looking to go to a school at some point of being recruited that it's old hat to not be recruited or to lose a roster spot for performance. But what her main concern was, was the current student-athletes that may lose these roster spots. And so she proposed a grandfathering of those student-athletes that are currently on the rosters.

The defense attorneys and for the NCAA and power conferences have pushed back on that idea. This was raised in the preliminary hearing back in October. The parties had said they would work together to come up with a creative solution to help with this issue of the roster spots. Nothing was done. And so the judge re-raised this issue. And the attorneys for the NCAA and power conferences essentially emphasize that eliminating the scholarship limits would reflect a sizable transfer of monetary benefits to the student-athletes. They also noted that the schools will be saving money by reducing the number of walk-ons and the others that would be cut given this new rule.

It is interesting though that one of the named plaintiffs, Grant House, which we don't really talk much about, but he is actually on record as saying he never signed up for anything limiting rosters. While that may not be important, that is certainly something to be considered. And this roster limitation, Cal, I've been banging this for a few months now, seeing that this is a major issue. And a lot of people that are currently on Division I rosters are concerned about the loss of their roster spot.

And in fact, even after the hearing was concluded yesterday, there were two more objection letters filed by current student-athletes that were actually docketed on the docket. So it is something definitely that Judge Wilkens and the court is looking at and will want the parties to correct in a week's time.

[0:12:53] Cal Stein:

To me, this really shows the thoroughness of Judge Wilkens' review of the settlement. Because in many ways, it's the exact opposite of the issue we just talked about. The issue we just talked about is the impact on the settlement of kids, 10-year-old kids who are not coming to college for many, many years. And here, on this issue, Judge Wilken is laser-focused on the student-athletes who are currently in college, the complete other end of the spectrum.

And clearly, in my mind at least, Judge Wilken was impacted, perhaps greatly impacted by some of the objection letters that you talked about, Chris, that came pouring in with anecdotal and very hard-to-read stories of student-athletes who had dedicated their life to a particular sport but were facing the very real possibility of having the rug pulled out from under them in their junior year, even their senior year. And, clearly, I think Judge Wilken was impacted by that, hence the concept she is proposing of grandfathering these student athletes who are already enrolled in on rosters.

Now, what that solution would not address, of course, is the possibility or perhaps eventuality at this point that there are going to be fewer roster spots for future student athletes. Kids in high school right now, the 10-year-olds on the asphalt, by the time they get to college, if this settlement goes through, even with a grandfathering provision, it looks like there are going to be fewer roster spots for them.

Okay, those were two of the main concerns Judge Wilken raised, but there were other ones that she raised as well. Let me address just a couple of these very briefly. At one point, she asked about the pro-competitive justification for continuing third-party NIL payments. Defense counsel addressed that, arguing that, by requiring third parties to go through the clearinghouse process, that would enhance competition for all student-athletes in the market. Judge Wilken didn't really tip her hand here. She kind of moved on to another topic. She asked how the settlement would affect state laws that prohibit the NCAA or NCAA institutions from doing what the settlement would require them to do.

Both parties agreed that nothing in the settlement would preempt state law, and Judge Wilken agreed with that as well. Hardly an agreement because they can't. But both parties also stated that they weren't aware of any state laws that would prohibit the NCAA from carrying out its settlement obligations. Judge Wilken didn't seem to really press them on this, even though I'm not entirely sure that's a fully accurate statement, or perhaps it is now and may not be in the future.

For example, there's legislation currently being considered in some states. For example, Oregon, that would prohibit the NCAA and schools from enforcing any limits on NIL payments to student athletes, which could collide with certain terms of the settlement. And then Judge Wilken also asked about the claims submission process. Certain objectives had raised issues about getting questions resolved. From plaintiffs' counsel, Wilken suggested again creating a

mechanism for better communication, maybe a help desk or a hotline were two things she proposed. That's not every concern she raised, but I think that's a pretty good overview of the ones that were discussed.

Now, let's talk about some of the issues that Judge Wilken did not entertain. And in a way, I think this is actually an even more interesting topic than the concerns she did raise. Let's start with the revenue-sharing pool. Chris, what did she have to say about this?

[0:16:39] Chris Brolley:

I think it's interesting, and like you noted, that there were certain issues that had been raised by everybody, experts, objectors throughout the last several months. And one of them was the revenue-sharing pool and whether there is a pro-competitive justification for this new what we're going to call "salary cap." And Judge Wilken essentially said that she did not view this as a per se antitrust violation, which I think is interesting. Because as we've talked about, the question has been "won't a settlement fixing any compensation cap between competitors still violate antitrust laws"? And I think that's a question that the courts may have to resolve at some point. But at this moment, Judge Wilken did not view this as a per se antitrust violation.

[0:17:27] Cal Stein:

Yeah. I mean, to me, this may be the biggest headline from the entire hearing, right? To me, this statement, this conclusion that's not a per se antitrust violation is a big win for the NCAA and a big win for parties looking for this settlement to go through. I mean, let's not forget the outgoing Biden Department of Justice filed the statement of interest in this case that sure suggested Judge Wilkens should treat this pool cap as a per se violation, and Judge Wilken really declined to do so. By saying it's not a per se antitrust violation, it means she's viewing this cap more like a monopoly situation, which is not a per se violation, than a price-fixing situation, which would be a per se antitrust violation.

And what that means from a practical perspective is that there is a path for legally affirming the cap here. And Judge Wilken referenced what's called the rule of reason, which is the rule that gets applied in courts to something like this cap that is not a per se antitrust violation. And, ultimately, a reviewing court will look at all the circumstances, the pro and the con, and determine if this cap is an unreasonable restraint on trade.

Now, as you mentioned, Chris, there is very, very likely going to be litigation on that issue, whether this cap is an antitrust violation, whether it violates the rule of reason. But by ruling it's not a per se violation, what that means is it's not dead on arrival. This is the issue that, in my view, could have torpedoed the settlement but it didn't, and that's why it was a big win for the NCAA and those looking to get the settlement approved.

The other big issue that have been floating around out there is Title IX and how Title IX and related issues would be addressed or if it would be addressed by Judge Wilken in this hearing. You, listeners, may recall that, again, the outgoing Biden Department of Education issued guidance on Title IX, basically saying, "We believe that these payments, these post-House settlement payments, assuming the settlement is approved, must comply with Title IX." Now, the Trump Department of Education immediately rescinded that guidance. How Judge Wilken

addressed this issue was going to be of major interest, at least to me. Chris, how did she address it? Or did she address it at all?

[0:20:13] Chris Brolley:

I think you just said it. She immediately put an end to any discussion regarding Title IX, wage and hour claims, and collective bargaining. There were countless number of objectors who actually argued that the settlement terms were violative of Title IX, that the settlement terms could not be approved because of the issues with collective bargaining, which would lead to certain antitrust issues, or the fact that student-athletes were not recognized as employees.

The judge put essentially a stop to these objections and said that this was a non-issue. This case, which is a collection of three cases that was before Judge Wilken, and she said none of those cases involve Title IX, wage and hour, and/or employment issues. These issues were not going to factor into her decision. Essentially, regarding Title IX, the objector's arguments that male athletes being paid more than female athletes will be problematic under Title IX, or whether student-athletes should be considered employees and able to unionize did not and will not factor into her decision to approve or reject the settlement. The judge continuously underscored throughout the hearing that she wanted to focus on antitrust issues as this was the issue presented in the cases before her court.

[0:21:33] Cal Stein:

Yeah. I mean, Judge Wilken really punted on this issue and with good reason in my view and with good justification to do so. As you just noted, Chris, this is an antitrust case, and she is really staying in her lane here, and it is appropriate to do so, particularly in the context of a settlement hearing. Now, this issue of Title IX and how it's going to come into play with the post-House payments, there's another issue that is surely going to be litigated in the absence of clear guidance, which we do not have right now because the Trump Department of Education rescinded the guidance, has not issued its own guidance yet. But in the absence of clear guidance, I think what we're going to have is schools interpreting it the way they want.

Some schools may interpret that they do have to comply with Title IX with these post-House payments. Some schools will surely interpret it that they don't. We're going to have disparate decisions by schools, which are going to lead to litigation. We're going to have disparate rulings by district courts. And eventually, hopefully, we'll get some uniformity. But for now, I think that there are going to be conflicting and contrary interpretations and decisions and it will all be worked out in the court system.

All right, the damages formula. Chris, what did Judge Wilken say about that?

[0:23:16] Chris Brolley:

This was interesting as well because I think one of the most high-profile student-athletes right now, the biggest earner of NIL, is Olivia Dunn, a gymnast who I believe is top 10 or top five in NIL earnings. And she actually argued and objected to the settlement on the basis that the settlement damages formula was flawed because it fails to recognize their individual value.

While the judge, I guess, somewhat agreed with this objector, the judge noted that if the settlement were approved, that they can go back and address the issues with the settlement administrator regarding issues of settlement payout. It didn't seem like she was overly concerned with this, but I think that may be something to keep an eye on if and when this settlement is approved.

[0:24:00] Cal Stein:

Yeah, very good point there. Okay, we're running short on time, so let's return now to next steps. As I mentioned at the outset, the court did not rule from the bench. Instead, Judge Wilken ordered the parties to submit a letter in one week's time that address the issues she raised. That letter, number one, has to include proposed fixes to the issues, or it has to provide law that would allow the court to overrule the objections that were made. And if the fixes require redrafting of the settlement, the parties in the court will set a deadline to submit a new proposed settlement agreement at that time.

Everyone seemed to recognize the need for expedience here. And I think the parties are going to try to avoid, at all cost, redrafting things. Once that letter is submitted, the objectors are going to have one day and one page to respond to the issues. Originally, that was rejected by the judge, but they're going to get at least one last word. But, look, it seems to me that we are hurtling towards ultimate approval here, given the next steps that the judge has outlined and given the issues that she very clearly has taken off of the table here. But, look, we've talked about most of them. But, Chris, can you give us – just quickly, run through the list of issues that need to be addressed in this letter?

[0:25:21] Chris Brolley:

Yeah, and forever the skeptic. I'm not sure one week will get it done, one day, for the objectors to file a response, will get it done. However, we'll see. But the judge essentially wanted somewhat of a laundry list of issues to be fixed, specifically the due process for those future class members, the process for future student-athletes to object to the settlement, the pro-competitive justification for third-party NIL deals, how the settlement would affect state laws, addressing issues with the claim's submission process, addressing Title IX's application to back payments, the college football playoff, and conflicts between current and future class reps.

[0:25:58] Cal Stein:

We will wait with very high interest to see this letter that the parties submit in one-week time. And something tells me, Chris, that we'll be back here on *Highway to NIL* talking about that and talking about potentially the objectors' one-day and one-page response and then what Judge Wilken does with it all.

Before we close, I want to read the statement yesterday from NCAA President Charlie Baker about this hearing. And here's what President Baker said. "Today's hearing on the landmark settlement was a significant step in modernizing college sports. If approved, the settlement will allow student-athletes the opportunity to receive nearly 50% of athletic department revenue in a sustainable and fair system for years to come."

Now, look, there's still work to be done. I'm certainly not suggesting that Charlie Baker is taking a victory lap, not suggesting he's taking a premature victory lap. But in my opinion, this statement comes from a very happy Charlie Baker and probably for good reason. I view the hearing yesterday as a big win for the NCAA. The whole settlement could have been torpedoed, but it wasn't. There's work to be done, but a path forward. And I think a quick path forward to getting this settlement approved remains as the most likely outcome.

And with that, we are out of time here today, so I want to bring this discussion to a conclusion. I really want to thank you, Chris, 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, I invite you to contact me or Chris directly. 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.

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