
**HIGHWAY TO NIL, S02 EP02 - UNIVERSITY OF MIAMI NIL ENFORCEMENT ACTION
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Callan Stein:

Hello and welcome back for a special one might even say emergency episode of *Highway to NIL*, the podcast series that discusses legal developments in the name, image, and likeness, or NIL, space. NIL, of course, affects colleges and universities all over the country, particularly those in Division I athletics. In this podcast series, we delve deep into the current NIL rules impacting colleges and universities and their compliance departments. My name is Cal Stein, and I'm a litigation partner at Troutman Pepper. I come to you today with two of my colleagues to discuss some breaking news out of the NCAA related to NIL, specifically related to NIL enforcement.

We have all been waiting for some time now for the first NIL enforcement action by the NCAA, and we need wait no longer, as last week, the NCAA announced its first enforcement activity against a school for NIL related violations. The school is the University of Miami, and the NIL related activity involved the school's women's basketball team and one of its quite prominent boosters, but we will get to all of that in a moment. The key and the reason we are here today is that the NCAA has finally taken its first enforcement action regarding NIL. We have done quite a bit of speculating on this podcast about what that might look like, and now we need speculate no more, or at least not for right now.

Right now, we can examine what happened, what the NCAA said, what it did, and then of course, we will do some speculating about what it all means for the future. But before we do any of that, let's get reacquainted as it were with my two co-hosts here today, Chris Brolley and Mia Marko. Chris, why don't you introduce yourself?

Christopher Brolley:

Thanks, Cal, and I'm looking forward to discussing our new topic, our first NCAA NIL violation. As you said, my name is Chris Brolley, and I'm a health sciences litigation associate out of our Philadelphia office. I primarily represent drug and medical device companies and also advise educational institutions on matters related to NIL and compliance.

Callan Stein:

Thanks, Chris. Mia, how about you? Why don't you introduce yourself again?

Mia Marko:

Sure. Thanks, Cal. As you said, my name is Mia Marko, and I'm an associate in the firm's business litigation group. I work on all different types of commercial litigation matters, but a large part of my practice is in the higher education space and involves providing litigation, counseling, and investigative services to colleges and universities, and more recently, involves advising colleges and universities on NIL issues.

Callan Stein:

Of course, as I mentioned, my name is Cal Stein. I am a litigation partner at Troutman Pepper. And as part of my practice, I represent colleges and universities, including internal investigations and state and federal enforcement actions and lawsuits, and I also advise educational institutions on name, image, and likeness questions. With that, let's start our discussion. I know we are all eager to get into the details of the enforcement activity and what it all means as we go forward in this new era of NIL.

Let's start with the facts. What happened here with the University of Miami Women's Basketball Team and what did the NCAA ultimately find? Chris, you are the one here who is following this story most closely, and that's not just because I know you're a big Hurricanes fan, but why don't you tell us what happened?

Christopher Brolley:

Yeah, sure. This case is not very notable for anything other than the fact that the NCAA decided to hand down its first NIL punishment to the University of Miami for recruiting activities involving the women's basketball program. As we've discussed on this program, the NCAA has largely sat on the sidelines since the inception of NIL in 2021, issuing only a few rounds of clarifications or guidance on permissible and impermissible activity. At bottom, this case involves the recruitment of Haley and Hanna Cavinder, exceptional women's basketball players, twins, and social media stars amassing over five million followers on Instagram and TikTok.

Back in March of 2022, they both enter the transfer portal, ultimately transferring from Fresno State to the University of Miami with the hopes of joining a winning program and playing in the NCAA tournament. However, during this recruitment, there was one event in particular that drew the attention of the NCAA, which can be seen as a warning for the loudest, most recognizable collegiate boosters. The underlying facts here are pretty simple. During the recruitment of the Cavinder sisters, a well-known Miami businessman and booster to the University of Miami, John Ruiz, hosted a private dinner at his home, unbeknownst to longtime University of Miami head coach Katie Meier.

Following the dinner, Mr. Ruiz posted a photo on social media, which, as I mentioned ultimately, drew the attention of the NCAA, and Coach Meier, who found out about the dinner from this tweet, he tweeted, and I quote, "Wishing the Cavinder Twins all the best in their quest to find their next home to play basketball. Amazing young ladies, as well as mom and dad." During this dinner, Mr. Ruiz promoted the university, talking about his children's experiences as student athletes at Miami. However, it is unknown whether they discussed NIL activities, but the Cavinder sisters reported that the dinner did not have an impact on their decision to commit or enroll at the University of Miami.

And although Coach Meier was unaware of the dinner and reportedly felt uncomfortable with the situation, the NCAA noted that the coach's failure to seek guidance from university compliance about her interactions with the booster ultimately resulted in impermissible recruiting contact and recruiting inducement. Mia, can you talk to us a little bit about the NCAA's enforcement action and process as it relates to this situation?

Mia Marko:

Sure, Chris. This enforcement action involved a negotiated resolution between the school and the NCAA. For those who might not be familiar with this process, when schools and the NCAA enforcement staff agree to a violation, they agree to the level and classification of the violation and certain penalties, they can use the negotiated resolution process instead of going forward with a hearing, for example. The intention of this negotiated resolution process is to allow the NCAA to use fewer resources and essentially expedite the review by the Committee on Infractions.

Once the parties agree to the resolution, the Committee on Infractions will review the case to determine whether the resolution was in the best interest of the NCAA and whether the agreed upon penalties are appropriate. And that Committee on Infractions can either approve the negotiated resolution or they can reject it, send it back to the university and the NCAA enforcement group with some guidance on how to continue negotiating. Here, ultimately, the Committee on Infractions approved the resolution, which we'll get into a bit further, the committee's impressions of the resolution.

But as to the outcome, the NCAA considered the dinner at the booster's home for the two basketball players and their parents to be a recruiting inducement. And just by way of reminder, boosters are explicitly prohibited from associating with or having in-person, off-campus contact with prospects or providing them with any benefits. As to penalties, the university and the NCAA agreed to a few different types of penalties. The first is for the head coach. She was issued a three game suspension, and this was because of her involvement. There were text messages between her and the booster showing that she had facilitated the initial contact between the booster and the players.

The head coach already served the suspension at the beginning of the 2022 to 2023 basketball season. And then separately, the school had some penalties and not just specific to the women's basketball program, but for example, the school had a one-year probation period. During this period, the school had to do a couple of different things, including develop and implement a comprehensive educational program on NCAA legislation for its coaches and its athletic department staff, and that's not just specific to the women's basketball program. The school also has to file with the Committee on Infractions a compliance report by the end of this year, 2023.

The school also has to inform prospects in the women's basketball program in writing about its probation and its violation. And finally, the school has to publish a statement on its website regarding the infractions. In addition to the probation period, the school has a \$5,000 fine plus 1% of the women's basketball budget, and the school also has certain recruiting restrictions, and these are specific to the women's basketball program. The first is a 7% reduction in the number of official visits for the program.

The second is a reduction of nine recruiting days for the program, and those are both for the 2022 to 2023 academic year. And then finally, there was a three-week probation on recruiting communications by the women's basketball staff, and that's going to begin with the open date of the transfer portal on March 13th and will continue to April 2nd of this year. And then in addition to the penalties, the school also agreed to some of its own corrective actions that it was going to take.

For example, the school agreed to reprimand the assistant coach who was also involved in the misconduct at the direction of the head coach, and the school agreed to have the athletic director meet with the booster to discuss his role in the violation and provide him with some targeted NCAA rules education concerning his status as representing the school's athletic interest. And then I just want to quickly touch on the Committee on Infractions' position of this negotiated resolution. As I mentioned earlier, ultimately, the Committee on Infractions was put in the position of either accepting or rejecting the outcome.

The Committee on Infractions chose to accept the outcome "based on the specific facts developed during the investigation and the timing of the submission of the case to the Division I Committee on Infractions." They explained that the investigation "did not develop any facts directly linking activities around name, image, and likeness to the prospect's recruitment or to the decision to enroll at the University of Miami."

However, they explained that during their review, the panel was troubled by the limited nature and severity of the institutional penalties agreed upon by the university and the enforcement staff, namely the absence of any disassociation of the involved booster.

Callan Stein:

Great. Thanks, Chris and thanks, Mia. Now we know what happened with the university, we know what happened with the NCAA, so let's talk about what it all means. What can we learn from this first enforcement action? What can schools learn from it and what can coaches learn? And really what does this action tell us about everything that the NCAA has been telling us to date and how it's going to look at these violations in the future?

Let me start with one big theme that I took away from this first enforcement action, and that is that in their very first chance to issue an NIL enforcement action, the NCAA has, for the most part, stayed true to its words on two of the most important aspects of NIL enforcement that we have been talking about. First, only the school was punished and its coach, of course. No penalty was assessed to the student athletes here, and really no penalty was assessed to the booster either. As we've discussed on this podcast, the NCAA has been clear that this would be the case, that it would be the school that is punished, and they stayed true to that here.

Second, the focus of this enforcement action was on an inducement, just as the NCAA has been saying. As we've been saying, forbidding using NIL as an inducement has been the primary, if not sole rule that the NCAA has consistently maintained across all of its guidance. And here in the very first enforcement action, the NCAA has found a case that checks many of the boxes one might expect to see when looking for an inducement. The biggest such box, in my opinion, is the most obvious, student athletes changing schools, which we do have here.

That is not to say that athletes changing schools is a prerequisite for a finding of an inducement, but that fact is, again, in my opinion, one that I could see leading the NCAA to draw a conclusion that there was an inducement here. The NCAA has been true to its word, at least in the first enforcement action. What else can we learn from this? What are some of the key takeaways from the University of Miami situation here? I'll go first, but Chris and Mia, be ready because I'm going to put you both on the spot as well to tell us what comes to your minds in terms of takeaways or lessons for schools that can be learned from this.

The first takeaway that I want to talk about has to do with the new charging standard that we discussed in our last podcast, and really how much that new charging standard that went into

effect January 1 can matter in these cases. One reason that I think the punishment here was so light, at least relatively speaking, is because of the quote that Mia read a few moments ago, that the NCAA found that it did not develop any facts directly linking activities around name, image, and likeness to the prospect's recruitment to or decision to enroll at the University of Miami.

This is true to the letter of the NIL interim policy, which, of course, focuses on inducements. But I can't help but wonder if the outcome would have been different if this conduct had occurred after the new charging standard took effect. The new charging standard, as listeners will recall, makes clear that the NCAA can and will use circumstantial evidence. When that circumstantial evidence suggests an NCAA NIL violation occurred, the NCAA is going to presume such a violation and leave it to the school to rebut it. That quote that I just read from the NCAA Infractions Committee, really it speaks to the absence of a "direct link" between the NIL activity and the player's recruitment.

Under the new charging standard, at least as articulated by the NCAA, such a direct link may no longer be necessary. Given the facts here, at least as they have been reported, under the new charging standard, one might think that the NCAA could and probably would take the position that an NIL violation can be presumed, or a more significant NIL violation can be presumed. And in that case, it would've been up to the University of Miami to rebut that presumption and demonstrate that there was no NIL violation. But of course, that was not exactly the circumstances we had here due to the timing. Chris, how about you? What's one takeaway that you see from this?

Christopher Brolley:

I think that's a major, major warning to schools and boosters, especially the loudest ones on social media like Mr. Ruiz, not only involving the women's basketball team, but there have been other issues with the men's basketball program as well. Despite the relatively mild penalties. I think this case is significant, as we discussed earlier, is that it serves as the NCAA's first infractions ruling in an NIL related matter. Although the booster was not reprimanded or punished, there were stern warnings directed at boosters in the preamble to the case synopsis. As Mia noted earlier, the investigation did not develop any facts directly linking activities around NIL to the Cavinder's recruitment.

However, they noted that the panel was troubled by the absence of a disassociation of the involved booster. The Committee on Infractions also noted that it will strongly consider disassociation penalties in future cases involving NIL adjacent conduct. Callan, as we've discussed, the booster was not punished. However, the committee chair Dave Roberts is quoted as saying, "We're not telling boosters we're not going to slam you. Don't take this as precedent that it will never happen." I think this should be a wake-up call to boosters and collectives, especially the most vocal ones.

Callan Stein:

Yep. That's a great take away, Chris. All right, Mia, what about you? What's your takeaway from this?

Mia Marko:

I think for me the takeaway is that even though this is the first enforcement action, so it's attention grabbing, unfortunately, its precedential value is really limited. There's a quote from the chief hearing officer Gary Miller that was made to Sports Illustrated after the violation came out, and he confirmed that it really has little precedential value. He said the ruling shouldn't be viewed as having precedent going forward. He talked about the fact that the Committee on Infractions had sent the resolution better back to the NCAA enforcement group seeking clarifications before signing it. It really showed the hesitancy of the Committee on Infractions on approving this resolution.

Cal, as you mentioned earlier, this was all before we got the new charging standard from the NCAA. In addition to Mr. Miller saying this has little precedential value, this case may well have come out differently now. The Committee on Infractions referenced this fact that they couldn't presume a violation under the rules, so that suggests that if they could have presumed a violation, things may have come out differently. The Committee on Infractions chose to ultimately accept the negotiated resolution but expressed some reservations. In doing so, as Chris had mentioned, the NCAA was clearly conflicted about not levying punishment on the booster.

Just because the booster avoided punishment here doesn't mean that boosters will avoid punishment in the future, and further punishments levied on coaches and schools might be harsher as well. I think this just all cuts against the precedential value of the first action we've seen from the NCAA.

Callan Stein:

Thanks, Mia, and thanks, Chris. Before we close, let me give two more mini takeaways that I've had. These are really athletics focused and school focused more than they are about the law or the precedential value. The first other takeaway I had was that the NCAA is very clearly watching coaches and watching them carefully. As Mia noted, the NCAA has said that this is not a precedent, but I do think it provides good insight into how the NCAA is going to handle coaches in the NIL era and what standards they're going to hold those coaches to. Here, the NCAA examined the women's basketball team's coach's text message, clearly a sign that they were looking for evidence of an inducement.

The NCAA here also viewed the facilitation by the coach to the booster as a punishment worthy violation. I think going forward, what we're going to see are communications by and between coaches being fair game for NCAA investigations, and that's going to include text messages, emails, and everything in between. Here, of course, we're talking about the communications of a head coach, the women's basketball team's head coach, but I think this is going to go for any coach involved in recruiting. I think we should also consider what this means in light of the new charging standard. In the Miami case, the NCAA considered the text evidence.

But in light of the charging standard permitting a presumption based on circumstantial evidence, it's going to be even easier for the NCAA to find hooks for coaches involved in perceived NIL violations. Even the mere appearance of a violation may result in charging activity. I think at the end of the day, the big takeaway, and the big lesson here for schools and coaches is that there is now a heightened need for compliance activities and NIL compliance

monitoring to focus on the actual coaches, the head coaches, the assistant coaches, and anyone else involved in recruiting.

And then the last mini takeaway that I want to mention is the involvement of the transfer portal in this the first enforcement action. I thought this was really interesting because, of course, this whole transfer portal concept is relatively new to NCAA athletics just like NIL is. I, for one, when NIL started, I thought most of it was going to focus on its impact on high school recruiting. I think we all had good reason to think that. But with the recent changes to intercollegiate transfer rules, many of the criticisms we have seen about NIL and the NCAA's lack of enforcement activity have centered around the transfer portal, especially in high profile sports like football and basketball.

We've seen a lot of movement of athletes from one school to another through the transfer portal, and several times at least, those have come with at least rumors of increased NIL deals. For that reason, I guess I'm not surprised that the very first NIL enforcement action involved allegations of an improper inducement not of a high school athlete to attend a college, but of athletes who are already competing at the collegiate level to transfer to a new school. I'm certain there are going to be enforcement actions to come involving high school recruits, but I am equally certain that this is not the last transfer portal enforcement case that we will see.

Colleges and universities that are active in the transfer portal in any sport should really take notice of this. Those schools really need to remember this case and the fact that the very first enforcement action that the NCAA took involving NIL involved transfers. When schools are setting up their compliance programs, there really needs to be a focus both on high school recruiting, but also on ensuring transfer portal recruiting is compliant with all NIL rules. With that, we are out of time here today, so I want to bring this discussion to a conclusion. I really want to thank Chris and Mia for joining me on this emergency 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 us directly at callan.stein@troutman.com, christopher.brolley@troutman.com, or mia.marko@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.

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