

COACHING CHANGES AND NCAA TRANSFER RULES: IS THE CURRENT SYSTEM LEAVING ATHLETES ABANDONED?

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I. Introduction

On October 26, 2010, blue-chip high school tailback, Mike Blakely committed to playing college football at the University of Florida for head football coach Urban Meyer.¹ Blakely

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¹ Mike Blakely Rivals.com Recruiting Profile, RIVALS.COM<http://rivals.yahoo.com/flavarsity/football/recruiting/player-Mike-Blakely> (noting that Mike

stated upon committing that "Florida is the place that I felt most at home with," and "I'm real excited to call myself a Florida Gator."² One of the main factors that attracted Blakely to Florida was a role in Meyer's high-powered spread option offense.³ On December 8, 2010, just over a month after Blakely committed to Florida, and just shy of two months from college football's national signing day, Meyer resigned as Florida's head football coach.⁴ Less than one week later, Florida hired former University of Texas defensive coordinator, Will Muschamp, to replace Meyer.⁵ Muschamp immediately scrapped Meyer's spread option offense in favor of running a pro-style system.⁶ Although Blakely signed with Florida and enrolled early, he announced a few months later during spring practice that he would transfer.⁷ The rumored reason was once Blakely saw what his role in the new offense would be, he decided that Florida was not the place he wanted to attend college.⁸ On May 25, 2011, Blakely decided to transfer to Auburn University and play in Auburn offensive coordinator Gus Malzahn's spread offense, an offense that recruiting experts have said Blakely was "made for."⁹ Blakely's high school football coach Joe Kinnan said, "when [Blakely] got there and (the former coaching staff) was gone, I think he realized that he picked the wrong place."¹⁰ While Blakely will be able to play college football at Auburn University, he will be ineligible for the 2011 season.¹¹ The reason: Blakely does not

Blakely was the Rivals.com 40th ranked high school football player in the country for the 2011 recruiting year).

² Corey Long, *Mike Blakely picks Florida Gators*, ESPN (October 26, 2010),

<http://sports.espn.go.com/ncaa/recruiting/football/news/story?id=5729377>

³ *Id.* ("The coaches have talked about using me in a role similar to Percy [Harvin],' Blakely said. 'But I just want to play. If they need me to run up the middle for 5 yards, I'm going to do that. And when I'm not in the game I'm going to be the loudest cheerleader on the sidelines.'")

⁴ Mark Long, *Urban Meyer Resigns: Florida Football Coach Stepping Down*, HUFFINGTON POST (December 8, 2010), http://www.huffingtonpost.com/2010/12/08/urban-meyer-resigns_n_793936.html

⁵ Rachel George, *Florida Gators Hire Will Muschamp to Replace Urban Meyer as Head Coach*, ORLANDO SENTINEL (December 11, 2010), http://articles.orlandosentinel.com/2010-12-11/sports/os-florida-gators-will-muschamp-1212-20101211_1_muschamp-boise-state-s-chris-petersen-mississippi-state-s-dan-mullen

⁶ *Florida Hires Weis as New Offensive Coordinator*, CBS SPORTS (January 1, 2011), <http://www.cbssports.com/collegefootball/story/14493249/florida-hires-weis-as-new-offensive-coordinator/rss>

⁷ Edward Aschoff, *Mike Blakely Transfers from Florida*, ESPN (May 10, 2011), http://espn.go.com/blog/ncfnation/post/_id/41843/mike-blakely-transfers-from-florida

⁸ *Id.* ("Where Blakely would have fit into the mix is a bit of a mystery. According to sources close to Florida, Blakely never really bought into the idea of playing in a pro-style offense once he saw what the offense could potentially look like on the field. That's not a very good attitude to have if you can't even get out and participate.")

⁹ *Former Florida RB Mike Blakely Confirms Transfer to Auburn*, USA TODAY (May 26, 2011), <http://content.usatoday.com/communities/campusrivalry/post/2011/05/florida-mike-blakely-transfer-auburn/1> ("He's a versatile guy. He can do a little bit of everything -- especially catch the ball out of the backfield," said Barton Simmons, a national recruiting analyst for 24/7 Sports who rated Blakely one of the nation's top five prep tailbacks. "He's made for a spread offense. I have no doubt that he'll be able to help in 2012. I thought he was ready to contribute this fall for Florida.")

¹⁰ *Id.*

¹¹ Andy Bitter, *Auburn Football Notes: NCAA Denies Mike Blakely's Appeal*, (August 31, 2011) <http://www.ledger-enquirer.com/2011/08/31/1714785/auburn-football-notes-ncaa-denies.html#ixzz1WiTvrwM5>

meet the conditions that must apply in order to meet the one-time transfer exception under NCAA Bylaw 14.5.2.2.10. As a result, Blakely will not be eligible to play at Auburn until the 2012 college football season.¹²

NCAA Bylaw 14.5.2.2.10 currently allows student-athletes one opportunity to transfer from one institution to another without having to sit out one year to establish residency as is currently required so long as certain conditions apply.¹³ One of these enumerated conditions is that the student-athlete is “a participant in a sport other than baseball, basketball, bowl subdivision football or men’s ice hockey at the institution to which the student is transferring.”¹⁴ The result of this condition is to essentially distinguish the rights of, and promote inequality between, “revenue” and “non-revenue” student-athletes.¹⁵ Conversely, collegiate coaches have the opportunity to move from job to job despite contractual obligations and non-athlete students as well as non-revenue sport student-athletes have the opportunity to freely transfer from institution to institution without any penalization. Restricting transfer opportunities for these student-athletes is the equivalent of telling a theatre student from Harvard who transfers to Yale that “she would be ineligible to participate in any dramatic production during her first year at Yale,” or “telling a coach who takes a new job that he or she must stay off the sidelines or bench for a season.”¹⁶

Although these scenarios seem preposterous, this is exactly the type of scenario that occurs every off-season for these student-athletes who wish to transfer from one Division I institution to another. Collegiate coaches, however, continue to cash in by breaking contractual obligations and moving to another “dream job” while leaving the student-athletes they recruit behind.

This paper addresses the current NCAA transfer policy pertaining to Division I “revenue” sport student-athletes as it relates to a head coach leaving a program from the date the student-athlete signs his or her National Letter of Intent (NLI) to the completion of his or her athletic eligibility. Part II provides two famous examples: one of a prospective student-athlete and one of

¹² *Id.*

¹³ See NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA), 2011-2012 NCAA Division I Manual, Operating Bylaws, 14.5.2.2.10 at 179 (August 2011), *available at* <http://www.ncaapublications.com/productdownloads/D112.pdf> (defining the one-time transfer exception).

¹⁴ *Id.* Bylaw 14.5.2.2.10(a) at 179 (stating a condition of the one-time transfer exception if the student is a participant in a sport other than baseball, basketball, bowl subdivision football or men’s ice hockey at the institution to which the student is transferring. A participant in championship subdivision football at the institution to which the student is transferring may use this exception only if the participant transferred to the certifying institution from an institution that sponsors bowl subdivision football and has two or more seasons of competition remaining in football or the participant transfers from a Football Championship Subdivision institution that offers athletically related financial aid in football to a Football Championship Subdivision institution that does not offer athletically related financial aid in football.).

¹⁵ See Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 Sports Law. J. 41, 75-76 (2006) (citing NCAA Proposal No. 2004-48 (“This restriction place on these ‘revenue’ sports cannot be justified philosophically”).

¹⁶ Ray L. Yasser & Clay Fees, *Attacking the NCAA’s Transfer Rules as Covenants Not To Compete*, 15 Seton Hall J. Sport & Ent. L. 221 (2005).

a current student-athlete. In both cases, their coaches left current jobs for new opportunities while still under contract. These two examples will be used as references throughout this paper. Part III provides a background on the NCAA, including the motives behind its formation, its purported mission and role in intercollegiate athletics, its current structure and legislative process, and its conflict between promoting amateurism and earning revenue. Part IV analyzes the two contractual documents that govern the student-athletes' rights while attending their universities as they relate to the current transfer policy. Part V looks into the arguments being made by the proponents for changing the current transfer policy and those in favor of keeping the current system. Part VI analyzes the legality of the contractual documents governing the transfer policy and how student-athletes could bring legal action in order to institute change. Part VII focuses on possible remedies for implementing a transfer system that is fair to both the student-athlete and the academic institution through the means discussed in Part VI. Part VIII concludes this paper.

II. Case Studies Regarding Current Transfer Rule

A. The Prospective NCAA Student-Athlete

On November 11, 2011, the West Virginia University Mountaineers men's basketball team kicked off the 2011-12 season against Oral Roberts under head coach Bob Huggins in Morgantown, West Virginia.¹⁷ About 1,000 miles to the northwest, in Minneapolis, Minnesota, Michael Beasley awaited the end of the NBA lockout as he entered his second season with the Minnesota Timberwolves, his fourth in the National Basketball Association.¹⁸ And in Manhattan, Kansas, Kansas State University men's basketball fans are wondering what may have been if these two had the opportunity to work together the past four years.

On April 6, 2007, Bob Huggins left Kansas State University after just one season as the Wildcats head men's basketball coach to take the same job at West Virginia.¹⁹ While Huggins had an impressive coaching resume prior to Kansas State, including fourteen trips to the NCAA Men's Basketball tournament in sixteen years with one Final Four appearance, he was dismissed from the University of Cincinnati in 2004 following a driving under the influence arrest.²⁰ Huggins's tenure at Cincinnati was also marred by low graduation rates, student-athlete conduct problems, and NCAA rules violations that landed the program on probation.²¹ Although Kansas State was taking a tremendous risk by bringing Huggins back into the collegiate coaching ranks due to his checkered past, he quickly turned things around leading the team to a 23-12 record in his first season that ended with a berth to the National Invitational Tournament to conclude the 2006-07 season.²²

¹⁷ WEST VIRGINIA UNIVERSITY 2011-12 MEN'S BASKETBALL SCHEDULE, *available at* <http://westvirginia.scout.com/3/bbschedule.html>

¹⁸ NBA SCORES AND SCHEDULE November 11, 2011, *available at* http://espn.go.com/nba/team/schedule/_/name/min/seasontype/2/minnesota-timberwolves

¹⁹ *Huggins Agrees to 5-year Deal With Mountaineers*, ESPN (April 6, 2007), <http://sports.espn.go.com/ncb/news/story?id=2827212> (April 6, 2007).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

Outside of his success on the court, Huggins had assembled one of the top incoming recruiting classes in the nation.²³ The quality of student-athletes assembled in this class, which included arguably the top high school player in the country, Michael Beasley, was unprecedented for Kansas State and was thought to be largely due to Huggins' resume rather than what Kansas State itself had to offer.²⁴ Following the announcement of Huggins' departure, however, school officials announced that the recruits who had already signed their letter of intent to play at Kansas State, who had expected to spend their collegiate careers playing under Huggins, would not be released from their commitment.²⁵ Tim Weiser, who was Kansas State's athletic director at the time and currently is the deputy commissioner of the Big 12 conference, stated, "our policy as a department is that we don't grant releases. We invest a lot in recruiting, training, scholarshiping, and boarding our student-athletes, and for us to grant releases is something we would have to be convinced is in the best interest of both the university and the student athlete."²⁶ Therefore, the only options for Michael Beasley, who before he signed his letter of intent could have chosen to play at the school of his choice, would have been to sit out a year after transferring to another NCAA Division I institution, play collegiate basketball immediately at the Division II or III level, or become at the time, what would have been the first high school athlete to sign a professional deal outside of the United States.²⁷ Huggins' only penalty was a \$100,000 fine for breaking his contract with Kansas State early, which was easily recouped with not only his initial contract in which the first year was worth 800,000, but also with a eleven-year, 1.5 million-dollar per year extension Huggins signed on May 2, 2008.²⁸

Beasley ended up affirming his decision to enroll at Kansas State and there is no doubt that he had a significant effect on the basketball program even though his tenure was brief. By averaging 26.2 points and 12.4 rebounds per game, he lifted Kansas State into its first NCAA men's tournament berth since 1996 and put himself into contention for national player of the year honors.²⁹ First year coach, Frank Martin, admits that keeping Beasley at Kansas State did wonders for the program. "He's embraced the responsibility of leading our program, of re-establishing Kansas State as somebody that's on the national scene that people in college

²³ Rivals.com Basketball Recruiting Staff, Preliminary *Enrolled Team Rankings*, RIVAL.COM (October 24, 2007) <http://basketballrecruiting.rivals.com/content.asp?SID=910&CID=730394> (ranking the incoming 2007 Kansas State University men's basketball class forth in the country). *See also*, Scout.com Basketball Team Recruiting Rankings, SCOUT.COM (November 7, 2008) <http://scouthoops.scout.com/a.z?s=75&p=9&c=14&cfg=bb&y=2007> (ranking the same class first in the country).

²⁴ Huggins Announces Huge Recruiting Class, K STATE SPORTS (November 8, 2006) <http://kstatesports.cstv.com/sports/m-baskbl/spec-rel/110806aab.html> (November 8, 2006) ("this is truly new territory for this program to sign two players that rank in the top-10 nationally at their respective position. This class will define the Bob Huggins' era at Kansas State. It is an enormous step for the program and will make everyone stand up and take notice at what is going on in Manhattan, Kansas").

²⁵ Kansas State turns to assistant coach Frank Martin, USA TODAY (April 6, 2007), http://www.usatoday.com/sports/college/mensbasketball/big12/2007-04-06-kstate-martin_N.htm

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Huggins Signs Extention*, WHSV.COM (May 2, 2008), <http://www.whsv.com/sports/headlines/18498444.html?storySection=story>.

²⁹ Beasley finds stability, comfort at Kansas State, USA TODAY (February 24, 2008) http://www.usatoday.com/sports/college/mensbasketball/big12/2008-02-24-beasley-cover_N.htm

basketball talk about. He's opened doors for us for television, for recruiting, for things that continue to benefit this program.”³⁰

B. The Current NCAA Student-Athlete

On September 3, 2011, the Brady Hoke era officially began at the University of Michigan as Michigan defeated Western Michigan in Michigan's first game since former head football coach Rich Rodriguez was fired on January 6, 2011.³¹ Michigan was led by quarterback Denard Robinson, who was playing his first game in Hoke's pro-style offense after playing in Rodriguez's spread option offense during the 2009 and 2010 seasons.³² While Robinson played well, completing nine of thirteen passes with one touchdown and also rushing for forty-six yards, perhaps the perfect quarterback for Hoke's system would have been Ryan Mallett, rookie quarterback for the New England Patriots, who transferred from Michigan to the University of Arkansas following the hiring of Rodriguez and the implementation of Rodriguez's spread option offense in 2008.³³

When Ryan Mallett chose to make a commitment to the University of Michigan to play quarterback for its football program, he stated that he felt as if “a thousand pounds has been lifted off [his] shoulders.”³⁴ In fact, Mallett was so excited about his commitment that he decided to take summer classes following his junior year in high school which would allow him to graduate early and enroll at Michigan a semester early.³⁵ When the 2007 season opened, Mallett was set to back up senior quarterback, Chad Henne, until the reigns of the pro-style offense run under Head Coach Lloyd Carr were turned over to him in 2008. When Henne went down with an injury, Mallett ended up playing in eleven games and completed 61 of 141 passes for 892 yards and seven touchdowns with five interceptions.³⁶

One year after Mallett arrived at Michigan, Lloyd Carr, the school's head football coach, announced his retirement. Michigan, shortly thereafter, tabbed West Virginia's Rich Rodriguez as Carr's successor.³⁷ The problem for Mallett was that Rodriguez ran a spread option offense,

³⁰ Martin Expecting Beasley To Go Pro, SPORTS ILLUSTRATED (March 25, 2008), http://sportsillustrated.cnn.com/2008/basketball/ncaa/specials/ncaa_tourney/2008/03/25/beasley.kstate.ap/index.html

³¹ Michigan Wins Weather-Delayed Game, FOX SPORTS (September 3, 2011), <http://msn.foxsports.com/collegefootball/story/Michigan-Wolverines-beat-Western-Michigan-Broncos-in-weather-delayed-game-090311>.

³² *Id.*

³³ Ryan Mallett “forced out”-Transfers from Michigan, MICHIGAN FOOTBALL SATURDAYS (January 10, 2008), <http://thosewhostaywillbechampions.blogspot.com/2008/01/ryan-mallett-forced-out-transfers-from.html>

³⁴ John Talman, *Mallett Headed to Michigan*, YAHOO! SPORTS (April 26, 2006), <http://footballrecruiting.rivals.com/content.asp?CID=538430>

³⁵ *Id.*

³⁶ Mark Snyder, *Why Ryan Mallett Transferred: Ex-Wolverine Felt 'Forced Out'*, DETROIT FREE PRESS (January 10, 2008), <http://www.freep.com/article/20080110/SPORTS06/801100423/WHY-RYAN-MALLETT-TRANSFERRED-Ex-Wolverine-felt-forced-out->

³⁷ Rodriguez Leaving West Virginia to Coach Michigan, ESPN (December 17, 2007), <http://sports.espn.go.com/nfc/news/story?id=3157227>.

which requires a quarterback who is at least as good on his feet as with his arm.³⁸ At 6'6, 247 lbs, Mallett came to Michigan in order to operate its traditional pro-style offense and was ill equipped physically to run the spread option.³⁹ With Rodriguez in place, there was no doubt Mallett was forced to reassess his future no matter how much he loved Ann Arbor, his teammates, or his classes. Mallett ultimately decided to transfer to Arkansas and played under Bobby Petrino, whose style of offense was much more suitable to Mallett's skills.⁴⁰ Following his decision to leave Michigan, Mallett stated that he had spoken to Rodriguez three times since he had been named head coach and came to the conclusion from these conversations that "I have a lot of respect for what he's done, but for me to be successful right now, I have to go somewhere else."⁴¹ At Arkansas, Mallett broke team records with 7,943 career passing yards and 62 passing touchdowns.⁴² Mallett's 158.1 career passing efficiency ranking was also the third-highest in Southeastern Football Conference history.⁴³ Following his career at Arkansas, Mallett was drafted in the third round by the New England Patriots in the 2011 NFL Draft.⁴⁴

What is common for both Michael Beasley and Ryan Mallett is that each had their once in a lifetime opportunities to play a collegiate sport at the university of their choice altered by the desires of a head coach and a university's administration and boosters. The standard of commitment that is often preached by these coaches is seemingly far less than what is expected of the student-athlete. Beasley and Mallett were forced to either honor an agreement under conditions they didn't sign up for or sit out a season and go through the whole recruiting process again in hopes of greater stability. The respective coaches, however, were free to move within the career path they desired without any real consequence or repercussion.

III. The NCAA

A. Formation

Whether you love, hate, or are indifferent towards intercollegiate athletics, there is no doubt that they have become a staple of entertainment in the United States. The first intercollegiate athletic contest took place in 1852 when crew teams from Harvard and Yale raced

³⁸ *Id.*

³⁹ Mark Snyder, *A Close Look at Rich Rodriguez's Time in Ann Arbor*, DETROIT FREE PRESS (January 5, 2011) <http://www.freep.com/apps/pbcs.dll/article?AID=/20110105/SPORTS06/101050448/A-close-look-Rich-Rodriguez-s-time-Ann-Arbor>.

⁴⁰ *Outside the Lines: When Coaches Leave Players Behind*, ESPN (July 9, 2000), <http://sports.espn.go.com/page2/tvlistings/show15transcript.html> (July 9, 2000) (Rick Majerus, Head Men's Basketball Coach at St. Louis University noted that "...players do come in a large part for the coach because he sets the style of play, where you play, how the game will be played, what direction your athletic career will take. And each coach sees players in a different vein and context. And each coach plays a different way.").

⁴¹ *Ryan Mallett "forced out"-Transfers from Michigan*, *supra* note 33.

⁴² CBS Sportsline Ryan Mallet NFL Draft Profile, CBSSPORTS.COM, <http://www.cbssports.com/nfl/draft/players/163224>.

⁴³ *Id.*

⁴⁴ Matt Jones, *Mallett Drafted By Patriots*, ARKANSAS ONLINE (April 29, 2011), <http://www.arkansasonline.com/news/2011/apr/29/mallett-drafted>.

on Lake Winnepesaukee in New Hampshire.⁴⁵ Although this event predated the NCAA, intercollegiate athletics were gaining considerable popularity across the United States as the only game in town.⁴⁶ The commercial effect of intercollegiate athletics began almost as soon as its inception as universities viewed winning on the field of play as a catalyst for public prestige for the school.⁴⁷ As a result, the Intercollegiate Conference of Faculty Representatives was organized in 1895 in order to “legislate and control two facets of player behavior: that of the ‘amateur idea’ and that of proper academic standards.”⁴⁸ This effort continued with the formation of the Intercollegiate Athletic Association of the United States (IAAUS) in 1906, which later became the NCAA in 1912.⁴⁹ These organizations were formed not only to retain the amateurism ideal but to also institute rule changes in collegiate football.⁵⁰ These rule changes were to limit football’s increasing violence, which was done as much to increase entertainment value, as it was to protect the student-athlete.⁵¹

B. Mission

As the NCAA continued to grow, it began to outline the policies by which it operates and governs through the annual Manual. This Manual provides that the fundamental policy of the NCAA is as follows:

“The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”⁵²

In addition to the NCAA’s fundamental policy of striving for education and amateurism, it lists nine purposes that its members should always strive to achieve. One of the nine is article 1.2 (c) stating the NCAA “encourages its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship, and amateurism.”⁵³

⁴⁵ James Shulman and William G. Bowen, *The Game of Life: College Sports and Educational Values*, 5-6 (2001).

⁴⁶ *Id.* at 7 (noting that during this time period there had yet to be a professional football, basketball, or hockey league and the first World Series was in 1901 and the rebirth of the modern Olympics was in 1896. There was also no television, movies, or Internet. In these small communities, intercollegiate athletics served as one of the only forms of entertainment offered providing continued growth into today).

⁴⁷ See Linda Bense-Meyers, *Breaking Faith with the College Athlete: How Athletic Scholarships Are Destroying College Sports In America*, National Institute for Sports Reform Publication (2003).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See 2010-2011 NCAA Division I Manual, Constitution Bylaws, art. 1.3.1 at 1 (2011), available at <http://www.ncaapublications.com/productdownloads/D112.pdf> (describing the “basic purpose” of a competitive athletics program as a vital part of an institution’s educational mission).

⁵³ *Id.* art. 1.2(c) at 1 (explaining the purposes of NCAA).

In Article 2 of the NCAA Constitution, the NCAA lists sixteen principles that it strives to fulfill. In the context of this issue the critical principles are: (1) the principle of student-athlete well-being⁵⁴; (2) the principle of amateurism⁵⁵; (3) principle of institutional control and responsibility⁵⁶; and (4) the principle of competitive equality.⁵⁷ All of the policies and principles are important in the context of this paper because their common theme is amateurism and student-athlete welfare are the responsibility of the NCAA and its member institutions to protect.

C. Legislative Process

1. Overview

The NCAA is a voluntary association comprised of over 1200 member institutions, 335 of which compete at the Division I level.⁵⁸ Membership to the NCAA is on a voluntary basis, and all member institutions and conferences are required to pay dues to the NCAA.⁵⁹ NCAA legislation is developed through membership-led a governance system where the membership introduces and votes on proposed legislation⁶⁰ Each Division in the NCAA maintains its own bylaws, which reflect “rules and regulations not inconsistent with the provisions of the NCAA constitution.”⁶¹

2. Initial Review

NCAA Division I legislation may be adopted or amended at any meeting of the Board of Directors or the Legislative Council.⁶² On initial review of a legislative proposal, the Legislative Council will conduct a single vote to adopt, distribute for membership review or defeat the proposal. Adoption of a new proposal requires a two-thirds majority vote of the Legislative

⁵⁴ *Id.* art. 2.2, at 3 (the Principle of Student-Athlete Well-Being states: “Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes.”).

⁵⁵ *Id.* art 2.9, at 4 (the Principle of Amateurism states: “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”).

⁵⁶ *Id.* art. 2.1, at 3 (the Principle of Institutional Control and Responsibility states that each member institution is to control its intercollegiate athletics program in compliance with the rules and regulations of the NCAA).

⁵⁷ *Id.* art 2.10, at 5 (The Principle of Competitive Equality states: “The structure and programs of the NCAA should provide members with the opportunity for equality of competition to assure that individual student-athletes and institutions are not prevented unfairly from achieving benefits inherent in participation in intercollegiate athletics.”).

⁵⁸ NCAA Members by Division, NCAA.ORG, available at <http://web1.ncaa.org/onlineDir/exec/divisionListing?sortOrder=2&division=All>

⁵⁹ William C. Martin, *The Graduate Transfer Rule: Is the NCAA Unnecessarily Hindering Student-Athletes From Traversing the Educational Paths They Desire?*, 15 Vill. Sports & Ent. L.J. 103, 106 (2008)

⁶⁰ Who is the NCAA, NCAA.ORG, (October 15, 2010) available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/behind+the+blue+disk/behind+the+blue+disk+-+who+is+the+ncaa>.

⁶¹ See 2011-2012 NCAA Division I Manual, Operating Bylaws, *supra* note 13, art 5.2.2, at 34.

⁶² *Id.*, art 5.3.2.1, at 33 (explaining Division I authority to amend or adopt legislation).

Council members present, and voting is subject to a review by the Board of Directors at their next scheduled meeting.⁶³ If a proposal is not adopted, but a majority of the Legislative Council members present and voting vote to adopt the proposal or forward it to the membership for review, the legislation shall be forwarded to the membership for review.⁶⁴

3. Final Review

At the Legislative Council's next scheduled meeting, following the membership's opportunity to review and comment, they will consider the suggestions and take action on the proposed changes.⁶⁵ If the changes receive a majority vote from the Legislative Council members present and voting, the proposal is adopted.⁶⁶ If the proposal does not receive a majority vote, it is considered defeated.⁶⁷

Legislation adopted by the Legislative Council is then subject to review by the Board of Directors at its next meeting.⁶⁸ If the legislation is not adopted by the Legislative Council, the Board of Directors may restore a proposal on initial review by the Legislative Council, forward the proposal to the membership for review and comment either in its original or amended form, adopt the proposal in its original or amended form, resurrect a proposal defeated on final review by the Legislative Council and consider the proposal on its merits or amend a proposal defeated on final review by the Legislative Council.⁶⁹

4. Membership Override

The membership may also override the adoption of legislation by the Legislative Council or the Board of Directors or the defeat of legislation by the Board of Directors.⁷⁰ In order to override the adoption of legislation, at least 30 active members must make written requests within 60 days of the date of the Board of Directors' meeting on which the adoption or defeat becomes final.⁷¹ An adopted legislative change will be suspended when 100 requests are received.⁷² Once the required number of override votes has been received the Legislative Council or the Board of Directors will review its legislative decision and if the decision is not changed the membership will vote on the decision at the next annual NCAA convention.⁷³ If

⁶³ *Id.*, art 5.3.2.2, at 35-36 (explaining Division I process for adoption or amendment of legislation at the initial review level).

⁶⁴ *Id.* at 36 (explaining Division I authority to amend or adopt legislation at the initial review level).

⁶⁵ *Id.* art 5.3.2.2.2, at 36 (explaining Division I authority to amend or adopt legislation at the final review level).

⁶⁶ *Id.* at 36 (explaining Division I authority to amend or adopt legislation at the final review level).

⁶⁷ *Id.*

⁶⁸ *Id.*, art 5.3.2.2.4.1, at 36 (explaining Board of Directors action on legislation adopted by the legislative council).

⁶⁹ *Id.*, art 5.3.2.2.4.2, at 36 (explaining Board of Directors action on legislation defeated by the legislative council).

⁷⁰ *Id.*, art 5.3.2.3, at 36 (explaining membership override of legislative changes).

⁷¹ *Id.*, art 5.3.2.3.1, at 36-37 (explaining membership override of legislative changes).

⁷² *Id.* (explaining membership override of legislative changes).

⁷³ *Id.*, art. 5.3.2.3.3, at 37 (explaining Legislative Council or Board of Directors review).

five-eighths of the membership votes against the decision, the legislation will not be implemented.⁷⁴

D. Competing Interests: Amateurism vs. Revenue

While the NCAA maintains that its primary focus is amateurism and the protection of student-athlete welfare there is no doubt that today's intercollegiate athletic scene is vastly different from the inception of the NCAA in 1912. The balance between education and competitive athletics as well as the relationship between using collegiate sports to the benefit of the athlete and the benefit of the academic institution has become increasingly difficult. The athletic scholarship has only complicated the ability of the NCAA to truly define what a student-athlete is. Does the use of athletic scholarships produce merely a free feeder system for professional sports? Does the athletic scholarship encourage student-athletes to put their athletic commitments ahead of their educational interests? Are we inhibiting more qualified students from attending particular institutions for the sake of holding an admissions spot for a prospective athlete? The amateur ideal is one that is supposedly the core concept of the NCAA. The NCAA cites its objective as to integrate "intercollegiate athletics into higher education so that the educational experience of the student athlete is paramount." While the NCAA holds itself out as the protector of the amateur ideal and student-athlete welfare, the NCAA has also become the equivalent of a big-money corporation.⁷⁵ While intercollegiate athletics allow a unique opportunity for additional growth in a student's collegiate experience, there can be no doubt that they are also a form of entertainment with the ability to influence potential students, induce media attention to a university, and attract sources of revenue otherwise unavailable. With the revenues being generated by the NCAA and member institutions and conferences as well as the increasing amount of capital being spent to fuel the intercollegiate athletic machine, it is questionable whether the NCAA is continuing to put the welfare of the student-athlete over their own financial well-being.

⁷⁴ *Id.*, art. 5.3.2.3.4, at 37 (explaining five-eighths vote to override the Legislative Council or Board of Directors review).

⁷⁵ *Time Warner Joins CBS in 10.8 Billion March Madness TV Deal*, FOX BUSINESS (April 22, 2010), <http://www.foxbusiness.com/markets/2010/04/22/time-warner-joins-cbs-billion-march-madness-tv-deal/#ixzz1WfJzUgup> (Time Warner's (TWX) Turner Broadcasting and CBS (CBS) inked a \$10.8 billion, 14-year deal Thursday to televise NCAA's March Madness basketball tournament beginning in 2011. The new agreement comes at a premium to the expiring 11-year contract that was signed by CBS in 1999 and was worth just \$6 billion. The deal means that for the first time, all games will be televised live across four national networks: CBS, TBS, TNT and truTV); *see also* Leah Finnegan and Danielle Wiener-Bronner, *The Most Profitable College Football Teams*, HUFFINGTON POST (December 30, 2010), http://www.huffingtonpost.com/2010/12/30/the-most-profitablecolle_n_802810.html#s217317&title=University_of_Texas (The University of Texas at Austin had total revenue of \$93,942,815 during the 2009-10 season with a total profit of \$68,830,484.).

IV. The Athletic Scholarship

A. History

While the NCAA has consistently struggled balancing revenue interests and amateurism, it tried to maintain some semblance of amateurism with the Sanity Code of 1948.⁷⁶ The purpose of the Sanity Code was to give the NCAA police power over its members for the tuition waivers that were being offered to prospective student-athletes.⁷⁷ The Sanity Code instituted a policy, which allowed universities to only provide “need-based” aid to student-athletes.⁷⁸ The NCAA was attempting to ensure that its member institutions were working to fulfill the purpose of intercollegiate sports other than just attempting to be successful on the field of play. When several major institutions threatened to withdraw membership from the NCAA, the Sanity Code was amended to provide for the student-athlete’s entire educational expenses as well as necessary room and board.⁷⁹ One benefit of the Sanity Code that remained for the student-athlete was that no athletic scholarship could be taken away for poor athletic performance.⁸⁰ This policy, however, was changed in 1967 when the NCAA allowed institutions to begin taking scholarships away for what was perceived as insubordination by the athlete or failure to take their sport seriously.⁸¹ In 1973 this rule was again changed to the current system of making scholarships renewable by the institution on an annual basis.⁸² While the NCAA initially worked to safeguard its principles, over time the use of the athletic scholarship regressed into its current state.

B. Scholarship Formation

Student-athletes are easily distinguishable from the general student body. Student athletes are obliged to perform services for their institution,⁸³ in most cases student-athletes are recruited on a much greater scale,⁸⁴ and student-athletes make their collegiate choice based on additional factors such as athletic facilities, media exposure, fan base, post-collegiate professional sports opportunities, the type of game play system their future coach runs, and their relationship with the current coaching staff. It is laughable to rely on the theory that an athlete attends an institution in turn only to receive a quality education free of charge.

⁷⁶ Bensel-Meyers, *supra* note 47.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Bensel-Meyers, *supra* note 47.

⁸² *Id.*

⁸³ Derek Q. Johnson, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 Colum. L. Rev. 96, 104 (January 1985).

⁸⁴ Tim Reynolds, *Clowney's Signing Will Punctuate Crazy Signing Sagas*, USA TODAY (February 13, 2011), http://www.usatoday.com/sports/preps/football/2011-02-13-clowney-signing-saga_N.htm (February 13, 2011) (detailing the 2011 NCAA football signing day: “A mother forges her son's signature on a letter of intent. A newly committed Georgia player hoists a live bulldog puppy to celebrate his college choice. A top-rated quarterback tries to avoid an argument by telling his mother — by text message — that he's not picking her preferred school.”).

The formation of the athletic scholarship takes place from two separate events, the signing of the National Letter of Intent (NLI) and the signing of the Statement of Financial Aid.⁸⁵ The NLI is a four-page document administered by the Collegiate Commissioner's Association for men's and women's athletes planning to attend NCAA institutions that award athletic scholarships.⁸⁶ The NLI amounts to a contract between the student-athlete and the school: the school commits to providing a scholarship if the athlete is admitted and the athlete commits to enroll if admitted.⁸⁷ The purpose of the National Letter of Intent Program is to deter school jumping by prospective student-athletes.⁸⁸ In order to do so, the NLI notes the adverse consequences on eligibility should the student athlete enroll at an institution not named in the letter.⁸⁹ The NLI basically is drafted in such a way to protect a school's interests.⁹⁰ It lays out that a student-athlete may only sign one letter of intent; that the letter will be considered invalid unless signed by the student-athlete, the student's legal guardian, and the school's Athletic Director; that all other schools must respect the student's choice which requires all recruiting to cease upon execution; and that a release procedure is provided in the event the student athlete and the institution come to a mutually satisfactory agreement.⁹¹

The Statement of Financial Aid, on the other hand, confirms what is being offered to the student by the university and their signatures evidence consent. Universities draft this statement in its entirety at their own discretion.⁹² A few clauses are typical to most institutions such as (1) student-athletes agree to abide by university rules and regulations; (2) student-athletes agree to abide to any rules and regulations of their athletic conference or other governing organization; (3) student-athletes agree to maintain eligibility; (4) student-athletes agree to abide by the rules and regulations of their team; (5) If any of these are breached by the student-athlete, then the university has the right to take away the scholarship. As noted, the university can choose not to renew a scholarship after any given year.⁹³

⁸⁵ *How do Athletic Scholarships Work*, NCAA.ORG, (June 21, 2011)

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Behind+the+Blue+Disk/How+Do+Athletic+Scholarships+Work>.

⁸⁶ Jack Carey, *Letter of Intent Can Turn Into Unintended Trap*, USA TODAY (April 21, 2003), http://www.usatoday.com/sports/college/mensbasketball/2003-04-21-recruits-trap_x.htm; *See also, Quick Reference Guide to the NLI*,

<http://www.ncaa.org/wps/wcm/connect/85bbf0004e0dc6ec94fef41ad6fc8b25/NLI+Guide+Updated+7-2011.pdf?MOD=AJPERES&CACHEID=85bbf0004e0dc6ec94fef41ad6fc8b25> (the letter of intent program was instituted after the NCAA twice failed to vote in favor of the program in the 1960s. After the second failure this organization was born out of commissioners and faculty athletic representatives as a voluntary, cooperative program. The NCAA has chosen not to adopt a letter of intent program because "it's a voluntary thing from the student-athlete's side and not all institutions have athletic financial aid.... high school athletes have also not yet stepped onto college campuses yet.").

⁸⁷ *Id.*

⁸⁸ Johnson, *supra* note 83, at 114 (citing *Sturup v. Mahan*, 290 N.E.2d 64, 68 (Ind. 1972)).

⁸⁹ *Id.* (the student-athlete who leaves the institution for which they signed the NLI loses their first year of eligibility at the school they wish to attend).

⁹⁰ *Id.*

⁹¹ *Id.* at 115.

⁹² *Id.* (citing Ron Waicukauski, *The Regulation of Academic Standards in Intercollegiate Athletics*, 1982 *Ariz. St. L.J.* 79, 99).

⁹³ Johnson, *supra* note 83, at 116.

C. Transfer Guidelines

Although these documents bind athletes to their signing school for athletic purposes what happens if that athlete desires to attend a different institution and continue to participate in intercollegiate sports? Although the NLI is signed only once before actual enrollment and the Statement of Financial Aid is signed on an annual basis, the current NCAA transfer rules limit the free movement of both prospective and current student-athletes from one educational institution to another after they sign the NLI and their Statement of Financial Aid.⁹⁴

For prospective student-athletes, the ability to transfer or withdraw from the institution for which they have signed the NLI is governed by the NLI itself. Among the provisions in the document is provision nineteen which states, "I understand I have signed this NLI with the institution and not for a particular sport or individual. If the coach leaves the institution or the sports program (or is not retained), I remain bound by the provisions of this NLI. I understand it is not uncommon for a coach to leave his or her coaching position."⁹⁵ While the NLI is binding on both parties, an appeals process exists for athletes who want to get out of the letter and have what the letter describes as "extenuating circumstances."⁹⁶

For the current student-athlete, the ability to transfer is governed not only by the NLI but also their Statement of Financial Aid as well as Article 14.5 in the NCAA Manual. Bylaw 14.5 basically states that student-athletes participating in revenue sports, which are defined as basketball, football, and hockey, wishing to transfer to another Division I institution must sit out one year of athletic eligibility, fulfilling a "residency" obligation at the new institution.⁹⁷ After transferring, student-athletes maintain their athletic eligibility without losing one of their four allowable athletic years; however, there is a five-year window to complete these years.⁹⁸ The NCAA does allow a "one-time transfer exception" which provides for a transfer without penalty of sitting out one year of athletic eligibility at the new institution provided they transfer 1) from one four-year institution to another; 2) to play a sport other than a revenue sport; 3) from one four-year institution to another for the first time; 4) in good academic standing from their current institution.⁹⁹ This one-time exception is unavailable to revenue sport student-athletes.¹⁰⁰ The school must also state that it has no objection to the waiver and therefore is releasing the athlete.¹⁰¹ The NCAA justifies this transfer policy stating "to be a true student-athlete, you'll need a

⁹⁴ Sarah Kinsky, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. Chi. L. Rev. 1581 (2003).

⁹⁵ *2011 National Letter of Intent*, MSNBC MEDIA, (Dec. 10, 2010) available at http://msnbcmedia.msn.com/i/CNBC/Sections/News_And_Analysis/_Story_Inserts/graphics/_PDF/NL_I_2010_2011.pdf.

⁹⁶ *Id.*

⁹⁷ Martin, *supra* note 59, at 113.

⁹⁸ *Id.*

⁹⁹ 2010-2011 NCAA Division I Manual, *supra* note 13, art. 14.5.5.2.10 at 181 (defining the one-time transfer exception).

¹⁰⁰ *Id.* art. 14.5.5.2.10(a), at 181 (defining the one-time transfer exception as applied to revenue sports).

¹⁰¹ *Id.* art. 14.5.5.2.10(d), at 181 (defining the one-time transfer exception and certification).

basic academic foundation before you are eligible to play sports”.¹⁰² Additionally, the NCAA wants to maintain a uniform playing field for member institutions where major programs cannot lure away talented athletes from the institutions who have invested in them.¹⁰³ A coach leaving a program has not yet been seen by the NCAA as an extenuating circumstance for either a prospective or current student-athlete.

V. **Analysis of the Issue: Should student-Athletes of Division I “Revenue” Sports Be Able to Transfer Without Penalty?**

A. **Arguments Against Change**

From the standpoint of the NCAA, the main justification made regarding its current transfer policies is that it is in line with the organization’s overall goals of promoting student-athlete education and intercollegiate amateurism. The NCAA has stated that the transfer rules are intended to “provide a better environment for the [student-athlete’s] collegiate experience and to establish appropriate standards to govern the manner in which institutions compete with each other both on and off the field.”¹⁰⁴ In cases against the NCAA, they have also claimed that the current transfer rules were to prevent transfers for purely athlete reasons, to avoid student-athlete exploitation, and to allow a transferring student time to adjust to his or her new environment.¹⁰⁵ Furthermore, even under the current transfer policy which would require a student to sit out a year, that student would be able to still attend classes which should be the primary reason a student-athlete is enrolled in school.

While the NCAA purports to promote both student-athlete academic welfare and amateur ideal, the NCAA has a competing duty to ensure competitive balance within each division among member institutions. Without competitive balance, the public appeal of intercollegiate athletics would lessen, as the outcome of events would become predictable. In this regard, it has been argued that creating a less stringent transfer policy would create a chaotic system where the top level institutions would not only be able to attract the most talented recruits out of high school but also from less successful athletic programs. Furthermore, if a coach leaves then a school is going to have no players when that new coach comes in. This would put them in an untenable position from a competitive balance standpoint.

From the perspective of the academic institution, one of the main arguments made for keeping the current system is the investment that the school has made in recruiting the athlete.¹⁰⁶ In fact, in 2010, the final Bowl Championship Series top 25 college football teams spent on

¹⁰² See *2011-2012 Transfer 101: Basic Information You Need to Know About Transferring to an NCAA College*, NCAA PUBLICATIONS, at 4, (August 2011) available at <http://www.ncaapublications.com/productdownloads/TGONLINE2011.pdf>.

¹⁰³ Martin, *supra* note 59 at 114.

¹⁰⁴ Sarah Konsky, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. Chi. L. Rev. 1581, 1587 (2003).

¹⁰⁵ *Id.* at 1587 (citing *McHale v. Cornell University*, 620 F. Supp. 67, 69-70 (ND NY 1985)).

¹⁰⁶ *Outside the Lines: When Coaches Leave Players Behind*, *supra* note 40 (Oklahoma athletics director, Joe Castiglione states that allowing a student-athlete to withdraw their letter of intent “would cause all sorts of problems for an institution that’s provided the resources for the student athlete’s recruitment.”).

average of \$629,985.80 on recruiting alone.¹⁰⁷ Collegiate coaches spend countless hours contacting prospective student-athletes from all over the nation in order to entice them to come visit their institution. If a student decides to take an "official visit", these expenditures allow the school to provide transportation, lodging, food, and other allotted sums in order to persuade the athlete to attend that institution.¹⁰⁸ If student-athletes were simply allowed to transfer immediately should there be a coaching change, the school is left with no return on its substantial investment along with no likely means of replacing them with the same caliber athlete.¹⁰⁹

From a coaching standpoint, there are three main arguments to keeping the current system in place. The first argument is that a player is free to leave early in the major revenue sports before his or her eligibility expires.¹¹⁰ If a player is allowed to leave early to seek a better financial situation after the coach invested in the athlete for a full four-five years, then the coach should have the same opportunity to seek a greater financial opportunity as well.¹¹¹

The second argument made by coaches is that it is not only the financial appeal of a new job that causes them to leave their current position. Like athletes, coaches are competitive and have the desire to compete with the best of the best. For example, current Notre Dame head football coach Brian Kelly left the University of Cincinnati before the conclusion of the 2009 college football season even though Cincinnati was undefeated and Big East conference champions.¹¹² While there was little doubt that Cincinnati had become a national power under Kelly with a 34-6 in three seasons, back-to-back Big East titles and two straight Bowl Championship Series berths, few programs, if any, can match the football tradition at Notre Dame.¹¹³

¹⁰⁷ Kristi Dosh, *How Much Does the BCS Top 25 Spend on Recruiting*, FORBES (Apr. 25, 2009), <http://www.forbes.com/sites/sportsmoney/2011/04/25/how-much-does-the-bcs-top-25-spend-on-recruiting/>.

¹⁰⁸ *Recruiting visits explained: Unofficial visits, official visits, and how they are set up?*, RECRUITING-101.COM (Oct. 11, 2007), <http://recruiting-101.com/recruiting-visits-explained-unofficial-visits-official-visits-and-how-are-they-setup/>.

¹⁰⁹ Incoming student-athletes would likely be not as physically mature due to age and also would not have the same experience as a transferring player of knowing the system that team runs. There is also no guarantee the coach would be able to recruit a similar athlete if a transfer decision was made late in the recruiting process.

¹¹⁰ In the NFL a player may leave once his graduating high school class is three years out of college. In the NBA a player needs to attend college for just one season. In the NHL a player may sign with a team at any point even in the middle of the NCAA season.

¹¹¹ Joshua Huffman, *Student Athletes Should Be Supported when Leaving School Early for Professional Sports*, ASSOCIATED CONTENT FROM YAHOO! (Sept. 16, 2009), http://www.associatedcontent.com/article/2181687/student_athletes_should_be_supported.html (noting the financial opportunities available in professional sports).

¹¹² Chris Mortensen, *Kelly To Be New Irish Coach*, ESPN.COM (Dec. 11, 2009), <http://sports.espn.go.com/nfl/news/story?id=4732205>.

¹¹³ *Coach Kelly introduced in South Bend*, ESPN.COM (Dec. 11, 2009), <http://sports.espn.go.com/nfl/news/story?id=4734086> (Notre Dame has won 11 college football national championships and has had 7 Heisman Trophy winners during its football history. Brian Kelly noted during his press conference that "you do not come to the University of Notre Dame because you want to be average. You want to be the best of the best. That's why I'm here.").

Rick Majerus, currently the men's basketball coach at St. Louis University, once left Ball State for the University of Utah. "Leaving the Ball State situation, it was a case of we were what they call a mid-major school. And Utah was a major school. And I thought that it would be a real challenge. And I thought we could play at Utah for things we weren't able to play for at Ball State. And that was the reason I made the move."¹¹⁴ What Majerus highlights is that you can only take certain programs so far if they don't have the funding or national exposure. While this may be hard for student-athletes to understand after the recruiting process, it is questionable what they would do if they had the same opportunity to leave a mid-major program for one of the top programs in the NCAA.

The final argument made by coaches is that with the current "win or else" mentality taken by Division I institutions, if a coach can be fired at will by an institution even after just one poor season during a long term contract then why can't they find a better job at the whim of success?¹¹⁵ Ben Howland, current UCLA men's basketball coach, who left Pittsburgh for his current job in 2003 stated that "you're saying the coaches can never leave to go anywhere... I worked my butt off for this opportunity which is a once-in-a-lifetime opportunity."¹¹⁶

Outside of the arguments of the NCAA and coaches for keeping the current transfer system intact there are also policy reasons that must be considered before changes are made. The first policy reason to keep the current system is that when a student-athlete signs with an institution they know exactly what they are getting themselves into as outlined by the contract they sign. There is no question it is a tough break for players when they decide to commit to a school based on a coach or a system the coach uses, and then the coach retires, leaves for another job or is fired. But, this should be a lesson to recruits that they are signing with an institution and not a coach, and this is even outlined specifically in the NLI.¹¹⁷ If this belief isn't realistic, a recruit should at least look at the current coach's job stability as well as his or her track record for changing jobs before making a decision. Even if unforeseen circumstances make this rule unfair to the athlete, there is a set procedural system in place for extraneous circumstances that allow an athlete to participate immediately. For example, Alex Bullard was allowed to transfer from the University of Notre Dame to the University of Tennessee without penalty because of the death of his father, which allowed them to be closer together since the family resided in Tennessee.¹¹⁸

¹¹⁴ *Outside the Lines: When Coaches Leave Players Behind*, *supra* note 40.

¹¹⁵ Pete Thamel, *Coaches Finding No Tolerance for Losing*, N.Y. TIMES (Mar. 31, 2010), <http://www.nytimes.com/2010/04/01/sports/ncaabasketball/01coaching.html> (noting that in 2010 Boston College parted ways with Al Skinner, who had reached the N.C.A.A. tournament seven times in the past 10 years but was 15-16 during the 2010 season).

¹¹⁶ *Outside the Lines: When Coaches Leave Players Behind*, *supra* note 40.

¹¹⁷ *2011 National Letter of Intent*, *supra* note 95 (quoting that "Coaching Changes: I understand I have signed this NLI with the institution and not for a particular sport or individual. If the coach leaves the institution or the sports program (or is not retained), I remain bound by the provisions of this NLI. I understand it is not uncommon for a coach to leave his or her coaching position.").

¹¹⁸ Andrew Gribble, *Alex Bullard Gets Hardship Waiver to Play This Fall*, GO VOLS XTRA (May, 5, 2011), <http://www.govolsxtra.com/news/2011/may/05/alex-bullard-gets-hardship-waiver-play-fall/?partner=RSS> ("A student-athlete typically must sit out a season when transferring within Division I. But in cases such as Bullard's, where a player's decision to transfer is motivated more by hardship than it is playing time, exceptions can be made.").

The second policy reason is that with procedures in place for extraneous circumstances, to expand this to when a coach leaves his program creates chaos. Where would the precedent end? Would we also allow players to transfer if it was for a position coach whom players are often closer to anyway? Western Athletic Conference Commissioner, Karl Benson, stated “worrying about that chaos is one reason we’ve held that position...once you allow that movement, it may be difficult to manage it.”¹¹⁹ Rick Majerus further notes that Athletic Directors and Presidents leaving a program can also have a significant impact on its direction. The “philosophy of the program, the changes relative to admissions, conference, commitment by the university to its athletic program” all can be impacted by people who are not the coach.¹²⁰

The final policy reason is to prepare student-athletes for life. The reality of the situation is that things in life change. When people choose a profession in life their boss or coworkers can leave. The circumstances can change. People need to the ability to adapt, move on, and make the best of the situation.

B. Arguments for Change

While the NCAA continues to claim that current transfer rules further both education and the amateur ideal, proponents of change claim that the current rules “restrict the freedom of athletes to make decisions which other students make in the regular course of their lives... (and are) designed not with the athlete’s interest in mind, but with an eye on protecting the economic interests of the NCAA and its member schools.”¹²¹ The current transfer rules benefit the schools by allowing them to unilaterally lock in their student-athletes for a period of five years while they can choose to not renew a scholarship.¹²² This benefits the school by ensuring a return on the substantial financial investment schools make in recruiting top-level student-athletes.¹²³

In regards to furthering education, the absurdity of this claim can be demonstrated by several separate observations. First, a student-athlete has the opportunity to obtain a quality education at a large number of NCAA institutions and may even be able to attend a higher academically ranked institution by transferring.¹²⁴ Furthermore, the transfer rules do not even take many academic motives into consideration. The only current academic exception allows a student-athlete to transfer if the current school discontinues their program of study.¹²⁵ The NCAA fails to take into account other possible academic reasons to transfer such as a desire to

¹¹⁹ *Outside the Lines: When Coaches Leave Players Behind*, *supra* note 40.

¹²⁰ *Id.*

¹²¹ Konsky, *supra* note 104, at 1596 (quoting Ray Yasser, *A Comprehensive Blueprint for the Reform of Intercollegiate Athletics*, 3 Marq. Sports L.J. 123, 147-48 (1993)).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*, at 1597; *See also* Christopher L. Chin, *Comment, Illegal Procedures: The NCAA’s Unlawful Restraint of the Student-Athlete*, 26 Loyola L. Rev. 1213, 1238 (1993) (recognizing that “most student-athletes can get an excellent education at one of several different universities,” and that the transfer guidelines do not take this parity of educational excellence into account).

¹²⁵ 2010-2011 NCAA Division I Manual, *supra* note 13, art. 14.5.5.2.3 at 180 (noting that if a student-athlete’s major course of study is discontinued they do not need to have a year of residence at the institution they transfer to).

change major, a leaving faculty member, a loss of scholarship assistance, or even a desire to acquire a higher caliber education.¹²⁶

Second, the NCAA's claim that student-athletes need time to adjust to a new academic environment, while arguable, is contradictable by its own past actions. While all transfer students may need time to catch up on credits that do not transfer and to become acclimated to their new teams, classmates, and schools, these same restrictive rules do not apply to junior colleges where students are in the same situation upon completion of their two-year degree.¹²⁷ Furthermore, the similar ban to freshman athletes was abandoned decades ago.¹²⁸ This would seem to be even more necessary because "if a "student-athlete" who has already adjusted to college life at one school is required a year to feel comfortable at a new institution, freshmen, often away from home for the first time in their lives, need even more time to adjust to college, especially to difficult academic work.¹²⁹ The NCAA has also reasoned that they have not moved from the bowl system to a playoff format in Division I-A football because they do not want to have student-athlete's being forced to miss more classes with additional games as opposed to the money the bowl revenues generate. Notwithstanding, basically all other team sports follow a tournament system and even individual sports usually have some type of qualifying system for their championships. The NCAA also fails to acknowledge that recently most Division I-A football teams have gone from an eleven to twelve game season and almost every conference now features a championship game which seems to also cause student-athletes to miss more classes.

In regards to furthering the amateur ideal, if you simply analyze how the NCAA operates it is hard to see how the current transfer rules really prevent the exploitation of the student-athlete. While the NCAA claims that allowing student-athletes to transfer is merely for athletic reasons, it is hard to believe this would really have a significant impact on its current state of amateurism. Furthermore, the current transfer rule is over inclusive in that it restricts almost all Division I revenue sports transfers regardless of the student-athlete's actual motivation and is under inclusive in that it fails to apply the same rules to non-revenue Division I sports as well as Division II and III sports.¹³⁰

The NCAA's claim that the transfer rules protect the competitive balance of all member institutions is also flawed. While the current rule would disallow student-athletes from immediately moving to the best teams, this really doesn't hold water because generally the best

¹²⁶ Konksy, *supra* note 104, at 1598.

¹²⁷ 2010-2011 NCAA Division I Manual, *supra* note 13, art. 14.5.4 at 176 (noting that junior college transfers do not need to sit out a year after graduating from their junior college into a four year institution).

¹²⁸ Konksy, *supra* note 104, at 1598 (*citing* Murray Sperber, *College Sports Inc.: The Athletic Department vs. The University*, at 241 (noting that the Freshman eligibility rule in all NCAA sports began in 1972 and since the decision to allow freshmen to compete, the NCAA has never waned from its decision. The NCAA made this change for economical reasons because these athletes were unable to participate even though they were on full athletic scholarships).

¹²⁹ *Id.*

¹³⁰ *Id.* at 1599.

teams and best funded athletic departments can get the best athletes out of high school.¹³¹ The NCAA also fails to take into account that because teams can only utilize a certain number of players it seems more logical that when student-athletes at higher ranked programs want to transfer to a lower ranked program that would even be more beneficial to competitive balance.¹³²

There are also policy reasons that justify a change in the current transfer rules. The main reason is that the NCAA fails to take into account that when an athlete chooses a school he is choosing more than what the institution itself has to offer. Former Arizona athletics director, Jim Livengood, who also served as the chair of the NCAA Division I basketball committee, noted “we’re kidding ourselves if we think kids are just signing with an institution. Coaches play a huge role in the decision. I have mixed feelings, but if I could cast a vote just for me, I would probably vote for some sort of timelines where kids have time to reconsider. There probably needs to be a period of two weeks, three weeks, whatever, a time where kids can see who the new coach is going to be. It might turn out to be a better situation than before. But to be fair to our kids, we at least need to have that option out there.”¹³³ Athletes can also make the same stepping-stone justification, as a coach in that playing for a big time program or the opportunity to advance to a professional league is what they have worked for all of their lives so why should they not share this same opportunity.

Requiring a sit-out rule for a transfer or release from the NLI is ridiculous. The Division I revenue sport student-athletes are playing a game under a whole separate set of rules than other NCAA students, other NCAA athletes, coaches, and administrators. The NCAA is continually masking this problem by claiming it is an academic enterprise rather than a business. The athletes are “employees” and should be as unhindered as coaches. The letter of intent or an athlete’s continuance to that intent through the Statement of Financial Aid over four years is a pledge of allegiance to a university. But what about a coaches pledge to be there for the athlete over the course of their collegiate career? Their pledges apparently do not carry as much weight and when oftentimes this pledge is the most influential factors in an athlete choosing an institution.

¹³¹ *Id.* at 1600.

¹³² *Id.*

¹³³ *Outside the Lines: When coaches leave players behind, supra* note 40 (Players have continuously voiced their displeasure with the current system. “I wake up some mornings being upset. I didn’t know who my coach was. I felt almost abandoned.” Brett Melton, Letter of Intent to Illinois when Lon Kruger left for the Atlanta Hawks of the NBA. “He was just talking about how he was going to really like working with me for the next four years. And one morning, somebody called and asked me what I thought about him leaving. And I really didn’t know about it. So I was kind of shocked.” Rashid Dunbar, who had signed a letter of intent for the University of Miami only to have Leonard Hamilton, his coach leave for the Washington Wizards added that he was “a little scared and a little excited. I’m scared because I don’t know the coach. I don’t know nothing about him. He don’t know anything about me. It leaves me stranded. You know, I had somebody that I went to Miami to go play for, and he’s not there anymore. So now it’s like I’m there by myself. Scennie Penn who played basketball at Ohio State added “Kids go to school for a certain reason. To go to school, yes. To play basketball, yes. And you have this type of bond and relationship with your coach. And this person leaves for whatever reason, it kind of leaves you not knowing what to do.” Penn ended up leaving Boston College to follow his head coach to Ohio State while sitting out the mandatory year.).

VI. Legal Analysis of the Current Transfer System

Although these student-athletes are being treated unfairly in regards to the NCAA's current transfer rules, the student-athlete does in fact choose to sign the documents that bind them under these rules. The question that results is what rights are available in order to bring a legal claim that can perhaps bring about a more equitable system? The answer lies in the relationship student-athletes have with the NCAA and their member institutions. Student-athletes are at a great disadvantage as they are forced to rely on the good faith of a university to perform its part of the bargain without knowledge of whether their scholarship will continuously be renewed. This at-will termination of an athletic scholarship has yet to be challenged due to a university's superior bargaining power, the NCAA's focus on revenue, and our court system's hesitancy to intervene.¹³⁴ While it seems counter intuitive that a university, a place of higher learning, could have any greater interest than the well being of all its students this has been shown not to be the case and it is time student-athletes make a claim based to enforce their rights.¹³⁵

A. Law of Contracts

"A contract is a promise or set of promises for the break of which the law gives a remedy, or the performance of which the law in some way recognizes a duty."¹³⁶ The principal function of contract law has been viewed as providing the framework for enforcing promises.¹³⁷ It is "society's legal mechanism for protecting the expectations that arise from the making of agreements for the future exchange of various types of performance."¹³⁸ At the advent of contract law, labeled classical contract law, the dominant belief was that the individual parties should be free to voluntarily enter into agreements as consenting parties and were left to protect their own interests without state interference.¹³⁹ As a result of classical contract theory, courts refused to read into anything outside of the plain language of the contract in fear that they would incorporate terms to which the parties had not consented to in the agreement.¹⁴⁰

In the 20th century it became apparent that unrestrained freedom of contract failed to balance society's "divided commitment to individual freedom and social control."¹⁴¹ The classical idea evolved into the modern era of contract law, which balances the need for individual autonomy with public concerns, which allows the judiciary to analyze social factors, public policy and community standards of morality.¹⁴² Another major difference in modern contract law with classical contract law is that modern contract law assumes that parties will not express

¹³⁴ Johnson, *supra* note 83, at 112.

¹³⁵ *Id.*

¹³⁶ Hanlon, *supra* note 15, at 58 (quoting RESTATEMENT OF CONTRACTS 1 (1981) (providing the definition of a contract).

¹³⁷ Timothy Davis, *Sports Law as a Reflection of Society's Laws and Values: Balancing Freedom of Contract and Competing Values in Sports*, 38 S. Tex. L. Rev. 1115, 1118 (1997) (citing Marvin A. Chirelstein, *Concepts and Case Analysis In The Law Of Contracts*, 11 (2d ed. 1992).

¹³⁸ *Id.* (citing Charles L. Knapp & Nathan M. Crystal, *Problems in Contract Law: Cases and Materials*, 4 (2d ed. 1993).

¹³⁹ *Id.* at 1120.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1121.

¹⁴² Hanlon, *supra* note 15, at 61.

every specific term of the agreement whereas classical contract law believed that every contract term would be expressly documented.¹⁴³ This allowed courts to incorporate terms into the contract that they believed were the parties' intent during the agreement's formation.

While the modern view of contract law makes it more difficult to determine what contracts a court will find enforceable, the allowance of limited judicial action ensures fairness between agreeing parties. While having clear-cut rules and giving parties full autonomy would make for greater clarity and certainty in predicting how the law would be applied, it may also expose weaker parties to parties with greater bargaining power. Society could not truly benefit if we have clear-cut rules at the expense of permitting gross unfairness.

B. Athletic Scholarships as Contracts

When analyzing the NLI and the Statement of Financial Aid, it becomes clear that the relationship between the student-athlete and the university is similar to an employment contract.¹⁴⁴ When an athlete signs a letter of intent to an institution, he or she is entering into a legal relationship with the particular institution that made the scholarship offer.¹⁴⁵ The athlete is agreeing to maintain a certain level of academic performance in order to stay eligible to compete and also to perform athletically in the given sport for the school.¹⁴⁶ The institution, on the other hand, provides the athlete with tuition, books, and certain other educational expenses.¹⁴⁷ The other components of the contractual relationship between the student-athlete and university are the NCAA's rules and regulations which are incorporated by reference in the NLI and Statement of Financial Aid as well as recruitment letters and the university bulletins and catalogues.¹⁴⁸ Because courts have viewed athletic scholarships as "contractual in nature" the student-athlete has the right to bring a breach of contract claim against a collegiate institution with which they have an athletic scholarship.

Although courts have consistently found that the athletic scholarship is a contract between the student-athlete and the academic institution, there is still a judicial reluctance to recognize any information not expressly contained in the signed contractual documents.¹⁴⁹ Courts have

¹⁴³ *Id.*

¹⁴⁴ Yasser, *supra* note 16, at 228; see also Davis, *supra* note 137, at 1144; *See also* Hanlon, *supra* note 15, at 63. ("The NLI is applicable "only to prospective student-athletes who will be entering four year institutions for the first time as full-time students." This includes high school students and students attending junior colleges. In order for the NLI to be valid, the student-athlete must also sign the school's Statement of Financial Aid. Both of these contracts will be considered null and void if the express terms and conditions are not satisfied. The NLI is signed one time only and only for one school. On the other hand, upon each year of renewal of the athletic scholarship by the institution, the student-athlete is required to sign the Statement of Financial Aid form. In addition to the terms and conditions found in the four corners of these documents, the language subtly incorporates by reference the compliance with the rules and regulations of the NCAA making these also contractually binding on the university officials and student athletes.")

¹⁴⁵ Yasser, *supra* note 16, at 228

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Davis, *supra* note 137, at 1142.

held that the athlete can bring this claim only if the institution makes an identifiable contractual promise to the student-athlete and breaches its contractual obligation by failing to make a good faith effort to perform those promises.¹⁵⁰ The courts in cases regarding these claims have consistently and mechanically used the classical model of contract law, which considers each party free to set their own terms in an agreement without judicial interference.¹⁵¹

The problem with using the classical model of contract law in this situation is due to the inequality of bargaining power between the two sides of the contract. In this context, the documents used in the formation of an “athletic scholarship” contract only use terms created by the NCAA and its member institutions. These boilerplate documents leave the athlete no room for bargaining power as there are virtually no feasible options in most cases but to accept the terms and conditions these documents set forth. While the use of the classical model is sufficient for negotiated contracts with parties of equal bargaining power that have the experience and knowledge to protect their interests, the rigid use of this model in regards to athletic-scholarships is simply unfair to the student-athlete as these contracts are basically non-negotiated standard form agreements used to prevent the student-athlete from having any bargaining ability.¹⁵²

The other problem with the use of the classical model of contract law is that it eliminates the student’s capability of asserting a contractual claim based on the failure to perform on an implied promise. The use of only specific contract terms located within the four corners of these documents simply ignores the fact that recruits primarily attend institutions not based upon the promises made in these documents but based upon the promises made by coaches and institutions through phone conversations, text messaging, recruiting visits, and visits to schools by coaches. These are the means by which a coach can convince a student-athlete to attend their institution. This current system allows coaches and university officials to make countless express oral promises that would not be enforceable unless those promises were found in the standard boilerplate NCAA and University forms or possibly documentation signed by all parties and referenced as part of the scholarship agreement.

C. Attacking the Contractual Legality of Athletic Scholarships

1. Unconscionable Contracts of Adhesion

Our legal system is one that has consistently prided itself on correcting inequality and injustice by refusing to enforce transactions where the relative bargaining positions of parties are such that one has complete power over the other.¹⁵³ These types of agreements, known as adhesion contracts” are defined as a “standard form contract prepared by one party, to be signed by the party in a weaker position...who adheres to the contract with little choice of the terms.”¹⁵⁴ There have typically been three factors recognized as leading to this unbalanced situation (1) The time and expert planning of the party offering the contract; (2) the offeree’s experience with

¹⁵⁰ See *Ross v. Creighton Univ.*, 957 F.2d 410, 417 (7th Cir. 1992).

¹⁵¹ *Davis*, *supra* note 137, at 1145.

¹⁵² *Id.*

¹⁵³ See *Hanlon*, *supra* note 15, at 65 (citing *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942) (Frankfurter, J. dissenting) (questioning the majority’s disregard of moral and equitable principles that have been part of our system of laws for centuries).

¹⁵⁴ *Id.* (quoting *Black’s Law Dictionary*, 342 (8th ed. 2004)).

the contract or the understanding of its contents; and (3) the disparity of bargaining power between the parties.¹⁵⁵ While adhesion contracts are not “unconscionable per se”, they do give substantial weight to a claim for unconscionability due to their standardized form and the lack of bargaining power afforded to the offerree.¹⁵⁶

Section II of the Uniform Commercial Code, which governs the sale of goods, states that an unconscionable contract is unenforceable as a matter of law.¹⁵⁷ UCC 2-302 provides that any court that finds a contract or any term of a contract to be unconscionable at the time it was made, allows the court to either (1) refuse to enforce the contract; (2) enforce the remainder of the contract without the unconscionable term; or (3) limit the application of the unconscionable term as to avoid an unconscionable result.¹⁵⁸ What the U.C.C. allows is for courts to look directly at the unconscionable term of the contract and find justice as to that unconscionable term. While U.C.C. only applies to sales of goods, it has been “extremely persuasive in non-sales cases and has been used in those contexts either by analogy or because of the overriding sense of fairness it represents, outweighing the statutory limitation applying only to the sale of goods.”¹⁵⁹ This outlook by courts is another example of adding a fairness component to freedom of contract in modern contract law.

When analyzing a contract for unconscionability, a court will look into the contract’s setting, purpose, and effect.¹⁶⁰ In this context, the student-athlete would both have to make the claim of unconscionability and would also bear the burden of proof before the court.¹⁶¹ The court would allow both the student-athlete and the institution to present evidence before the court would make its final decision.¹⁶² Although neither the U.C.C. nor the Restatement of Contracts provides a specific test used by courts to determine unconscionability, a majority of courts today

¹⁵⁵ *Id.* (citing E. Allen Farnsworth, Farnsworth on Contracts 4.26 (3d ed. 2004)) (“Thus, the party drafting the contract has been afforded as much time as necessary to create a document with the aid of expert advice, regularly leading to a contract heavily favoring the drafting party. The other party typically has little time to fully read the contract, much less completely understand the fine print and complicated clauses commonly contained in these form agreements. Usually, these contracts are not between parties with equal bargaining power. In fact, adhesion contracts regularly deny one party any bargaining power whatsoever. For example, these adhesion contracts may be used by an “enterprise with such disproportionately strong economic power that it simply dictates the terms.” Another recurring form of adhesion contracts is that of take-it-or-leave-it agreements. In a take-it-or-leave-it contract, the party’s “only alternative to complete adherence is outright rejection.”)

¹⁵⁶ RESTATEMENT (SECOND) OF CONTRACTS, 208 cmt. A (1981).

¹⁵⁷ *Id.*, at 66 (citing U.C.C. 2-302; accord RESTATEMENT (SECOND) OF CONTRACTS, 208).

¹⁵⁸ *Id.* (citing U.C.C. 2-302).

¹⁵⁹ *Id.* (citing E. Allen Farnsworth, Farnsworth on Contracts, 4.28 (3d ed. 2004) (noting that in addition to the RESTATEMENT (SECOND) OF CONTRACTS 208, several uniform laws began to incorporate the doctrine of unconscionability).

¹⁶⁰ *Id.*, at 67.

¹⁶¹ *Id.* (citing *Guaranteed Foods of Neb. v. Rison*, 299, N.W. 2d 507, 512 (Neb. 1980) (holding that the party asserting unconscionability must also plead it).

¹⁶² *Id.* (citing U.C.C. 2-302(2): “Parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.”); accord RESTATEMENT (SECOND) OF CONTRACTS 208 cmt. F: “Parties are to be afforded an opportunity to present evidence as to commercial setting, purpose and effect to aid the court in its determination.”).

rely on a two-part test provided by the court in *Williams v. Walker-Thomas*.¹⁶³ This court stated that “unconscionability” requires that the aggrieved party have some combination of (1) procedural unconscionability, which considers whether there was an absence of meaningful choice, and (2) substantive unconscionability, which focuses on the actual contract terms and whether those terms are unreasonably favorable to the drafting party.¹⁶⁴ There is no set standard of how much you need for either part of the test but generally, if more of one of the categories is present, then less of the other is required.¹⁶⁵

2. Application to Student-Athlete Scholarships

As previously mentioned, courts have determined that the NLI, the Statement of Financial Aid, official university documents, correspondence between the university and the student-athlete, and NCAA rules and regulations as the contractual documents between the student-athlete and the university. A court must look into the four corners of these documents to determine what the actual contractual relationship is. As noted, a student-athlete asserting a claim of unconscionability bears the burden of proving both procedural and substantive unconscionability before a court will find the athletic scholarship contract to be an unconscionable contract of adhesion.

a. Finding Procedural Unconscionability: Oppression and Unfair Surprise

In regards to procedural unconscionability, two elements are focused on, oppression and unfair surprise.¹⁶⁶ The oppression element looks into whether an inequality of bargaining power exists between the two parties and whether there is an absence of a meaningful choice for one of the parties.¹⁶⁷

The reason athletic scholarships are oppressive is because the student-athlete has no meaningful choice besides to enter into the contractual agreement and has a complete lack of bargaining power in regards to the contractual documents. In order for the student-athlete to attend a university on an athletic scholarship, the student-athlete must sign both the NLI and the

¹⁶³ *Id.* (citing *Williams v. Walker-Thomas*, 350 F.2d 445 (D.C. Cir. 1965)).

¹⁶⁴ *Id.* (citing *Williams*, 350 F.2d at 449); *See, e.g., Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666 (6th Cir. 2003) (“Under Ohio law, the unconscionability doctrine has two components: (1) substantive unconscionability, i.e. unfair and unreasonable contract terms, and (2) procedural unconscionability, i.e., individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds as possible.”); *see also Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 983 (Cal. 2003) (“The doctrine of unconscionability has both a “procedural” and “substantive” element, the former focusing on “oppression” or “surprise” due to unequal bargaining power, and the latter on “overly harsh” or “one-sided” results.”).

¹⁶⁵ *Id.* (citing E. Allen Farnsworth, *Farnsworth on Contracts* 4.28 (3d ed. 2004)).

¹⁶⁶ *Id.* at 68 (citing *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145 (Cal. App. 1 Dist. 1997)); *accord Navellier v. Sletten*, 262 F.3d 923, 940 (9th Cir. 2001) (“The procedural aspect [of unconscionability] is manifested by: (1) ‘oppression,’ which refers to an inequality of bargaining power resulting in no meaningful choice for the weaker party, or (2) ‘surprise,’ which occurs when the supposedly agreed-upon terms are hidden in a document.”).

¹⁶⁷ *Id.*

university's Statement of Financial Aid.¹⁶⁸ The NLI explicitly states that the student-athlete has no opportunity to negotiate, change, or delete any of the provisions.¹⁶⁹ The institution's Statement of Financial Aid also has a provision severely limiting the student-athlete's bargaining power, stating that any changes or modifications must be in compliance with the university, its athletic conference rules, and NCAA legislation. The documents are contracts of adhesion because the universities were afforded the time necessary to create a document which heavily favors their own interests, the student-athlete may not be well-versed in the actual contents of the contract, the student-athlete has no bargaining power which allows them to add or change terms of the agreement, and the student-athlete is at a take-it-or-leave-it state as if they do not sign the contract they have no other reasonable alternative while a university has an ample pool of prospective student-athletes from which to choose.

While it may be argued that the lack of bargaining power in this context is meaningless because the student-athlete, the NCAA, and the member institution have the same stated goals, in reality this is not the case. There can be no doubt that coaches, athletic directors, high level university officials, and student-athletes will at some point during their tenures face a conflict of interest on this issue.¹⁷⁰ Because the NCAA, the member institution, and their employees are purportedly in the business of protecting student-welfare you would believe that the standard of care issues should be one of good faith that their actions are for the best interests of the student-athletes.¹⁷¹ The problem is that both high-level university officials as well as coaches also have a non-academic stake in the success of their athletic program and in Division I revenue sports their employment is based upon this success. The extreme salaries offered to coaches and athletic directors at Division I revenue programs are well documented and this represents a significant financial investment by the institution in ensuring winning teams; we also know how fast these same people can be fired after a losing season.¹⁷² The President's stake is also important as they are hired and fired by the Board of Trustees, which are often alumni who may be more interested in the prestige and economic benefits of a winning athletic program than the educational mission of a university.¹⁷³ These conflicts of interest prove that bargaining power is of extreme importance to student-athletes because they are the only ones who can truly look out for their well-being. A prime example of this is with Michael Beasley. As noted, the Kansas State athletic department stated that they would only release Beasley if it were in the best interest of both Beasley and Kansas State. The fact of the matter was Beasley was not even yet enrolled at Kansas State so the decision was obviously made with only the school's interests in mind.

¹⁶⁸ *Id.* at 70 (citing *Text of the National Letter of Intent*, NCAA.ORG, available at http://www.national-letter.org/guidelines/nli_text.php (The NLI is a uniform document used by the NCAA member institution. Additionally, each institution's Statement of Financial Aid is substantively the same document from school to school in order to comply with the NCAA)).

¹⁶⁹ *Id.*

¹⁷⁰ Joel Eckert, *Student-Athlete Contract Rights in the Aftermath of Bloom v. NCAA*, 59 Vand. L. Rev. 905, 916 (2006) (noting that student-athlete's "fuel" the NCAA's revenue).

¹⁷¹ *Id.*

¹⁷² See Hanlon, *supra* note 15, at 56.

¹⁷³ *Id.*

The unfair surprise element occurs when supposedly agreed upon terms are hidden or concealed.¹⁷⁴ Unfair surprise occurs in the contractual relationship because the NLI and the Statement of Financial Aid incorporate NCAA rules and regulations by reference. The problem with doing this is that why those two documents alone are manageable in terms of length, the NCAA manual itself is over 400 pages of information that requires a strong background in statutory interpretation.¹⁷⁵ Due to this complexity, it is unfeasible that neither a prospective student-athlete nor their legal guardian has the time and in most cases the ability to sift through this document in hope to understand its breadth even if it were in fact in the documents they had signed.

The unfair surprise element is also relevant when a coach or university official makes an oral promise to a student-athlete. For the prospective student-athlete, much of the recruiting is done via telephone in addition to a few in-person communications. The problem with these types of communications is that there is no documentation of any promises made by a coach to a prospective student-athlete either expressly or impliedly. For example, what if a coach expressly told the athlete that he would be at that university during the entirety of that student-athletes collegiate experience? Or, what if that coach had stated that his contract would run through the entirety of that student-athletes collegiate experience? Should these types of communications be part of the athletic scholarship contract? In reality, these communications are a major part of the reason why a student-athlete chooses a university. They rely not only on the substance of the communication itself but also the relationship that is formed via the communication. Allowing these elements would allow the consideration of the relative status of the parties as well as other information that may provide relevant insight into the reasonable expectations of parties and thus the true nature of their respective contractual undertakings.¹⁷⁶

While it would only be fair to include these communications if the goal of everyone involved is purportedly student-welfare, the major problem with including these oral terms in the contractual document is that there is no feasible mechanism by which to enforce them. Courts have consistently held this position and refuse to enforce anything outside of what is expressly written into the contractual document.¹⁷⁷

¹⁷⁴ *Id.*, at 71.

¹⁷⁵ *Id.* (“NCAA member institutions have positions within their athletic departments whose sole purpose is to ensure NCAA compliance. The job of compliance director involves the difficult task of attempting to “master the intricacies of NCAA rules.” Many of the NCAA rules are either “too abstract to be read literally or must be interpreted by the NCAA even when they appear to be clear.” Thus, even those most qualified to handle NCAA rules experience difficulty.”)

¹⁷⁶ Davis, *supra* note 137, at 1144.

¹⁷⁷ See *Jackson v. Drake University*, 778 F. Supp. 1490, 1493 (S.D. Iowa 1991) (holding that the financial aid agreement does not implicitly imply a right to play basketball because “where the language of the contract is clear and unambiguous, the language controls); see e.g. *Hyshaw v. Washburn University*, 690 F. Supp. 940, 946-47 (D. Kan. 1987) (holding that the athletic scholarship only promised the athletes would receive money and not that they would be able to play football despite oral communications from the football staff about playing on the team); See also *Ross v. Creighton*, 957 F.2d 410, 415-416 (7th Cir. 1992) (recognizing that a contract claim was enforceable in an athletic scholarship context only if the claimants could “point to a identifiable contractual promise that the school failed to honor.”).

In terms of analyzing procedural unconscionability, courts are basically following the classical model in that independent parties are capable of protecting their own affairs. This analysis fails to take into account that these contracts between student-athletes and their institutions are not negotiated for but rather constitute standard form agreements. They also ignore the fact that it may be important to apply special rules to non-negotiated contracts. As a result, Courts are failing to procedurally assist the powerless student-athletes in bringing a justified legal claim against universities.

b. Finding Substantive Unconscionability: Unreasonable Terms

Under substantive unconscionability, the court will examine whether the contract's actual contractual terms are unreasonably favorable to the more powerful party.¹⁷⁸ Under this examination the court will look into the integrity of the bargaining process and whether the agreement is contrary to public policy.¹⁷⁹ A substantively unconscionable term is one, which is unfairly one-sided.¹⁸⁰ Although courts have generally held that a combination of both procedural and substantive unconscionability is enough to find a contract unconscionable, the "substantive" element itself can render a contract unconscionable "if the sum total of the (substantive) provisions" is grossly unfair and "drives too hard a bargain."¹⁸¹

When looking at athletic scholarships it becomes quite apparent that they truly are substantively unconscionable especially in the context of transferring to another institution. First, NCAA Bylaw 15.3.5.1 allows a member institution to revoke athletic scholarships without cause, provided reasonable notice is given to the student-athlete. For example, Ray Ray McElrathbey won national acclaim in 2006 for taking custody of his younger brother while playing football for the Clemson Tigers.¹⁸² Clemson coach, Tommy Bowden, however, chose to not renew McElrathbey's scholarship after his junior season due to the scholarship needs of the incoming recruiting class despite McElrathbey's progress towards his degree and his participation on the football team.¹⁸³ If this student-athlete whose scholarship is not renewed and who has a continuing desire to compete in intercollegiate athletics wanted to transfer, he would be further penalized under the current NCAA rules upon transferring to another institution. As previously noted, NCAA Bylaw 14.5.1 requires a transferring student-athlete to sit out of NCAA competition for one full year before regaining eligibility. Furthermore, the student-athlete

¹⁷⁸ Hanlon, *supra* note 15, at 68; *See also* Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, 18:10 (4th ed. 1998).

¹⁷⁹ Hanlon, *supra* note 15, at 68.

¹⁸⁰ *Id.* (citing *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 983 (Cal. 2003) (quoting *Armendariz v. Found Health Psychare Servs.*, 6 P.3d 669 (Cal. 2000)).

¹⁸¹ *Id.* (quoting *United Cos. Lending Corp. v. Sargeant*, 20 F.Supp. 2d 192, 196 (D. Mass. 1998) (quoting *Waters v. Min Ltd.*, 587 N.E. 2d 231, 234 (Mass. 1992)).

¹⁸² Jemele Hill, *Clemson's Treatment of Ray Ray McElrathbey is Simply Wrong*, ESPN.COM (March 17, 2008) <http://sports.espn.go.com/espn/page2/story?page=hill/080314>; *See also* Alan Scher Zagier, *Revoked Scholarships Surprise College Athletes*, HUFFINGTON POST (May 24, 2010), http://www.huffingtonpost.com/2010/05/24/revoked-scholarships-surp_n_586854.html (The University of North Carolina's College Sport Research Institute found that 11 of 95 Division I schools studied had at least 20 percent roster turnover for the 2009-10 season. The UNC study also excluded injured players as well as those who turned pro or graduated).

¹⁸³ *Id.*

whose scholarship is not renewed cannot be contacted by, or receive an athletic scholarship from another institution until the former institution "agrees to 'release' the athlete."¹⁸⁴ These terms are extremely unconscionable. McElrathbey, who had done nothing to justify having his scholarship not renewed, is further penalized for actions he had no part in and is afforded no reasonable opportunity to mitigate the damage, which he is caused. Beasley and Mallett's situations are no different. These two student-athletes could have chosen to attend virtually any university in the NCAA and because of their coaches actions they are not allowed to seek immediate relief while a baseball player, for example, would have a one-time transfer exception available.

Sean M. Hanlon noted that the student-athlete and university athletic scholarship contract is analogous to the *Campbell Soup Co. v. Wentz* case.¹⁸⁵ In this case, there was a contract between a family who sold carrots and the Campbell Soup Co. Campbell Soup drafted the agreement so that the family could not sell their carrots to anyone but their company.¹⁸⁶ When carrots became hard to come by, the family also began selling their carrots to others wherefore Campbell Soup sought to enjoin any further sale of the carrots by the family and compel specific performance of their contract.¹⁸⁷ The United States Court of Appeals for the Third Circuit found it obvious that Campbell Soup's contract had been skillfully drafted with the "buyer's interest in mind," and that it was "too hard a bargain and too one-sided an agreement to entitle [Campbell Soup] relief in a court of conscience."¹⁸⁸ The court specifically identified one clause, which allowed Campbell the option of not accepting the carrots under certain circumstances, but "prohibited the Wentzes from selling them elsewhere without the permission of Campbell" as being the most objectionable.¹⁸⁹

As in *Campbell*, NCAA member institutions are able to renew athletic scholarships at their own will on a yearly basis. Student-athletes in turn are bound by the terms of the athletic scholarship throughout until their intercollegiate athletic eligibility is exhausted unless their current institution grants permission.¹⁹⁰ If permission is not granted, the transferring student-athlete is not only precluded from participating in intercollegiate athletics for a year but is also prevented from receiving an athletic scholarship at their new institution until they have established a year of residency at that university.¹⁹¹ If permission is granted, they are allowed to receive an athletic scholarship but are still unable to participate in their sport for the transfer year until the one-year residency requirement has been met.¹⁹²

¹⁸⁴ See 2010-2011 NCAA Division I Manual, *supra* note 13, art. 14.5.1 at 175 (noting that general rule for a student who transfers is the student is required to complete one full academic year in residence before being eligible to compete at the new institution).

¹⁸⁵ *Id.*, at 73 (citing *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3rd Cir. 1948)); see E. Allen Farnsworth, *Farnsworth on Contracts* 4.28 (3d ed. 2004).

¹⁸⁶ *Campbell Soup Co.*, 172 F.2d 80.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Campbell Soup Co.*, 172 F.2d 80.

¹⁹² *Id.*

When looking at the current transfer system as it relates to the contractual relationship between student-athletes and universities, it is clear that the current system is both procedurally and substantively unconscionable to the student-athlete. Student-athletes have no other realistic choice but to sign the NLI and Statement of Financial Aid for the institution of their choice based upon the statements made during the recruiting process. The student-athletes in turn must then rely on the university and NCAA to do what is in their best interests. If a coach leaves a program and the student-athlete no longer would like to remain at their current university, the transfer system deters them from making the decision that is in their best interests. As a result, the university is unjustly enriched as they benefit from being able to field a team using a student-athlete who under equitable circumstances would no longer be attending that university.

VII. Remedial Analysis

From the above analysis, it can be easily concluded that a student-athlete who participates in a Division I “revenue” sport attends a university under vastly different circumstances and conditions than any other undergraduate student. While a non-athlete is under no specific written contract to follow the rules and regulations of a university, the Division I “revenue” sport student-athlete is held to the written obligations of both the NLI, which compels attendance to the signed with institution, and their Statement of Financial Aid, which puts forth the terms and conditions they must abide by to even possibly keep their athletic scholarship.¹⁹³ While the student-athlete does agree to be governed by these rules and regulations, the fact of the matter is they have no other choice in the matter. Division I “revenue” sport student-athletes are afforded no bargaining power in the athletic scholarship process and due to this lack of bargaining ability, when a coach decides to take a more lucrative job, they are left without reasonable options to address the situation. The question that remains is what options should student-athletes have that balance both their interests as well as the competing interests of their university as well as the philosophy and mission for which the NCAA purports to strive.

The next hurdle is what kind of solutions would courts be able to offer in order to remedy this problem. Courts have declined to allow for the recovery of damages in unconscionability suits, but if unconscionability is found then past decisions have allowed a few different courses of action.¹⁹⁴ Courts who have found a contract to be unconscionable have (1) found the entire contract to be void; (2) refused to enforce or have limited the unconscionable clause in the contract; or (3) added in additional terms to the agreement so as to eliminate the unconscionability.¹⁹⁵ As noted before, while there is both procedural and substantive unconscionability, the substantive unconscionability is what needs to be removed in order for the

¹⁹³ See Johnson, *supra* note 83, at 104 (noting that the enforceability of the NLI is likely to not be challenged due to the severe eligibility penalties a student-athlete may receive if broken. Moreover, the NCAA also requires the parents or guardians of the student-athlete to cosign the NLI, which likely prevents a student-athlete from a claim of incompetence, incapacity, or duress.).

¹⁹⁴ See Hanlon, *supra* note 1, at 74 (*citing* E. Allen Farnsworth, Farnsworth on Contracts 4.28 (3d ed. 2004); *Bracey v. Monsanto, Co.*, 823 S.W. 2d 946, 950 (Mo. 1992) (“It may refuse to enforce the contract. It may also enforce the remainder of the contract, free from provisions it deemed to be unconscionable, or it may even limit the application of the offending clause in order to avoid the unconscionable result.”))

¹⁹⁵ *Id.*

athletic scholarship contract to be legal. Therefore, the remedy must eliminate the substantive unconscionability to the student-athlete.

The first and second courses of action of declaring the entire contract void or declaring the unconscionable term void are not feasible solutions because the results of each would cause a free agency type system until the athletic scholarship documents as well as NCAA rules and regulations could be rewritten in compliance with a court's ruling.

The solution to the problem would be the addition of a term that would eliminate the substantive unconscionability of the athletic scholarship contract. There are many possible approaches that could be taken and it remains to be seen what courts, the NCAA, universities, coaches, and student-athletes would prefer.

One possible solution to the problem is analyzing each student-athlete's transfer request on an ad-hoc basis. The NCAA already handles red-shirt seasons and granting of additional ability through the individual circumstances on a case-by-case basis and would seemingly have the resources to do the same for transfer requests. This would protect the athlete from athletic programs, who are unwilling to look out for the best interest of the student-athlete for their own institutional gain. If this solution was used the NCAA could take into account the fact that Beasley had signed at Kansas State during the early signing period and was months away from even enrollment and Mallett and the University of Michigan came to an all but mutual agreement that he would be better off with another program that was more suitable for his skills. While these factors may not have changed anything, the fact that the NCAA could be able to address each case with these factors in mind is a reasonable alternative to the current system.

Another possible solution would be to allow for transfer windows that would allow a student-athlete to transfer before a certain date without penalty. This window could range anywhere from pushing back the signing dates for each sport until the conclusion of the academic year or even until the first day of classes begins. The later the window the fairer this would be to the student-athlete because once the academic year is concluded there are likely to be few coaching changes. This would also allow a student athlete to meet a new coach which would both give the new staff an opportunity to get to know the student-athlete, to get to know his parents, and continue to sell him on the positives and the advantages of going to that particular school. This seems reasonable to both the university and the student-athlete as it allows both the opportunity to address their desires. The only foreseeable problem is whether universities would allow this type of uncertainty for enrolling a student at a later date as well as the athletic program having the uncertainty of filling out their scholarship allotments.

Other possible solutions would be putting forth transfer options. Transfer options could range from allowing a student-athlete to only transfer to the university their coach is now at or allowing a student-athlete to transfer to any school but the one the coach is now at. The problem with these options is that allowing student-athletes to transfer to only their coaches new university may create bidding wars for entire teams as basically a university could basically buy the whole program. The problem with allowing student-athletes to just move to any university where the coach is continuing the failure to acknowledge the fact that student-athletes attend institutions in part because of the coach who is present and the type of game planning they use.

Another option would be to allow the athlete to negotiate terms into the athletic scholarship such as the addition of a “coaching clause.” Allowing this type of clause would have given both Beasley and Mallett the option to move on to other institutions when Coach Huggins and Carr left Kansas State and Michigan. The problem with allowing this type of solution is it would create a complicated system where student-athletes would almost need an “agent” type representative to negotiate the best possible deal. This would continue to blur the line between NCAA amateurism and professional athletics.

Other possible solutions which are less likely to garner much support would be forcing coaches to play under the same rules as the athletes meaning they would also have to sit-out a year at their new institution. This is unfeasible because it is simply expanding on an unfair practice. Another unlikely solution would be to allow student-athletes the ability to transfer after each year just as their scholarship is renewable. This option would probably be too much because it would be too much of a professional system with players jumping schools constantly looking for better options. This would also seem to prohibit their academic development if they continuously were not working towards their degree for an extended period of time.

VIII. Conclusion

As it exists today, the athletic scholarship contract is an unconscionable contract of adhesion, inconsistent with the important NCAA principles of student-athlete welfare and amateurism. Today’s athletic scholarship has considerable amounts of both procedural and substantive unconscionability that serve to benefit NCAA member institutions to the detriment of the student-athlete.

While it is obvious that transfer rules are necessary to prevent athletes from jumping universities to the point where they are not working towards their degrees, it is also obvious that some sort of amendment needs to be put into place that allows a greater equality than the current system. Why shouldn’t a student athlete be allowed to apply to transfer to an institution of his choice without penalty if the head coach leaves for another institution, retires, or is fired or even if he would like to change schools for personal or academic reasons like every other student his own age? These student-athletes are mostly 18-22 years old and to be told that they do not have an opportunity to make a mistake of such a monumental decision without penalty is completely unfair and unlawful.