Using Contract Law to Tackle the Coaching Carousel

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Introduction

STUDENT-ATHLETES who demonstrate the skills and dedication throughout their college careers that predict success in professional sports become attractive prospects for major league drafts. Yet their professional aspirations can be significantly affected by the departure of their college coaches, whose team's recurring success often results in lucrative offers from professional teams or wealthier and more successful college programs. Although the potential harm to a university left behind by an upwardly-mobile coach is often recognized, less attention has focused on the connection between a coach's departure from the university and the student-athlete's standing in the National Football League ("NFL") draft. A recent study has demonstrated that a coach's decision to leave a university can substantially lower an athlete's position in the draft.[1]

Each year, a large number of football programs face coaching changes;[2] indeed, a top school's hiring away a coach from another program often has a ripple effect—a "coaching carousel."[3] Student-

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1. *See* Philip L. Hersch, *Does the NCAA Coaching Carousel Hamper the Professional Prospects of College Football Recruits?*, 13 J. SPORTS ECON. 23–30 (2012).

2. *See id.* at 21 (stating that the median number of coaching changes per year is between 18 and 22).

3. For example, after the 2012 football season the California Golden Bears fired Jeff Tedford and hired Sonny Dykes from Louisiana Tech, who replaced Dykes with Skip Holtz from South Florida, who replaced Holtz with Willie Taggart from Western Kentucky, who replaced Taggart with Bobby Petrino, who was fired by Arkansas following the 2011 season. Arkansas in turn, fired its interim coach and hired Bret Bielema from Wisconsin, and Wisconsin thereafter hired Gary Andersen from Utah State. The carousel only ended because Utah State hired its own offensive coordinator. *See Walker Resigns From NMSU*, COLLEGEFOOTBALLPOLL.COM (Jan. 24, 2013), http://www.collegefootballpoll.com/coaching_changes.html.

athletes with professional football aspirations would be well served by developing a strategy to protect them from the significant risk that the coaching carousel will adversely affect their collegiate and professional careers. Such a strategy would also benefit the fans and stakeholders of their alma mater, who suffer as well when their favored program is harmed by the annual coaching carousel among big-time college coaches.

This Article suggests that student-athletes can protect themselves (and, indirectly, fans and students at the university at which they are about to enroll), by securing a binding promise from the coach that he will not voluntarily leave the university throughout the student-athlete's career. This promise could be in a legally binding contract directly between the coach and student-athlete, or by adding to the coach's employment contract with the university a proviso expressly designating student-athletes as third party beneficiaries. Part I briefly describes problems resulting from the coaching carousel and describes the potential for contracts that limit a coach's mobility to minimize harmful effects on student-athletes. Part II explains why contracts in which the coach agrees to provide unique sports services are legally enforceable and how contracts can effectively bind a coach through the issuance of a negative injunction. Part III analyzes the bargaining dynamics between coaches, universities, and star athletes, and concludes that the requisite dynamics are likely present in some cases to successfully negotiate each of the contracts. Finally, Part IV discusses why current National Collegiate Athletic Association ("NCAA") rules should be interpreted to permit voluntary contracts, enforceable by the student-athlete, that limit a coach's ability to terminate his coaching contract and accept an offer that advances his own professional aspirations at the expense of students who relied on his tutelage to develop their own careers.

I. The Coaching Carousel

A. Problems Student-Athletes Face when Forced to Ride the Coaching Carousel

Upon completion of each NCAA college football season, a significant number of coaches leave their respective universities. Although some are dismissed by their employer for on- or off-field failures, many leave voluntarily for a more prestigious position.[4] This frequent

4. *See* Hersch, *supra* note 1, at 20.

exchanging of coaches has been dubbed the "coaching carousel."[5] Over a period of ten years, from 2000–2009, 190 head coaching changes occurred at Football Bowl Subdivision (formerly Division I-A) schools[6] and the coaching carousel continues to spin today. One demonstrable problem with the coaching carousel is its detrimental effects on college athletes.[7] In addition to intangible problems caused by the additional time involved in learning a new playbook (given the severe time constraints facing many student-athletes), and the anxiety of developing a new relationship with a new set of coaches (given the huge role that these relationships play in the student-athlete's initial selection of a college), a coaching change during a student athlete's career drops the average player's NFL draft pick by nearly two-thirds of a round.[8] A drop in draft stock occurs regardless of whether the coach was fired or exited the university voluntarily.[9] Additionally, professional teams are more attracted to players originating from programs with solid coaching reputations.[10]

Because a young NFL player's compensation is primarily determined by draft position, a later round draft pick can result in the loss of millions of dollars in guaranteed compensation and signing bonuses.[11] Aside from a potentially substantial drop in future earnings, a coach's departure can result in more immediate consequences for the student-athlete. For example, a student-athlete may experience difficulty adjusting to a new leadership style. Additionally, a coach's departure can create a lack of trust, the loss of a support system, and

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5. *Id.* at 20–21.

6. *Id.* at 21.

7. *But cf.* Joshua R. Pate, Sarah E. Stokowski & Robin Hardin, *Third Time's a Charm: The Case of Tennessee's Four Junior Football Players who Endured Three Different Head Coaches in Three Seasons*, 4 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 354, 361 (2011) (suggesting that, in some cases, coaching changes during a student-athlete's college career may help prepare the player for the NFL by forcing him to adapt to different coaching techniques since the athlete will likely experience multiple coaching changes while playing in the NFL, while recognizing that college coaching changes cause more harmful effects than beneficial effects).

8. *See* Hersch, *supra* note 1, at 22, 30.

9. *Id.* at 30.

10. *See* Recruiting & Developing NFL Draft Picks – 2012 Review, The College Football Matrix Blog, http://collegefootballmatrix.wordpress.com/special-features/articles-2/the-bestworst-of-recruiting-developing-nfl-draft-picks/recruiting-developing-nfl-draft-picks-2012-update/ (last visited Jan. 24, 2013) (stating that "[o]f the 192 total picks in the 2012 draft, 166 came from teams with winning records in 2011").

11. *See* Hersch, *supra* note 1, at 29 (noting that the 2009 draft's median guaranteed money was $10.1 million for a first round draft pick compared to $1.91 million for a second round draft pick).

alterations in the training environment.[12] Moreover, a student-athlete who selected a college based on the presence of a coaching style that emphasizes preparedness for professional sports may find his expectations are not achieved if the new coach has a different style (even if equally successful in winning college games).[13]

Coaching changes are particularly unfair to student-athletes who base their decisions to attend an institution on the presence of a particular coach.[14] Although traditional students basing their matriculation decisions on the presence of a particular professor would experience similar inequities in the event the professor left for greener pastures during the students' academic careers, the NCAA's transfer rules exacerbate the problem as it applies to student-athletes.[15] After student-athletes commit to an institution, the NCAA significantly inhibits transfers by making student-athletes ineligible to play for their new universities for the season immediately following a transfer.[16]

B. Methods for Lessening the Harm

While the NCAA restrains the movement of players, coaches are seemingly free to change positions relatively free of consequences.[17] If

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12. Pate, Stokowski & Hardin, *supra* note 7, at 354.

13. *See, e.g.*, Sanjay Kirpalani, *Alabama Football: "Saban Effect" Gives Tide Players an Edge in NFL Draft*, BLEACHER REPORT (May 8, 2012), http://bleacherreport.com/articles/1177327-alabama-football-saban-effect-gives-tide-players-an-edge-in-nfl-draft (arguing that Saban's NFL coaching experience and "pro-type culture" heavily contributed to four of his Alabama players receiving first round draft picks for two consecutive years).

14. *See* Hersch, *supra* note 1, at 21.

15. *See id.* at 21. NCAA men's basketball teams are also affected by the frequent exchange of coaches. Fifty head coaching changes are in place for the 2012–2013 men's basketball season at Division I schools. *See NCAA Division I Coaching Changes*, ESPN (Jun. 22, 2012, 3:05 PM), http://espn.go.com/mens-college-basketball/story/_/id/7647785/ncaa-division-coaching-changes-2012-13-season.

16. *See* NCAA BYLAWS, art. 14, § 14.5.1 [hereinafter NCAA BYLAWS], *reprinted in* NAT'L COLLEGIATE ATHLETIC ASS'N, 2011–12 DIVISION I NCAA MANUAL 173 [hereinafter NCAA MANUAL], *available at* http://www.ncaapublications.com/productdownloads/D113.pdf.

17. *See, e.g.*, Bill Brubaker, *Departed Coaches, Deserted Recruits – Recruits Are Jilted By Coaches in Search of Greener Pastures*, SEATTLE TIMES (Aug. 2, 1998), http://community.seattletimes.nwsource.com/archive/?date=19980802&slug=2764305 (highlighting the perceived unfairness of the restrictions on players' movement compared to the limitless mobility of coaches). In many cases, a coach's contract gives him the right to terminate with the payment of a fee to the current employer easily borne by the coach or his new employer. *See* Douglas A. Kahn & Jeffrey H. Kahn, *Tax Consequences When A New Employer Bears the Cost of the Employee's Terminating A Prior Employment Relationship*, 8 FLA. TAX REV. 539, 540 (2007). Even where a contract's terms make it difficult for a coach to leave, university presidents often grant permission to leave. *See, e.g.*, *Beilein Settles Buyout with West Virginia for $1.5 Million*, USA TODAY (Apr. 26, 2007), http://www.usatoday.com/sports/

future college athletes aspire to play for a professional team, adopting measures to protect themselves from harm caused by frequent coaching changes is in their self-interest. At first glance, the clear answer may be to simply adopt the solution invoked by non-athlete students. In academia, if a student selects an institution based on a particular professor and that professor leaves for another university, the student may follow the instructor by transferring to the new institution without penalty so long as she is qualified to attend the transferee school. However, this solution is undesirable in college sports because it would result in the institution not only losing its coach, but all of its star players as well, intensifying the harm to the school and athletic program. Furthermore, most athletes sign a National Letter of Intent ("NLI"), which requires them to play at the institution for one year along with an additional one or two year penalty for transferring.[18] Between the restrictions imposed by current NCAA transfer rules and NLI, and the harmful consequences to the university, encouraging student-athletes to follow their coaches to the new institutions is not a viable solution.

Similarly, informal promises communicated by the coach or university are just as ineffective because actions brought by students to enforce these "promises" have proved consistently unsuccessful, either because there was no evidence of the actual promise, or because the written scholarship contract contained no evidence of the oral promise, or because the "promise" is not the sort of pledge that most people would take as a binding pledge.[19] Although representatives of the

college/mensbasketball/2007-04-26-beilein-buyout_N.htm (West Virginia University agreed to reduce the buyout clause in John Beilein's contract by $1 million after he announced that he was leaving the University five years before his contract was set to expire).

18. *See* Michael J. Riella, *Leveling the Playing Field: Applying the Doctrines of Unconscionability and Condition Precedent to Effectuate Student-Athlete Intent Under the National Letter of Intent*, 43 WM. & MARY L. REV. 2181, 2187 (2002). Schools only agree to honor promises of an athletic scholarship to students who sign a letter of intent. *See About the National Letter of Intent (NLI)*, NAT'L LETTER OF INTENT, http://www.ncaa.org/wps/wcm/connect/nli/nli/about+the+nli/index.html (last visited Dec. 19, 2012).

19. *See* Ross v. Creighton Univ., 957 F.2d 410, 417 (7th Cir. 1992) (holding that students must identify a specific contractual promise that the University "failed to honor"); Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940, 946–47 (D. Kan. 1987) (holding that the language of the written contract controls, regardless of any additional promises not in writing); Soderbloom v. Yale Univ., No. CV-91-0324553 S, 1992 WL 24448, at *3 (Conn. Super. Ct. Feb. 3, 1992) (holding that students must identify a specific contractual provision that the University breached if their claim is to prevail); PAUL C. WEILER ET AL., SPORTS AND THE LAW 866–67 (4th ed. 2011) (describing unsuccessful litigation by Bryan Fortay to enforce oral promise by Miami Hurricanes Head Coach Dennis Erickson to start him at quarterback); Riella, *supra* note 18, at 2188–92 (discussing the cases in which courts have held that oral representations and implied promises are separate from written con-

university's athletic department often issue verbal assurances to induce prospective athletes to attend their university, courts have consistently held that oral and implied promises made by the coach or university are unenforceable.[20] Thus, student-athletes cannot safely rely on oral or implied assurances regarding continued instruction by a specific coach, guaranteed playing time, or any other aspect of their college careers, because such promises are not binding.

More workable solutions include a contract between the coach and university in which the coach promises not to voluntarily leave the school, or a contract between the coach and student in which the coach promises to remain at the university throughout the student's career. If entered voluntarily, these contracts are both legally binding and beneficial to the university. They protect student-athletes while allowing the school to retain its coach and prized players by reducing coaching turnover. Of course, these solutions are unachievable unless the requisite bargaining dynamics are present and unless these options are available to coaches and student-athletes at schools seeking to comply with NCAA regulations.

II. The Solution: Contracts that Limit a Coach's Ability to Leave the University Voluntarily

A. Contract Between the Coach and Student-Athlete

The most straightforward solution is a contract between a student-athlete and coach. In return for the student-athlete's agreement to enroll at the coach's school, the coach would promise to continue his employment with the university throughout the student's career, meaning that the coach could not voluntarily accept another head coaching position, even if offered a more preferable position elsewhere. Where necessary, the coach may wish to create an exception permitting him to leave under specially designated circumstances—such as the opportunity to coach in the NFL or at other universities with some particular attraction.[21] Such a contract would recite the

tracts); James Kennedy Ornstein, *Broken Promises and Broken Dreams: Should We Hold College Athletic Programs Accountable for Breaching Representations Made in Recruiting Student-Athletes?*, 6 SETON HALL J. SPORT L. 641, 641–47 (overviewing the breach of contractual duty cases between student and university).

20. Stacey Meyer, Comment, *Unequal Bargaining Power: Making the National Letter of Intent More Equitable*, 15 MARQ. SPORTS L. REV. 227, 227 (explaining that coaches and representatives of the institution make a myriad of promises to recruit prospective athletes that often fail to come to fruition).

21. The contractual promise discussed in this Part would not apply where unexpected circumstances, such as illness, rendered the coach incapable of performing his duties

unique qualities of the coach and the unavailability of money damages as adequate compensation in case of breach.

In addition to offer and acceptance, the main requirement to create an enforceable contract between coach and student-athlete is that the agreement be supported by consideration or a consideration substitute.[22] An agreement is supported by consideration when the parties have engaged in a bargained-for exchange.[23] In this case, a student presenting the possibility of a contract to a prospective coach in exchange for the student's matriculation to the institution constitutes an offer.[24] If the coach demonstrates willingness to agree to the terms of the contract, he has accepted the student's offer.[25] Under this scenario, a contract between a coach and student-athlete is supported by consideration because both parties participated in a bargained-for exchange. The coach foregoes his right to quit coaching for the university in exchange for the star player's promise to enroll in the coach's university and commitment to contribute to the team throughout his career. Thus, if both parties voluntarily consent, the contract is legally enforceable, provided that NCAA rules do not bar the agreement.

Liquidated damages, however, are not an adequate remedy in this context. While a liquidated damages clause that reflects an upper-limit on a reasonable estimation of the financial harm (both to the student-athlete's professional opportunities as well as the harm to the university) could in theory be constructed, thereby making it financially difficult for a new team to lure the coach away,[26] it cannot rem-

under the contract. In such a case, the coach could assert the defense of impracticability, which relieves parties of their duty to perform contractual obligations when doing so is not possible. *See* Restatement (Second) of Contracts: Discharge By Supervening Impracticability § 261 (1981); Restatement (Second) of Contracts: Death Or Incapacity Of Person Necessary For Performance § 262 (1981). Such a defense would not be applicable, however, if the coach simply wished to retire or accept a position elsewhere. *Id.* § 261 cmt. d (1981) (explaining that the party asserting the defense must show that, by no fault of his own, performing his duty under the contract is highly impractical).

22. Restatement (Second) of Contracts: Requirement Of Exchange; Types Of Exchange § 71 (1981).

23. *I*d.

24. *See* Restatement (Second) of Contracts: Offer Defined § 24 (1981).

25. *See* Restatement (Second) of Contracts: Acceptance of Offer Defined; Acceptance By Performance; Acceptance By Promise § 50 (1981).

26. Liquidated damage clauses are enforceable when (1) damages would otherwise be difficult to calculate and (2) the amount must be reasonable (close to the amount of actual damages). Restatement (Second) of Contracts: Liquidated Damages And Penalties § 356 (1981). Assuming that a player would have turned pro, $1 million might superficially appear to be a reasonable liquidated damages clause, because it reflects the actual amount that the player would lose. However, including a $1 million liquidated damages clause in

edy the breach because the NCAA would likely bar an athlete from receiving payment pursuant to such a clause.

B. Contract Between the Coach and University

A second option to reduce coaching turnover is to declare student-athletes to be third-party beneficiaries of a provision in a coach's employment contract with the university. This option may be feasible when a university has an institutional interest in recruiting a student-athlete on the basis of the promised unique tutelage from a particular coach. Similar agreements to provide unique services prohibiting employees from performing similar services for anyone but the contracting employer are commonplace for professional athletes[27] and entertainers.[28] Unique service contracts are frequently implemented in the sports and entertainment industries because athletic and entertainment skills are of such a unique nature that employers would experience difficulty and sometimes even impossibility finding replacements.[29] A promise to provide exclusive services as a stipula-

every player contract is problematic because (while damages are difficult to estimate because of the uncertainty of a professional career), if the player did not have the ability to turn pro, the liquidated damages clause would likely be deemed a penalty clause (since the estimated damages are so much higher than actual damages) and penalty clauses are unenforceable. RESTATEMENT (SECOND) OF CONTRACTS: LIQUIDATED DAMAGES AND PENALTIES § 356, cmt. b (1981).

27. *See, e.g.*, Winnipeg Rugby Football Club, Ltd. v. Freeman, 140 F. Supp. 365 (N.D. Ohio 1955) (holding that where football player was of peculiar and particular value to his employer, a preliminary injunction was appropriate); Weirmuller v. Stone, 3 Pa. D. & C. 165 (Pa. C.P. 1923) (holding that where a boxer's services were of a unique character and the employer would have difficulty finding a substitute, an injunction was warranted).

28. *See, e.g.*, Winter Garden Co. v. Smith, 282 F. 166 (2d Cir. 1922) (holding that a comedian's reputation, personality, and ability to attract large audiences made him unique so that the employer was entitled to an injunction); Pike Rollarena, Inc. v. Clark, 54 Pa. D. & C.2d 25 (Pa. C.P. 1971) (holding that organist was of special skill and not easily replaceable, which justified an injunction).

29. A typical provision is found in Clause 4(a) of the Major League (Baseball) Uniform Player's Contract:

> The Player represents and agrees that he has exception and unique skill and ability as a baseball player; that this services to be rendered hereunder are of a special, unusual, and extraordinary character which gives them peculiar value which cannot be reasonably or adequately compensated for in damages at law, and that the Player's breach of this contract will cause the Club great and irreparable injury and damage. The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of this contract.

Major League (Baseball) Uniform Player's Contract, *reprinted in* PAUL C. WEILER ET AL., DOCUMENTS AND STATUTORY SUPPLEMENTS TO SPORTS AND THE LAW 182–83 (4th ed. 2011);

tion to an employment contract meets the basic requirement of consideration because the coach agrees to render unique sports services in exchange for compensation and other benefits provided by the university. Adding student-athletes as third-party beneficiaries is important, however, because university presidents and athletic directors have proven to be lax in their willingness to enforce their contract rights vis-à-vis coaches.

1. The Law of Employment Contracts

At common law, employment is at will, meaning that either party may terminate the employment relationship at any point without cause.[30] The employer and employee can agree upon a contract that modifies the at-will relationship.[31] Specifically, the parties may decide to include additional protections against the discharge of an employee, beyond what is provided by employment at will, such as requiring just cause for firing.[32] Since most employees are easily replaceable, usual damages for breach of an employment agreement is the cost of finding a new employee, which includes incidental damages, such as advertising, interviewing, and training costs, plus any additional salary that the employer must pay the new employee if wages have increased over the contract term.[33]

Conversely, in industries where employees offer unique skills and are extremely difficult to replace, equitable relief is available for breach of an employment contract.[34] Courts will not order specific performance of the contract, but will issue negative injunctions barring employees from providing the same services to rival employers if the employment contract states that the employee agrees to provide

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see also Shubert Theatrical Co. v. Rath, 271 F. 827, 830 (2d Cir. 1921); Harry Rogers Theatrical Enters. v. Comstock, 232 N.Y.S. 1, 4 (N.Y. App. Div. 1928).

30. *See* Skinner v. Maritz, Inc., 253 F.3d 337, 339 (8th Cir. 2001) (employers may discharge at-will employees without cause); Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc., 160 F.3d 1048, 1050 n.11 (5th Cir. 1998) (noting that "the overwhelming majority of states recognize the traditional common law doctrine of employment at-will").

31. *See, e.g.*, Saperstone v. Airport Group Int'l, Inc., 02-CV-6354 CJS(F), 2003 WL 21730710 (W.D.N.Y. June 6, 2003) (interpreting an employment contract that modified the at-will relationship).

32. Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 885 (Mich. 1980) ("[A] provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable . . . .").

33. *See* Valentine Dolls, Inc. v. McMillan, 202 N.Y.S.2d 620, 622 (N.Y. Sup. Ct. 1960); Peters v. Whitney, 23 Barb. 24, 25 (N.Y. Gen. Term 1856).

34. *See* Shubert Theatrical Co. v. Rath, 271 F. 827, 832 (2d Cir. 1921); Am. Broad. Companies, Inc. v. Wolf, 420 N.E.2d 363, 366–67 (N.Y. 1981); Zomba Recording LLC v. Williams, 839 N.Y.S.2d 438 (N.Y. Sup. Ct. 2007).

special or unique services or has extraordinary qualifications.[35] An injunction is necessary when deprivation of an employee's unique services would result in irreparable harm to the employer.[36] The injunction serves to ensure that the employee cannot shirk the bargain inherent in a long-term contract, which assures the employee of the promised salary even if best efforts result in a decline in skill or performance, but assures employers that they can receive the employee's services even if they turn out to be more valuable than estimated over the course of the contract term. Even if a negative injunction is not expressly provided for in the contract, courts will often infer that an agreement to work for an organization is an implied promise not to perform the same services for a competitor.[37]

When a contract stipulates that a professional athlete provides special services, the team is entitled to seek an injunction if the athlete attempts to play for another team during the contract term.[38] In fact, almost all major league athletes are required to sign a provision stipulating that they offer unique skills and are irreplaceable.[39] These personal service agreements afford employers much needed protection in circumstances where the services provided by employees cannot be duplicated by others.[40]

The historic case of *Lumley v. Wagner*[41] established a precedent for courts of equity to enforce unique service agreements when damages would be inadequate by enjoining an employee from providing similar services to another employer. In *Lumley*, an opera star breached a personal service agreement with her employer when she

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35. *See Shubert Theatrical Co.*, 271 F. at 832; *Am. Broad. Companies, Inc.*, 420 N.E.2d at 366–67; *Zomba Recording LLC*, 839 N.Y.S.2d at 438.

36. *See* Madison Square Garden Boxing, Inc. v. Shavers, 434 F. Supp. 449, 452 (S.D.N.Y. 1977) (granting an injunction against the defendant boxer and in favor the plaintiff, a promoter of boxing matches, on the grounds that the plaintiff's credibility within the industry would suffer irreparable harm if the boxer failed to fulfill his obligations).

37. *See, e.g.*, Cort v. Lassard, 22 P. 1054, 1056 (Or. 1889) (contract stipulating that employee provided unique services need not contain a negative clause in order for a court of equity to exercise jurisdiction in deciding whether employer is entitled to equitable relief when employees left for a competitor).

38. *See, e.g.*, Winnipeg Rugby Football Club, Ltd. v. Freeman, 140 F. Supp. 365 (N.D. Ohio 1955).

39. *See* Sharon F. Carton, *Damning with Fulsome Praise: Assessing the Uniqueness of an Artist or Performer as a Condition to Enjoin Performance of Personal Service Contracts in Entertainment Law*, 5 VILL. SPORTS & ENT. L.J. 197, 209 (1998).

40. *See, e.g.*, *Madison Square Garden Boxing*, 434 F. Supp. at 452 (in enforcing a personal service agreement, the court granted a negative injunction where the defendant breached an agreement to box Muhammad Ali).

41. 42 Eng. Rep. 687 (Ch. 1852).

performed at a competing theater during the contract term.[42] Although the court's order did not compel the singer to perform her contractual duties, the court precluded her from performing in any establishment but the first employer's theater, reasoning that such an order would encourage the opera star to fulfill her contractual duties to the original employer since she could not sing elsewhere.[43]

The Lumley rule was notably extended to the context of sports contracts in *Philadelphia Ball Club v. Lajoie*.[44] In *Lajoie*, a baseball player breached his contract to compete for the Philadelphia Phillies when he arranged to play for the cross-town rival, the Athletics. The court granted an order prohibiting the Hall of Fame second baseman from playing baseball for rival teams, holding that an injunction is warranted even if the player is not impossible to replace, as long as the same services are not easily obtainable from others.[45] The court pointed to several attributes, from the athlete's high level of expertise as a baseball player to his great reputation as a second baseman, in determining that the player's services were unique.[46] The court also considered the athlete's relationship to his employer and determined that, as an essential contributor to the team's success, his withdrawal from the team would undoubtedly weaken it and likely decrease game attendance.[47] The uniqueness inquiry focuses not only on the employee himself, but also on the employee's connection to the employer's business and the value of the employee's services to the operation.[48]

Courts have continued to order negative injunctions as a remedy for breach of service contracts in the sports industry, finding that most professional athletes' services are unique and, therefore, not readily replaceable. The court in *Dallas Cowboys Football Club v. Harris*[49] held that a football player with superior skill is unique (even though not literally one-of-a-kind), in the sense that a club would have difficulty

42. *Id.* at 697–98.

43. *Id.* at 693.

44. 51 A. 973 (Pa. 1902).

45. *Id.* at 973.

46. *Id.* at 974. The contract that the Phillies sought to enforce was a big victory for the National League team to win over a star player from the then-rival American League. In 1901, Lajoie led the American League in runs, hits, doubles, home runs, total bases, runs batted in, batting average, on base percentage, and slugging percentage. *See* WEILER, *supra* note 29, at 99.

47. *Id.* at 974.

48. Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 71 (2d Cir. 1999).

49. 348 S.W.2d 37 (Tex. Civ. App. 1961).

obtaining a replacement.[50] Similarly, the court in *Central New York Basketball, Inc. v. Barnett*[51] determined that a basketball player's services were unique based on his unusual, crowd-pleasing ability as a ball handler and further concluded that professional athletes in baseball, football, and basketball leagues must demonstrate extraordinary talent or they would not be employed in the profession.[52]

2. Coaching Contracts as Agreements to Provide Unique Services

Customarily, coaching contracts provide grounds for termination by the coach[53] as well as a provision allowing the university to terminate the coach for just cause.[54] Coaching contracts will often contain buyout clauses under which the coach may leave the university before his contract expires upon payment of a specified sum.[55] However, these clauses rarely prevent a coach who wishes to leave the university from doing so because the buyout is usually too low to present a significant monetary obstacle.[56] The relatively modest sums required are often covered by the coach's new employer.[57] Significantly, few buyout clauses cover the full harm to the university and its student-athletes from the coach's decision to accept other employment. From the student-athlete's perspective, absent a provision providing a specific payout to each student-athlete on the team (which, as discussed below,[58] is not realistic under NCAA regulations), the only approach to ensure that a coach will remain loyal to his current university is through a unique services provision in the employment contract that will justify equitable relief to prevent breach of the promise during the stated terms of the contract. Just as unique services agreements have been successfully used to protect athletic clubs by prohibiting players from switching to a rival team, these provisions can also effectively require

50. *Id.* at 45.

51. 181 N.E.2d 506 (Ohio C.P. 1961).

52. *Id.* at 513-14.

53. *See* WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW: COACHING CONTRACTS § 16:8 (2011).

54. Christian Dennie, *There Are No Handshake Deals in College Coaching Contracts*, *in* 20 NO. 1 ANDREWS ENT. INDUS. LITIG. REP. 2, 3 (2008).

55. *Id.* at 7.

56. *See* Clay Travis, *Why Don't College Coaches Have Non-Competes in Their Contracts?*, OUTKICK THE COVERAGE (Dec. 2, 2011), http://outkickthecoverage.com/why-dont-college-coaches-have-non-competes-in-their-contracts.php (suggesting that buyouts are not an effective substitute for non-compete clauses because, in most cases, buyouts do not deter coaches from leaving their respective universities).

57. Dennie, *supra* note 54, at 7.

58. *See infra* text accompanying notes 113–15, 118.

coaches to remain committed to their current universities while under contract to do so.

As demonstrated in the *Lajoie*, *Harris* and *Barnett* cases, courts utilize the "difficulty of replacement" standard in determining the uniqueness of sports professionals. Under this standard, coaches are undoubtedly unique. A university has a legitimate, protectable business interest in retaining its coach for the contracted term. Coaches are privy to confidential information about recruits gained during their employment, and in many cases the coach's services are so sufficiently distinctive, if not unique, that the university would have severe difficulty finding a replacement.[59] In addition to their primary role of instructing athletes, coaches drive the success of athletic programs by performing many functions for the university.[60] Coaches are recruiters, academic guidance counselors, fundraisers, advertisers, and alumni coordinators.[61] They are responsible for maintaining a team of talented players and developing connections with recruits who will eventually become assets to the university.[62]

Coaches provide unparalleled value to their respective universities by accomplishing far more than winning seasons.[63] Aside from being highly talented experts in their fields, coaches create a "brand" for the university. The loyalty and commitment of many fans depends on the coach, making it very difficult for the university to recreate its brand and preserve loyalty after the coach leaves. A decline in the team's fan base can result in lower game attendance and a drop in merchandise sales. Since athletic programs serve as a revenue generator for many universities,[64] a successful coach is an invaluable resource. Given the unique benefits coaches provide for universities, finding an equivalent successor is often extremely difficult.

An injunction would therefore be a viable remedy if a coach breaches a contract with a student-athlete. At the time of breach, the precise effect on the player is difficult to quantify: according to an

59. *See* Phila. Ball Club v. LaJoie, 51 A. 973, 974 (Pa. 1902) ("[The] services of the [second baseman] are of such a unique character, and display such a special knowledge, skill, and ability, as renders them of peculiar value to the [Phillies], and so difficult of substitution that their loss will produce 'irreparable injury' . . . .").

60. *See* CHAMPION, *supra* note 53, § 16:8.

61. *See id.*

62. Travis, *supra* note 56 (emphasizing the importance of coaches to their universities).

63. *See, e.g.*, Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS L. REV. 127, 152 (2001) (listing the vast duties of a typical college basketball coach).

64. *See id.* 131–34.

empirical study, the harm to the athlete, including reduced possibility of being drafted at all or the precise number of draft slots that a player that endured a coaching change will fall, is probabilistic within a range.[65] Damages calculations are further complicated by the need to estimate lost income, endorsements, and other opportunities because there is no method to predict how successful the athlete could have been had the coach stayed. Indeed, a court is unlikely to award monetary damages because the doctrine of uncertainty of harm limits damages that are too unpredictable to accurately calculate.[66]

Similarly, an injunction is an attainable remedy for the university if a coach breaches the employment agreement. The university can demonstrate that, due to the unique nature of the coach's position and near irreplaceability of his services, monetary damages would not adequately compensate for the university's loss. The university may also recover from the institution attempting to lure the coach, on a theory of tortious interference with existing contractual relations.[67] Although this tort renders the defendant institution liable for economic losses caused thereby, the same problems of damage estimation that stymie the award of monetary relief directly from the coach would ensue in a tort suit against the new employer.

3. Is the Contract Enforceable Under the Common Law Reasonableness Test for Restrictive Covenants in Restraint of Trade?

An agreement that limits the free movement of employees in commerce is subject to claims of unenforceability as an unreasonable restraint of trade. While a personal service contract between a coach and university limits the coach's ability to transfer freely during the term of the contract, the agreement should be found to be reasonable because the university provides substantial compensation to the coach in return for unique services, and the university, its student-athletes, and its fans (many of whom make substantial monetary commitments to the university to secure season tickets) have a legitimate interest in receiving the benefits of the coach's talent which he has promised to provide.

Nor is there any concern that these agreements are anticompetitive. A coach with sufficient bargaining power remains free to find a

65. Hersch, *supra* note 1, at 25.
66. *See* Chi. Coliseum Club v. Dempsey, 265 Ill. App. 542, 549–50 (1932).
67. *See* RESTATEMENT (SECOND) OF TORTS: INTENTIONAL INTERFERENCE WITH PERFORMANCE OF CONTRACT BY THIRD PERSON § 766 (1979).

university willing to hire him without securing an enforceable promise that he will fulfill the terms of his contract. He can also decline to agree to a contract extension and seek employment elsewhere at the end of his contract (although, as discussed below, there are business reasons that discourage that practice). Competition for multi-year contracts that the employer legitimately expects to be fulfilled is an entirely procompetitive structure for an industry and these contracts are not unreasonable restraints of trade.[68]

The common law doctrine of ancillary restraints has been assimilated into the reasonable restraint of trade analysis.[69] This doctrine is most commonly applied in determining the enforceability of an employee's promise not to compete with the employer *after* the termination of the existing employment contract. The court evaluates the legitimate employer interests that would be harmed if the employee were to compete, and employee's legitimate interests, and the public interest.[70] Even when a non-compete clause is not explicitly included in the contract, the reasonableness test still applies if the contract imposes a penalty on an employee for engaging in the same business with another employer.[71] Since a promise to render unique services prevents an employee from performing the same services elsewhere, the agreement must pass the reasonableness test for ancillary restraints.

To the extent relevant for a court of equity, enforcement of the agreement is likely to benefit the university's interest in maintaining fan loyalty, the interest of fans relying on coaching stability in purchasing season tickets and, as noted earlier, protecting student-athletes' careers. Coaching contracts as personal service agreements are reasonable from a practical perspective to ensure that both parties, as well as the public, receive the benefit of the bargain, and are therefore distinguishable from the more controversial use of a non-compete

68. *See* Paddock Publ'ns, Inc. v. Chi. Tribune Co., 103 F.3d 42, 47 (7th Cir. 1996) (noting that exclusive dealing contracts are lawful if limited to a year's duration because such contracts "can promote competition by making it feasible for firms to invest in promoting their products—for these costs would not be recoverable if the contracts were of very short terms, or if rivals could exhibit the same films and obtain the benefit of this promotional activity").

69. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 226 (1899).

70. *See* Bires v. WalTom, LLC, 662 F. Supp. 2d 1019, 1033 (N.D. Ill. 2009); 6 WILLISTON ON CONTRACTS § 13:13 (4th ed. 2012).

71. *See Bires*, 662 F. Supp. 2d at 1033 (applying the reasonableness test even though there was no covenant against competition in the racecar driver's contract because the driver was penalized for engaging in the same business with another employer); 6 WILLISTON ON CONTRACTS § 13:13 (4th ed. 2012).

clause to limit an employee's opportunities after the term of the employment contract expires.

C. Whether Contract Law can Effectively Bind a Coach Through Viable Remedies

Monetary damages serve as the normal remedy for a breach of contract.[72] Estimating the monetary damages to universities, and in particular to student-athletes as third-party beneficiaries, raises a myriad of problems. Although traditional damage awards can compensate a university for expenses such as search costs, transition expenses, and potentially higher salaries necessary to immediately replace a departing coach, judges and juries would struggle to quantify the harm to the university in terms of recruiting, athletic donations, and the economic effect of a decline in team performance attributable to the coach's breach.

However, equitable relief is available when monetary damages are not fully compensatory. Generally, an injunction is granted when, in the absence of an injunction, irreparable harm would ensue.[73] For breach of a unique service agreement, courts will grant a negative injunction that restrains employees from performing their services elsewhere to offset the harm to employers in finding a replacement.[74]

Even if the obstacles to ascertaining money damages could be overcome,[75] NCAA rules—which student-athletes cannot bargain to overcome—likely preclude the payment of money to an elite student-athlete for a coach's contract breach.[76] If bargaining dynamics could lead coaches to compete with each other in offering credible promises to remain at a school during a star student-athlete's collegiate career, the case for equitable relief seems particularly strong.

III. Bargaining Power

Contracts are voluntary bargains, so even if the laws of contract and remedies and NCAA regulations permitted courts to enforce

72. *See* Restatement (Second) of Contracts: Judicial Remedies Available § 345 cmt. b, (1981).

73. *See supra* Part II.B.1.

74. *See* Am. League Baseball Club of Chi. v. Chase, 149 N.Y.S. 6, 8 (Sup. Ct. 1914).

75. In the event that an unusual University president authorized litigation to keep a head coach from hopping on the coaching carousel, it is possible that, contrary to my prediction in text, that improvements in damage estimation, or a liquidated damages clause that fully compensated all those harmed by the coach's departure, could lead a judge to deny equitable relief because adequate damages could be awarded.

76. See *infra* Part IV.

promises made by coaches to universities and student-athletes to remain at the school, the bargaining dynamics must be sufficient to induce a coach to make such a promise. These dynamics are explored below.

A. Bargaining Dynamics Between the Coach and Student-Athlete

The ability of parties to negotiate a contract depends on bargaining dynamics.[77] When one side has considerably more bargaining power than the other, the contract's terms are rarely negotiated.[78] Instead, the weaker party is presented with a "take-it-or-leave it" form contract referred to as a contract of adhesion.[79] In contracts of adhesion, the stronger party fixes the terms and the weaker party must agree to those exact terms or forgo entering the contract.[80] This coercive atmosphere is exactly the case when upcoming college athletes sign agreements with the institutions where they will play an NCAA sport.[81]

The contract between a university and student-athlete is a contract of adhesion with the university establishing the terms.[82] Typically, before freshmen become official team members, they are presented with a contract that governs the terms of their scholarships, compliance with NCAA rules, waiver of publicity rights, and many other aspects of their college careers.[83] Student-athletes must sign the agreement or forfeit their right to play for an NCAA member school, leaving them with little choice but to conform.[84] Even as rule-abiding

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77. *See* Robert S. Alder & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 5 (2000).

78. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203–04 (2003).

79. *See* Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41, 64–65 (2006).

80. *See id.*

81. *See* Thomas A. Baker III, John Grady & Jesse M. Rappole, *Consent Theory as a Possible Cure for Unconscionable Terms in Student-Athlete Contracts*, 22 MARQ. SPORTS L. REV. 619 (2012).

82. *See* Meyer, *supra* note 20, at 234–35 (the recruit's only bargaining power is the decision to accept or refuse an offer).

83. *See* Baker, Grady & Rappole, *supra* note 81, at 619.

84. *Id. But see* Kendall K. Johnson, *Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts*, 19 SPORTS LAW. J. 1, 25–29 (2012) (arguing that students have a meaningful opportunity not to play for an NCAA school because other less favorable opportunities to play sports exist).

competitors in NCAA sports, student-athletes hold little influence over regulations that the NCAA adopts.[85]

Not only do student-athletes lack individual bargaining power, they lack the ability to unite and bargain collectively against the university. Even assuming that the massive number of students involved could be effectively organized, a union-like bargaining atmosphere is unachievable because student-athletes are not considered employees afforded protection under the National Labor Relations Act.[86] Even more favorable to the university, NCAA rules bar student-athletes from employing attorneys or sports agents to represent their interests or negotiate a more equitable contract.[87]

Student-athletes' only opportunity to exercise bargaining power occurs when players initially choose the program that best suits their aspirations.[88] Within the parameters of permissible conduct set forth in NCAA regulations, universities vigorously compete to recruit the best student-athletes to agree to enroll at their institutions. After athletes formally agree to attend an institution, all negotiating abilities are lost with regard to scholarship awards and other accommodations.[89] As was discussed earlier, athletes also lose their power to enforce informal promises that were made by members of the university's athletic department during the recruitment process.[90]

A student-athlete's fate remains uncertain even after he signs the NLI before the school makes a definite scholarship award because the NLI does not guarantee a minimum scholarship amount or playing time.[91] In fact, an athlete could sign the NLI only to discover that his school "oversigned," meaning that the institution has accepted more NLIs from students than it has available scholarships, in which case

85. *See* Marc Jenkins, *The United Student-Athletes of America: Should College Athletes Organize in Order to Protect Their Rights and Address the Ills of Intercollegiate Athletics?*, 5 VAND. J. ENT. L. & PRAC. 39, 46 (2003) (describing the student-athlete committee that reports to the NCAA management council as "a passive representative of student-athletes and not a strong voice for potential reform").

86. *Id.*

87. *See* Oscar Robertson, *Don't Treat Players Like Gladiators*, CHRON. OF HIGHER EDUC. (Dec. 11, 2011), http://chronicle.com/article/Dont-Treat-Players-Like/130072/ (explaining how students are at a severe disadvantage when it comes to negotiation, especially since they are prohibited from hiring a lawyer).

88. Meyer, *supra* note 20, at 235.

89. *See id.*

90. *See id.*; *supra* Part II.B.

91. *See* Jonathan D. Bateman, *When the Numbers Don't Add Up: Oversigning in College Football*, 22 MARQ. SPORTS L. REV. 7, 7, 14 (2011).

the player may receive no scholarship and must become a "walk-on" member of the team.[92]

While NCAA regulations preclude student-athletes from the opportunity to negotiate the terms of their contracts with the institution, star athletes may possess the necessary bargaining power to negotiate a contract with their coach. In exchange for the star's promise to play at the coach's university, a coach may be willing to promise to remain at the institution for the duration of the student's career. Of course, the average college-bound player, eager to secure a Division I scholarship, cannot exert the necessary bargaining power to negotiate such a contract, because several other players with comparable abilities would likely be willing to accept a scholarship and play for the school without requiring a legally binding commitment from the coach. However, a star player, who many schools strive to recruit, may be able to secure such a promise.

Star players can exercise bargaining power over coaches because most athletic programs covet players with extraordinary abilities.[93] When students advantageously use their recruitment from competing schools as leverage over the desired coach, a contract binding the coach to remain at the university for four or more years becomes a viable option. However, the student must secure the coach's promise to stay before the student signs the NLI; a coach has no incentive to agree on a contract with a student who is already committed to the program.

A contract between the star recruit and coach would not only aid prospective players showcasing extraordinary talent, but would also benefit average players who lack the necessary bargaining power as well as students who have already matriculated to the university. If one star recruit is able to secure a contract with the coach and ensure that he remains at the university for a period of four or more years, every teammate will benefit. If more players successfully negotiate these contracts, the agreements will become easier to obtain, as more coaches are forced to offer the contract in attempts to attract star players.

92. *See id.* at 7–8.

93. *See* Meyer, *supra* note 20, at 227 ("Coaches travel all over the country in hopes of recruiting a star athlete that can help their program achieve success.").

B. Bargaining Dynamics Between the Coach and University

The bargaining dynamic between coaches and universities begins on a more equal footing because the university has a slightly greater ability to negotiate than the student.[94] The university's goal is to secure a provision in the coach's employment contract where the coach agrees to render unique sports services for the college. With this type of clause in the contract, a breach of contract can, if the university demonstrates irreparable harm, lead to a negative injunction to prevent the coach from performing similar services for a competing team. Universities have a strong incentive to seek to include these provisions in coaching contracts since popular coaches generate a considerable amount of revenue and the university wants to retain its star players.

For many colleges, the success of football programs, both in terms of winning games and generating revenue, depends on the coach.[95] Successful, lucrative coaches are valuable commodities affording them great bargaining power over universities.[96] Consequently, coaches can exercise their bargaining power to avoid terms that significantly restrain their ability to breach their contract. Antitrust laws preclude all Division I schools from agreeing to require the provision as part of a coach's employment contract.[97] Such an agreement would give universities nearly all of the bargaining power since the coach would be unable to threaten employment with a rival school as leverage. Although this type of collusion is prohibited, universities will likely have to affect the bargaining dynamics to induce coaches to agree to terms that would significantly increase the economic cost of a contract breach to a coach and the new employer.

An emerging trend in college coaching contracts is to include restrictive clauses, similar to unique service agreements, which limit the coach's ability to leave for another rival school during his contract

94. *Compare* Martin J. Greenberg, *Representation of College Coaches in Contract Negotiations*, 3 MARQ. SPORTS L.J. 101 (1992) (universities routinely negotiate the terms of coaching contracts), *with supra* notes 87-90 (students have little, if any, bargaining power with coaches).

95. *See* Travis, *supra* note 56.

96. Michael P. Elkon, *Enjoining Nick Saban: Non-Compete Agreements and College Football Coaches*, FISHER & PHILLIPS LLP: NON-COMPETE AND TRADE SECRETS (Jan. 9, 2012, 11:09 AM), http://www.noncompetenews.com/post/2012/01/09/Enjoining-Nick-Saban-Non-Compete-Agreements-and-College-Football-Coaches.aspx.

97. *Cf.* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998) (NCAA rule limiting assistant coaches' salaries violated Sherman Act).

term.[98] West Virginia University included these provisions in its past several coaching contracts, including those agreements with Bob Huggins, John Beilein, Rich Rodriguez and Bill Stewart.[99] However, the clauses in West Virginia's coaching contracts differ from traditional non-compete provisions because they prohibit the coaches from leaving West Virginia for another Big East Conference school during the term of their contracts,[100] whereas traditional non-compete clauses in employment contracts prevent the employee from going to work for a competitor after the contract term expires.[101] More universities are attempting to insert these provisions, which strengthen universities' legal options to prevent a coach from leaving for a competing school before his contract term expires. Before he was dismissed, Arkansas's Coach Bobby Petrino agreed to a non-compete clause where he promised to remain loyal to the Razorbacks by refraining from coaching at another Southeastern Conference West school for all but the last two years of his contract term.[102] His replacement, Coach John L. Smith, agreed to a similar clause which will cost him $850,000 if he wishes to leave before the end of his contract term.[103]

These provisions are illustrative of a trend but do not adequately protect student-athletes; the harm to the athlete is the same whether the coach leaves for a conference rival or other employer. Nor is an $850,000 buyout sufficient to protect the student-athlete, as the only programs to which a successful Arkansas head coach would be attracted can easily afford to provide this compensation.

More coaches may be agreeable to these restrictive provisions if the compensation and added perks, such as bonuses for bowl games, escalator clauses which ensure that a coach remains near the top of the highest paid coaches in the industry, and use of private planes and cars, are attractive enough. Even though the NCAA prohibits colleges from paying players, despite the ample revenue that student-athletes generate, colleges can still protect athletes by using the revenue to

98. *See* Kevin Scarbinsky, *The Next Big Thing in Contracts: Will More Coaching Deals Include Non-Compete Clauses?*, ALABAMA (Aug. 29, 2010, 3:15 PM), http://www.al.com/sports/index.ssf/2010/08/next_big_thing_will_more_coach.html.

99. Jack Bogaczyk, *Holgorsen's Deal Sweet for Coach, Not WVU*, CHARLESTON DAILY MAIL: WVU SPORTS (Dec. 20, 2011), http://dailymail.com/Sports/WVUSports/201112190104.

100. *See id.*

101. *See* C.T. Drechsler, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, As Affected By Duration of Restriction*, 41 A.L.R. 2d 15, 24 (1955).

102. *See* Scarbinsky, *supra* note 98.

103. *See* Matt Jones, *Smith's Contract Short and Sweet*, THE SLOPHOUSE (Apr. 23, 2012), http://blogs.nwaonline.com/slophouse/2012/04/23/smith-gets-his-chance/ (last visited May 15, 2013).

compensate coaches for agreeing on unique service provisions. Colleges are more likely to receive longer, binding commitments from coaches if they can offer more compensation in exchange.

There is another important element in the bargaining dynamic that would exist if colleges and their coaches could credibly promise that the coach would remain during a student-athlete's tenure (or would do so absent specified circumstances). Coaches that resisted binding loyalty promises would face a serious recruiting disadvantage. For example, consider the case of Brian Kelly, who left the University of Cincinnati to accept the head-coaching job at the University of Notre Dame after Notre Dame paid a relatively modest and affordable buyout. Would Kelly have been able to attract the top athletes that made Bearcat football so successful if rival schools had coaches who had signed contracts allowing student-athletes to enforce negative injunctions?

C. Dynamics Require Contracts Enforceable by Student-Athletes, not just Universities

Even if a university had the bargaining power to protect itself from all losses resulting from a coach's resignation, contract provisions are only as good as the university's willingness to fully enforce their contract rights. Typically, the ultimate decision regarding a university's approach to a coach's desire to breach a contract to move to a "better" school lies in the hands of the university president. In the academic world, college officials are used to "one way" contracts. Professors are typically given life tenure but are free to leave for another school whenever they choose. In the world of professional sports, coaches—like players—are typically held to their promises. Attitudes such as "we wouldn't want to keep a coach here if he wasn't happy"[104] often lead university presidents to approaches that a professional club owner would never adopt. Because big-time college coaches are compensated in a manner more akin to a professional coach than a typical professor, treating them like professional coaches seems appropriate. Still, even if the terms of an employment contract could permit the university to secure a negative injunction barring their coach from providing his unique services to another college

104. As a faculty member of a university's athletic board, Professor Ross responded to this observation by the university's chancellor by asking the board if they could imagine George Steinbrenner releasing a Yankees player who had exceeded expectations from a multi-year contract, when the player perceived he could get more money with another team, on the grounds that the player "wasn't happy." The chancellor did not reply.

team, college presidents rarely take advantage of the rights afforded them by law: to threaten litigation for tortious interference with contractual relations if another university's president or athletic director approached the coach for a new position.[105] Thus, student-athletes need some means to enforce these contracts themselves.

IV. Validity of Contracts Under NCAA Rules

Although a contract in which the coach promises to remain at the university is legally and equitably enforceable, enforcement is meaningless if NCAA Bylaws preclude either the agreement or its enforcement. The principal issue in analyzing conformity of these provisions with NCAA regulations relates to the NCAA rule precluding student-athletes from receiving "extra benefits" from their athletic participation not available to other students, unless specifically authorized by the NCAA. This Part concludes that the contract provisions discussed above should not constitute an impermissible extra benefit.

The NCAA governs the operation of intercollegiate athletics through its primary function of developing regulations.[106] The activities of both students and coaches are heavily monitored by the NCAA.[107] The NCAA Bylaws include three distinctive goals relevant to this issue: (1) a philosophical commitment to the amateur ideal that participation in intercollegiate athletics is primarily motivated by the physical, mental, and social benefits that the student-athletes expect to derive; (2) regulations that maintain a "clear line of demarcation" distinguishing intercollegiate athletics from professional sports; and (3) regulations designed to prevent member schools from behavior that will result in what the member schools perceive as an unfair competitive advantage.[108] In furtherance of these goals, the NCAA prohibits student-athletes from receiving any type of compensation or "extra

105. *See, e.g.*, Darren Heitner, *Kent State's Buyout Clause and Tortious Interference Claims*, ChangeLegal (May 15, 2011), http://changelegal.com/2011/05/15/kent-states-buyout-clause-and-tortious-interference-claims/; Benjamin Clark, *Coaching Changes Lead to Lawsuit*, Iowa Law Blog (July 28, 2010), http://www.iowa-lawblog.com/2010/07/articles/general-law-1/coaching-changes-lead-to-lawsuit/. *See generally* Restatement (Second) of Torts: Intentional Interference with Performance Of Contract by Third Person § 766 (1979).

106. Walter T. Champion, Jr., Fundamentals of Sports Law § 12:3 (2011); *see also* NCAA Const. art. I, § 1.2(h), *reprinted in* NCAA Manual, *supra* note 16, at 1.

107. Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for A New Game Plan*, 46 Ala. L. Rev. 487 (1995).

108. *See* NCAA Bylaws, *supra* note 16, art. 12, § 12.01.2, *reprinted in* NCAA Manual, *supra* note 16, at 61; NCAA Manual, *supra* note 16, at 1; Sarah M. Konsky, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. Chi. L. Rev. 1581, 1582 (2003).

benefit" in return for their participation in intercollegiate athletics, other than those benefits expressly authorized by the NCAA.[109]

Occasionally, coaches succumb to the intense pressure to win and run afoul of NCAA regulations.[110] As an added measure of enforcement, the NCAA requires that all coaching contracts contain a provision stating that a coach who violates any NCAA rule is subject to disciplinary action by the NCAA.[111] The university is also required to incorporate the NCAA rules into coaching contracts, meaning that a coach who violates an NCAA rule has also breached his employment contract with the university.[112] Among sanctions available to the NCAA Infractions Committee is a ruling that bars any other NCAA member school from hiring a coach found guilty of violating NCAA regulations.[113] Although a student-athlete would gain no direct monetary benefit from an agreement with their coach to remain at the institution throughout the student's career, all parties must exercise precaution to avoid an unwanted violation of the NCAA rules.

No NCAA rule expressly prohibits the formation of a contract between a coach and player in which the coach promises not to leave the university during the student's career. The "Extra Benefit Rule" forbids prospective student-athletes from receiving any "financial aid or other benefits" from representatives of the institution and its athletic program.[114] Specifically, the NCAA strictly prohibits coaches or other members of the athletic department from giving players any type of monetary bonus, including cash, equipment, clothing, loan money, housing, sponsorship, or reimbursement for academic expenses.[115] If NCAA officials were to conclude that a contract between a coach and

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109. *See* NCAA BYLAWS, *supra* note 16, at art. 12, § 12.01.2, *reprinted in* NCAA MANUAL, *supra* note 16, at 61; Michael A. Corgan, Comment, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 372–77 (2012). Formally, the NCAA's ban on paying players in ways other than specifically approved by their rules is no different than the NBA's similar ban on paying players other than in accordance with their salary cap rules! An analysis of the NCAA's controversial rules strictly limiting pay to players is beyond the scope of this article.

110. *See generally* Michael S. Selvaggi, *The College v. The Coach*, 3 SETON HALL J. SPORT L. 221, 222–25 (1993) (noting coaches who have blatantly disregarded NCAA regulations and explaining how the "tremendous emphasis placed on athletic success" fuels the temptation to violate NCAA rules).

111. *See id.* at 226–27.

112. *See id.*

113. *See* NCAA BYLAWS, *supra* note 16, at art. 19, § 19.5.2(k), *reprinted in* NCAA MANUAL, *supra* note 16, at 323.

114. *Id.* at art. 13, § 13.2.1, *reprinted in* NCAA MANUAL, *supra* note 16, at 100.

115. *Id.*

student which includes the coach's promise to remain at the university constitutes a prohibited "extra benefit" to a prospective student athlete, it would run afoul of the NCAA regulations, because any "benefit" that is not expressly authorized is not permissible.

Allowing coaches to enter into binding promises with student-athletes furthers the NCAA's goals, and it would be unfortunate if NCAA officials construed "extra benefit" so broadly as to include this promise. The applicable rule is designed to prohibit schools from inducing players with financial awards and similar monetary incentives. The items specifically prohibited under the rule are all tangible things of substantial cash value, whereas a coach's agreement to continue in his coaching capacity during the player's career cannot be measured in dollars (indeed, this is why equity courts would enforce the promise with a negative injunction!).

While a monetary gift presumably persuades a student-athlete to attend a particular institution that the recruit would not choose absent the gift, a contract with the university's coach promotes fairness in the recruitment process by protecting the athlete's interests after he has decided to attend a particular institution. The coach attracts the student and the contract makes it more likely that the student-athlete's collegiate experience will be what the school promised.

Unlike tangible items of monetary value, which constitute extra benefits, a coach's promise to remain at the university furthers the three relevant NCAA policies that underlie the ban on impermissible extra benefits.[116] While monetary gifts are inconsistent with amateurism principles, among the legitimate "educational" benefits that are supposed to motivate student-athletes is the opportunity to have their competitive talents honed by a particularly effective coach, and more generally by the type of program run by that coach. While monetary gifts are likewise inconsistent with maintaining a clear line between intercollegiate and professional sports, allowing the athlete to ensure that a chosen coach will remain is of course foreign to a professional team and a paid player. Finally, enforcing these promises will likely promote a level playing field, rather than hinder it. The coaching carousel is generally an upward cycle, which harms well-run, rising programs and benefits under-performing traditional powers.

Student-athletes are not parties to a contract between the coach and university; therefore, they have no right to enforce the agreement unless they are intended third-party beneficiaries. For students to be-

116. *See supra* note 109.

come intended third-party beneficiaries, the school and coach must make it clear that performance of the agreement is intended to benefit the university's student-athletes.[117] Otherwise, the players lack standing to legally enforce the contract in case of a breach. If a coach were to breach a contract where student-athletes are intended beneficiaries, both the university and the athletes may seek damages as well as pursue available equitable relief.[118]

Just as a student-coach contract should not constitute an "extra benefit" under NCAA regulations, NCAA regulators should permit an express provision in the coach's contract with the university that designates student-athletes as third party beneficiaries. Although monetary damages (or a monetary settlement to avoid equitable relief) would likely constitute "pay" prohibited under NCAA regulations,[119] allowing student-athletes to secure a negative injunction would, as noted above, further NCAA goals rather than defeat them.

Conclusion

Creating legally enforceable contracts to hold coaches to promises to remain at a school during the career of a student-athlete is the most effective manner in which student-athletes can shield their professional careers from the harm that erupts when coaches leave their universities. These beneficial contracts can be achieved in two ways. First, star players can and should step forward and utilize their coveted abilities to negotiate contracts with their coaches. Agreements which ensure that a coach remains committed to his respective university throughout the athlete's career would not only help players with extraordinary talents, it would benefit the entire team. Second, universities have a strong business incentive to include unique service provisions in coaches' employment contracts. These agreements ensure that the school remains competitive in the college sports market under the leadership of its current coach. Both contracts are attainable under current bargaining dynamics.

Each agreement meets the basic requirements to create a legally enforceable contract. A clause in the coach's employment contract re-

117. *See* RESTATEMENT (SECOND) OF CONTRACTS: INTENDED AND INCIDENTAL BENEFICIARIES § 302 (1981).

118. *See* RESTATEMENT (SECOND) OF CONTRACTS: CREATION OF DUTY TO BENEFICIARY § 304 (1981).

119. *See* NCAA BYLAWS, *supra* note 16, at art. 12, § 13.1.2, *reprinted in* NCAA MANUAL, *supra* note 16, at 62 (prohibiting players from being compensated for participating in NCAA athletics and stipulating that players who are compensated will lose their "amateur" status).

citing that his services are unique would not raise serious antitrust concerns if the term was the product of a competitive market for coaching services. Given the current NCAA regulations, it is unlikely that either contract is impermissible because neither agreement persuades recruits to play for a particular school by offering them monetary benefits nor do they reward current players with financial compensation for their sports services.

Finally, should a coach breach his contract with a student or the university, equitable relief is an available remedy. These contracts cannot force a coach to carry out his duties throughout the contract term, but they come as close as legally possible to producing the same result. If a coach is prohibited from rendering his services to any other team, his only option in the NCAA world is to remain employed with his current university, which would ultimately save student-athletes' futures from irreparable harm.