SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY
VOLUME 7 FALL 2017 ISSUE 1

NATIONAL LETTER OF INTENT'S BASIC PENALTY: ANALYSES AND LEGAL BASES TO END THE PRACTICE

LEONARD W. ARAGON* AND CAMERON MILLER**

ABSTRACT

This article strives to give a fair summary of the National Letter of Intent ("NLI") Program, its development through the history of intercollegiate athletics, and the administrative process college athletes can use to obtain a release from the agreement. It also serves as a guide to future college athletes seeking to avoid the NLI's onerous penalties by setting forth legal arguments that can be used during the release process or, if the athlete is so inclined, in a lawsuit against the NLI's operating entity (and possibly the National Collegiate Athletic Association) in state or federal court. The article concludes by suggesting common-sense reforms that transform the NLI from a one-sided adhesion contract to a mutually beneficial agreement.

INTRODUCTION

On the first Wednesday in February, high school seniors participate in what has become one of amateur athletics' most revered annual traditions: National Signing Day. After a lengthy recruiting process,[1] these young men and women, many of whom

---

*Partner, Hagens Berman Sobol Shapiro, LLP, Phoenix, Arizona.
**Law Clerk, Hagens Berman Sobol Shapiro, LLP, Phoenix, Arizona.
The authors thank Tory Beardsley and Marcus Brown for their comments on and assistance with this article, and ASU Law's *Sports and Entertainment Law Journal* for providing a forum for discussing these issues.

[1] NCAA institutions routinely offer scholarships to players well before they enter high school. *See* Cam Smith, *Hawaii Football*

are minors, finally put pen to paper and officially mark their collegiate destination (often with millions watching on TV[2]) by signing a National Letter of Intent ("NLI").

But the ensuing celebration can soon turn to frustration for athletes who, for various reasons, feel the institution to which they signed is no longer the one they desire to attend.[3] Under the NLI's Basic Penalty provision, signees who do not attend the institution named in the NLI for one full academic year and instead enroll at a different institution are subject to draconian consequences.[4] These consequences are intended to deter players from transferring.[5]

Offered a Scholarship to a Fifth-Grade QB Named Titan Lacaden, USA TODAY HIGH SCHOOL SPORTS (June 12, 2017), http://usatodayhss.com/2017/titan-lacaden-fifth-grade-hawaii-football; Joseph Zucker, *286-Pound 8th Grade Prospect Jaheim Oatis Offered Scholarships by Alabama, More*, BLEACHER REPORT (July 24, 2017), http://bleacherreport.com/articles/2723544-286-pound-8th-grade-prospect-jaheim-oatis-offered-scholarships-by-alabama-more; *Lane Kiffin Offers Quarterback Who Just Finished Sixth Grade*, USA TODAY HIGH SCHOOL SPORTS (June 5, 2017), http://usatodayhss.com/2017/lane-kiffin-sixth-grader-recruiting-pierce-clarkson; Jason Kirk, *Nevada Reportedly Offers 9-year-old a Football Scholarship, Setting New Record*, SB NATION (June 23, 2017), https://www.sbnation.com/college-football-recruiting/2017/6/23/15857484/football-scholarship-offer-middle-schoolers.

[2] In 2017, the ESPN family of networks aired hours of content related to National Signing Day, including 10 hours of coverage on the network's SEC channel, and no less than 10 live announcements from recruits on other channels. *See* Gracie Blackburn, *Notes and Quotes from SEC Network's National Signing Day Coverage*, ESPN MEDIA ZONE (Feb. 1, 2017), http://espnmediazone.com/us/press-releases/2017/02/notes-quotes-sec-networks-signing-day-coverage/.

[3] In the 2010 signing period, over 700 (out of 36,000) NLI signees requested releases from the agreement. Michelle Brutlag Hosick, *History of the National Letter of Intent*, NAT'L COLLEGIATE ATHLETIC ASS'N (Feb. 2, 2011), http://www.ncaa.com/news/ncaa/2011-02-02/history-national-letter-intent. (Athletes request releases for a number of reasons, including coaching changes, problems with teammates, and family issues).

[4] *Basic Penalty*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/nliProvisions/penaltyBasic.html (last visited Nov. 19, 2017).

[5] *See generally* Aaron Falk, *Joe Tukuafu's Inability to Transfer from Utah State to BYU Without Penalty Shines Light on a Growing*

***

Consider the story of Sara Woods, a world-class tennis player who signed an NLI with State University (while still a minor) but later attempted to transfer—nearly derailing her collegiate career. What follows is a true story (which mostly took place in 2016), though the identity of Ms. Woods, the university, and the sport she played have been replaced to protect her and her collegiate and professional career.[6] The authors helped Ms. Woods secure a partial release from the NLI, and her story spawned this article.

Woods, the number-two ranked amateur tennis player in the world and best amateur player in the United States (and an equally strong student), could have easily bypassed college and began life as a professional athlete. Instead, she elected to attend college to earn an education, enjoy the camaraderie of college athletics, and generally enjoy the "college experience." Woods orally committed to State (over the dozens of other universities that recruited her with offers of a full scholarship) early in her high school career due to its traditionally strong tennis program and her belief that its coaching staff—one member of whom had closely followed her progress for years—could develop her into an NCAA and professional champion. Also important to Woods was the opportunity to train with supportive teammates, something she yearned for after years of practicing alone.

Due to NCAA rules, State allows only a handful of athletes from its roster to compete against other schools in NCAA-sanctioned events. These "traveling" spots are highly coveted and reserved for the best players—usually juniors and seniors with full scholarships. Following her verbal commitment, Woods, who would almost certainly take one of the traveling spots from a current player, was the subject of unwelcoming and hostile behavior from members of State's tennis team and their families. Over the remainder of her high school career, Woods was ostracized and alienated by her future teammates at tournaments and during her official visit to State. Despite her efforts to mend and build relationships with her future teammates and their families, she was rebuffed at every turn.

Issue, SALT LAKE TRIB. (Aug. 17, 2017), http://www.sltrib.com/sports/2017/08/17/joe-tukuafus-inability-to-transfer-from-utah-state-shines-light-on-a-growing-issue/.

[6] Ms. Woods consented to the use of her story in this article.

Even after Woods and her parents informed the State coaching staff of these developments, the hostility continued. Despite concerns about her fit within State, Woods still believed in the coaching staff's ability to hone her skills, and therefore honored the verbal commitment she gave to the school by signing an NLI. Woods believed that once she became a member of the team, State's other players would accept her as they strove to win a national championship.

She was wrong. In fact, the abuse continued and worsened after she signed the NLI. Moreover, the coaches did nothing to stop or even ameliorate her future teammates' conduct.

Due to this situation, Woods informed State before her high school graduation that she would be taking a gap year to re-evaluate her academic and athletic options. A few months later, the assistant coach whom Woods believed could best develop her skills departed for another job. With nothing left for her at State, Woods sought a release from her NLI. The school refused, stating that Woods' request was denied "in order to restrict her from immediately competing at a [conference] institution or an institution against whom we are scheduled to compete this academic year." But for intervention by the authors, Woods would likely have been required to sit out a year before competing for a different NLI-subscribing institution *and* lost a year of eligibility, resulting in a delay of her professional career and a lost year of access to elite coaches and training facilities.

***

Unfortunately, Woods' story is not unique; hundreds of athletes seek releases from their NLIs each year.[7] It is only when athletes (and their parents) read through the NLI that they find their change of heart has significant consequences. As per the NLI's Basic Penalty, enrolling at an NLI-subscribing institution other than the one with whom the athlete signed results in a ban from athletic competition for one academic year (year-in-residence requirement), *and* a one-year loss of eligibility in all sports.[8] And although the athlete can still receive an athletic scholarship while fulfilling the residency requirement, most schools are unwilling to "waste" one of their valuable scholarships (which are capped in number and value under

[7] *See* Hosick, *supra* note 3.

[8] *See infra* Section II(A)(1).

NCAA rules[9]) on a player unable to contribute to a team's competitive success.

For most athletes, and particularly those who are socioeconomically disadvantaged or whose window of opportunity to pursue a professional athletic career is small and closing, these consequences effectively prohibit transferring—even if the original school becomes inhospitable or another school presents a better athletic or academic opportunity. Now locked in to what some have called the worst agreement in American sports[10] and the "National Letter of Indenture,"[11] NLI signees face an arduous road to free themselves from their original agreements and compete athletically at an institution that better meets their financial, academic, athletic, and personal preferences.[12]

The administrative appeals process to be released from the NLI is a secretive and unnecessarily complicated process that favors the institution with whom the NLI was signed.[13] Most athletes (and their parents) cannot navigate the process alone, and

---

[9] *See generally* 2017-2018 NCAA DIVISION I MANUAL Bylaw 15.5, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaapublications.com/productdownloads/D118.pdf (last visited Nov. 19, 2017).

[10] Andy Staples, *Why Prized Recruits Should Refuse to Sign the NLI*, SPORTS ILLUSTRATED (Feb. 9, 2015), https://www.si.com/college-football/2015/02/09/national-letter-intent-punt-pass-pork. *See also* Patrick Hruby, *Why Top NCAA Recruits Shouldn't Sign National Letters of Intent*, VICE SPORTS (Feb. 1, 2017, 10:01 AM), https://sports.vice.com/en_us/article/pgn38z/why-top-ncaa-recruits-shouldnt-sign-national-letters-of-intent.

[11] Jason Belzer & Andy Schwarz, *National Letter of Indenture: Why College Athletes are Similar to Indentured Servants of Colonial Times*, FORBES (Jul. 25, 2012, 8:52 AM), https://www.forbes.com/sites/darrenheitner/2012/07/25/national-letter-of-indenture-why-college-athletes-are-similar-to-indentured-servants-of-colonial-times/.

[12] According to the NLI Program, appeals typically take six to eight weeks to be discharged. *NLI Appeals Process*, NAT'L LETTER OF INTENT, http://www.nationalletter.org/documentLibrary/appealsProcessSheet100110.pdf (last visited Nov. 19, 2017).

[13] *See* Robert Webster, *How the Baylor Scandal Exposes Problems with NCAA and the National Letter of Intent*, LAW & CRIME (June 2, 2016, 5:34 pm), https://lawnewz.com/high-profile/how-the-baylor-scandal-exposes-problems-with-ncaa-and-the-national-letter-of-intent/.

either do not appeal or remain at the original institution—decisions profoundly affecting the athletes' academic, athletic, and professional futures.

Instead of pursuing these administrative remedies exclusively, it may be more effective for college athletes to challenge the NLI's transfer regulations using traditional legal means, or at least use legal arguments to support the administrative request for an NLI release. As described below, the NLI and its Basic Penalty are vulnerable to challenges based in contract, antitrust, and state common law and statutory claims related to fraud and deceptive practices.

Perhaps the strongest argument is that the NLI is not actually a contract. All contracts require consideration—generally some exchange of value—but the NLI gives nothing to the signee and causes no detriment to the school. Without consideration, there is no contract. If the contract is unenforceable, so is the Basic Penalty. And even if the NLI was assumed to be a valid contract, the appeal process (described below in detail) is so unfair it breaches the covenant of good faith and fair dealing inherent in every contract, as do any promises given to the athlete that frustrate the contractual promises in the NLI, such as false claims related to playing time, positions, and scholarships. Further, the Basic Penalty's first clause is effectively a covenant not to compete that is unnecessarily broad and thus unreasonable and unenforceable. These contract-based arguments are in Section IV.

We also briefly discuss the potential for fraud-based claims under state statutes and common law fraud principles. A signed NLI is not necessary to accept a Grant-in-Aid award (an athletic scholarship), yet coaches and university administrators often present the document to recruits without explanation, leading many athletes to believe or assume the NLI is a prerequisite to securing a scholarship. Recruiters also fail to explain that athletes need not sign the NLI to be eligible for NCAA competition. And some coaches and administrators make outright false promises to athletes to induce them to sign the NLI. [14] These misrepresentations and omissions are likely actionable individually and possibly as a class action. The

[14] Notably, these include coaches' promises to remain at the school the athlete is signing with, and then departing after the NLI is signed. *See, e.g.*, Ray Glier, *High School Athletes Think Twice About Signing Letters of Intent*, N.Y. TIMES (Feb. 13, 2015), https://www.nytimes.com/2015/02/15/sports/ncaafootball/high-school-recruits-think-twice-about-signing-letters-of-intent.html?mcubz=0.

common law and statutory arguments to void the NLI are in Section V.

Maybe the most ambitious argument challenging the NLI is that the Basic Penalty constrains trade in violation of the Sherman Antitrust Act. Functioning as both a covenant not to compete and a group boycott, it stifles the free-flow of talent between competing institutions and allows schools to avoid competing against their former athletes. Discussed in light of the recent *Pugh*, *Deppe* and *Vassar* lawsuits involving challenges to the NCAA transfer rules, Section VI outlines how the NLI's limits on player movement can be invalidated based on similar antitrust theories.

In closing, we discuss litigation-averting policy changes that would eliminate onerous penalties on athletes and make the consummation of the recruiting process more judicially defensible and fair. If prospective college athletes take one thing from this article, it is this: **DO NOT SIGN THE NLI**. There is no law or NCAA rule requiring recruited athletes to sign the document, and signees gain nothing through the agreement—but lose their ability to freely transfer to an institution that may offer a more desirable bundle of academic, athletic, and other opportunities.

I. THE NATIONAL LETTER OF INTENT PROGRAM

"[The NLI's] original purpose was to end recruiting once you signed. It evolved into a contract that benefits the institution because it limits the student-athlete's ability to transfer. It puts the student-athlete in handcuffs."

—Former SEC Assistant Commissioner Eugene Byrd[15]

From the genesis of collegiate sports in the mid-nineteenth century, athletic recruiting has been one of the fiercest

[15] Kevin Scarbinsky, *College Athletes' Rights: National Letter of Intent plus NCAA Transfer rules tie student-athletes to schools*, AL.COM (last updated Dec. 4, 2011), http://www.al.com/sports/index.ssf/2011/11/college_athletes_rights_nation.html. (Byrd was an administrator in the NLI Program when it was operated out of the Southeastern Conference (SEC) office).

battles for talent any American industry has ever experienced.[16] Driven by capped labor costs[17] and the potential for significant financial gain,[18] colleges and universities compete for the best high school athletes, hoping these players will bring their lucrative, consumer-appealing skills to the institution. Even in the pre-billion-dollar media rights agreement era, the competition for players was intense, and it was not uncommon for players to be *lured* from one school to another despite having matriculated at the first.[19]

In 1964, a "solution" to this understandable talent competition was implemented.[20] Seeking to curtail recruitment costs by "end[ing] the recruiting once [the athlete] signed,"[21] a group of seven conferences and eight independent institutions, in concert with the Collegiate Commissioners Association ("CCA"), distributed a document to prospective college football players with their athletic scholarship offer. Called the "National Letter of Intent," it was and remains an agreement that obligates the athlete (signee) to attend the institution (full-time) for a single academic

---

[16] *See generally* Charles A. Clotfelter, BIG-TIME SPORTS IN AMERICAN UNIVERSITIES 44 (2011).

[17] *See* 2017-2018 NCAA DIVISION I MANUAL Bylaw 15.01.6, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaapublications.com/productdownloads/D118.pdf (last visited Nov. 19, 2017) (capping college athletes' compensation at "the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution.").

[18] In the 2015-16 academic year, public institution athletic departments in the NCAA's Division I generated over $9.7 billion in revenue. Steve Berkowitz, *NCAA Finances*, USA TODAY SPORTS, http://sports.usatoday.com/ncaa/finances/ (last visited Nov. 19, 2017).

[19] Hosick, *supra* note 3 (emphasis added). *See also infra* Section III.

[20] Michelle Hosick, *History of the National Letter of Intent*. NAT'L COLLEGIATE ATHLETIC ASS'N (Feb. 2, 2011, 16:00 EST), http://www.ncaa.com/news/ncaa/2011-02-02/history-national-letter-intent.

[21] Greg Bishop, *Want to Play at a Different College? O.K., but Not There or There*, N.Y. TIMES (June 7, 2013), http://www.nytimes.com/2013/06/08/sports/ncaafootball/college-coaches-use-transfer-rules-to-limit-athletes-options.html?mcubz=0. The stated intent of the NLI Program was to "curb recruiting excesses that began when college sports became a national endeavor." *See* Hosick, *supra* note 3.

year.[22] In "exchange" for that obligation, other institutions must cease recruiting the athlete.[23] According to the NCAA, "[r]ecruits were informed of the recruiting rules from that point on and told that if they didn't hold up their end of the deal, their athletics eligibility would be limited."[24] The CCA, led by former Texas Tech Faculty Athletics Representative J. William Davis, introduced the NLI as a voluntary program, and though it remains one today, approximately 650 Division I and II institutions participate [25] (including all Power Five and Football Bowl Subdivision conferences).[26] Originally for football players only, the NLI is now distributed to athletes in every sport and across both sexes.[27] Importantly, signing the NLI is not (and was never) required to accept an offer of athletic financial aid, though the documents are transmitted in tandem and schools often fail to differentiate between the effects of the two.[28]

The CCA is an unincorporated association of conference commissioners whose primary responsibility is the NLI Program. [29] All thirty-two conference commissioners in the NCAA's Division I are members.[30] Largely a policy-influencing

---

[22] *National Letter of Intent 2011-2012*, NAT'L LETTER OF INTENT, https://sc.cnbcfm.com/applications/cnbc.com/resources/editorialfiles/2012/05/03/2226580_NLI_2010_2011.pdf (last visited Dec. 11, 2017).

[23] *Id.*

[24] Hosick, *supra* note 3.

[25] *About the National Letter of Intent (NLI)*, NAT'L LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/ (last visited Dec. 11, 2017).

[26] *See National Letter of Intent Member Schools*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://web1.ncaa.org/onlineDir/exec2/nliListing (last visited Dec. 11, 2017).

[27] *See* Hosick, *supra* note 3.

[28] Pat Forde, *Why Sign NLI Early ... If At All?*, ESPN (Apr. 22, 2003), http://assets.espn.go.com/ncb/columns/forde_pat/1542338.html ("But there's one piece of vital recruiting information most prospects never hear from the coaches who vow to treat them like family while developing their jumper: You don't have to sign a national letter of intent.").

[29] *See generally* Hosick, *supra* note 3.

[30] *See* Jeremy Crabtree, *CCA Panel Eyes Early Signing Period*, ESPN (June 15, 2015), http://www.espn.com/college-

(not policy-making) group, the CCA meets twice annually to provide a forum to discuss shared interests and other issues of common concern. However, the group does play some legislative role, as the CCA is allocated four spots on the NCAA's 40-member Division I Council.[31] In 2004, the CCA turned over general operations of the NLI Program to the NCAA's Eligibility Center, though the CCA still maintains oversight of the program and its various subcommittees.[32] Perhaps logical, this overlapping relationship strengthens the notion that the NLI is an NCAA program, leading some athletes to believe signing the document is a necessary step in the athletic recruitment process. To be clear: The NLI is not an NCAA program, nor are any of its provisions codified in the NCAA's bylaws. Rather, it is a wholly voluntary system that a large majority of Division I and II institutions have adopted. This distinction is not well understood by, or communicated to, signees.

In the modern recruiting cycle, the NLI is transmitted to the prospective athlete along with a separate offer of Grant-in-Aid. Both are executed and sent back to the athlete's future institution, effectively ending the recruiting process. While the latter document actually contains the institution's scholarship offer, the NLI is treated as the Holy Grail of the recruiting process. The fetishizing of the NLI by coaches, the media, and impressionable high school athletes has likely contributed to a fundamental misunderstanding of the document's actual meaning, legal and otherwise. We clarify those misconceptions here.

A. THE NLI'S PROVISIONS

The NLI, a three-page document containing 12 provisions, is sent to a prospective college athlete shortly before his or her signing day. The agreement is unambiguously a contract

---

football/story/_/id/11105557/collegiate-commissioners-association-panel-formed-explore-early-signing-period-college-football.

[31] *See* Division *I Council*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/governance/committees/division-i-council (last visited Dec. 20, 2017) ("The Division I Council is a high-level group responsible for the day-to-day decision-making for Division I.").

[32] *See About the National Letter of Intent (NLI)*, *supra* note 25. The NLI program operates four subcommittees: NLI Policy and Review Committee, DI Appeals Committee, DII Review Committee and DII Appeals Committee. Hosick, *supra* note 3.

of adhesion because it provides no opportunity to negotiate the incorporated terms and is drafted by the party with superior bargaining strength (the institution).[33] In the opening paragraph, the NLI informs prospective athletes and their parents that signing the document is voluntary and unnecessary to receive athletics aid and participate in intercollegiate athletics. But this is a hollow reminder ignored by athletes, parents, coaches, and administrators alike, with even relatively sophisticated athletes giving the document only a cursory look.[34]

Provision One explains that only first-time enrollees at a four-year institution or transfer athletes graduating from a two-year college may sign NLIs.[35] Provision Two outlines the institution's obligation to deliver a scholarship offer in tandem with the NLI, though it fails to distinguish that scholarship offers, if accepted, are binding with or without an NLI.[36] Provision Three describes the circumstances under which the NLI is considered performed, but, tellingly, the only indicia of performance are actions performed by the athlete.[37] Provision Four, the Basic

---

[33] *See, e.g.,* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 543–44 (1995) (a contract of adhesion is one that the party presented it "must accept" despite "[having] no position to bargain"); Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 374 (2007) (contracts of adhesion contain "non-negotiable condition[s]").

[34] *See* Jay Bilas, *Committed to a Coach, But Signed to a School*, ESPN (Apr. 29, 2003, 12:43 PM), http://assets.espn.go.com/ncb/columns/bilas_jay/1541904.html ("When I signed a National Letter of Intent to attend Duke University in April, 1982, I didn't even read it. As an 18-year-old, I looked at the letter then very much the way I look at a rental car contract now. Sign the contract, get a car. Sign the Letter of Intent, get my scholarship."). Bilas earned both undergraduate and law degrees from Duke. *Jay S. Bilas Of Counsel: Overview*, MOORE & VAN ALLEN, http://www.mvalaw.com/professionals-30.html (last visited Dec. 11, 2017). One of the authors had a similar experience when signing his NLI in Feb. 2012.

[35] *National Letter of Intent 2011-2012*, *supra* note 22.

[36] *Id.*

[37] *Id.* The NLI is considered "performed" if a signee attends the institution for a full academic year, or if they graduate from a two-year institution (after having signed the NLI in their first year at the institution or in high school). *Id.*

Penalty, will be discussed further below.[38] Provision Five dictates when the NLI may be signed without incurring a penalty.[39] A general overview of the release and appeal process is in Provision Six, but is devoid of any useful information on an athlete's substantive and procedural rights on appeal.[40] The materials found on the NLI's website (nationalletter.org) explain the procedural rules athletes must follow when requesting a release from an NLI and gives a general overview of the appellate process, but never fully identifies or explains the rules or guidelines member institutions and the NLI's subcommittees must follow when evaluating a request for release, nor is that information available anywhere else.[41]

As set forth in Provision Seven, there are six circumstances in which the NLI is void, including: failure to be admitted to the institution, failure to meet the NCAA's initial eligibility criteria, and situations in which the incoming athlete's eligibility was jeopardized due to recruiting irregularities committed by the institution.[42] The only semblance of any benefit accruing to the athlete under the agreement is in Provision Eight, which is an acknowledgement that NLI-participating institutions agree to discontinue recruitment of NLI signees.[43] As explained below, this is not a benefit for the signee, but rather another benefit for the signing institution. Sanctions for schools violating Provision Eight are not in the NLI itself or the program's website. While primarily devoted to modifying the duration clause of the NLI, Provision 10 states plainly that the NLI is "binding,"[44] which, as explained in Section IV below, is false under well-established contract law.

Blind to the realities of the recruiting process—during which coaches sell athletes on *their* ability (and theirs alone) to develop the athlete into a professional-caliber talent[45]—Provision

---

[38] *Id.* See Section II.A.1.

[39] *Id.*

[40] *See id.*

[41] *See id*; *See also* NLI Appeals Process, NAT'L LETTER OF INTENT, http://www.nationalletter.org/documentLibrary/appealsProcessSheet100110.pdf (last visited Dec. 11, 2017).

[42] *See National Letter of Intent 2011-2012*, *supra* note 22.

[43] *Id.*

[44] *Id.*

[45] *See* Kyle Tucker, *5-Star Guard Diallo Likes Both Duke, UK Pitches*, COURIER JOURNAL (Apr. 25, 2016, 10:45 AM),

11 clarifies the signee's allegiance is to the institution only by prohibiting players from seeking a release from the NLI based on a coaching change.[46] As one men's college basketball coach remarked in 2003: "[t]he player signs with the head coach, not the school. The school isn't recruiting that kid. What if the new coach has a new system that doesn't fit that player's style? That's not fair to him."[47] Ex-Mississippi State basketball player Gary Ervin echoed that sentiment prior to his matriculation at the school in 2003: "[e]veryone goes to a college because of the coach. You want a great relationship with your coach. And it's not the same if he leaves."[48] Dismissive of these realities, coaching changes do not affect the athlete's obligations under the NLI.

1. THE BASIC PENALTY

The Basic Penalty is perhaps the most well-known term in the NLI. It sets forth the consequences (which a former NLI official described as "severe"[49]) signees are subject to if they do not attend the institution for a full academic year as a full-time student:

---

http://www.courier-journal.com/story/sports/college/kentucky/2016/04/25/5-star-guard-diallo-likes-both-uk-duke-pitches/83492530/. *See also* Staples, *supra* note 10 ("[A] school is a building. What separates all of these schools? The things these college coaches sell these kids on are relationships. It's the people.").

[46] *See National Letter of Intent 2011-2012*, *supra* note 22.

[47] Andy Katz, *Less-Binding NLI May Give Recruits More Options*, ESPN (Apr. 25, 2003, 5:50 PM), http://assets.espn.go.com/ncb/columns/katz_andy/1542395.html. *See also* Jay Bilas, *Committed to a Coach, But Signed to a School*, ESPN (Apr. 29, 2003, 12:43 PM), http://assets.espn.go.com/ncb/columns/bilas_jay/1541904.html ("[T]he practical reality of the recruiting process is far different. Players don't commit to institutions, they commit to coaches.").

[48] Michael Kruse, *Just Ask the Recruits: It's the Coach that Matters*, ESPN (Apr. 22, 2003, 2:51 PM), http://assets.espn.go.com/recruiting/s/2003/0422/1542325.html.

[49] DOYICE J. COTTEN & JOHN T. WOLOHAN, LAW FOR RECREATION AND SPORT MANAGERS 412 (3d ed. 2003).

> I understand that if I do not attend the institution named in this document for one full academic year and I enroll in another institution participating in the NLI program, I may not compete in intercollegiate athletics until I have completed one full academic year in residence at the latter institution. Further, I understand I shall be charged with the loss of one season of intercollegiate athletics competition in all sports. This is in addition to any seasons of competition expended at any institution.[50]

Understand the dual-sided nature of the Basic Penalty: in the first clause, the provision outlines a one-year ban from collegiate competition; the second clause introduces a reduction in an athlete's overall eligibility. Practically, this means that if Athlete A signed with Institution 1, but ultimately left 1 before matriculating or before completing one academic year at the school and enrolled at Institution 2, A could not compete for 2 for one academic year (two semesters or three quarters). And even then, A would have only three remaining seasons of playing eligibility, rather than the four seasons college athletes initially receive.[51]

For many athletes, and particularly those who are of limited means or have professional aspirations, the Basic Penalty can be devastating. After the one-year residency requirement, college football players have two additional years to recover before being NFL draft-eligible[52]—but the penalty makes them a far less attractive labor option to other schools, who cannot utilize the player's football services for an entire season. Under the NCAA's bylaws, Division I football programs are limited to 85 Grants-in-Aid per year, while men's basketball is limited to 13.[53] Expending even one of those Grants-in-Aid on an athlete unable

---

[50] *Basic Penalty*, NATIONALLETTER.ORG, http://www.nationalletter.org/nliProvisions/penaltyBasic.html (last accessed Dec. 12, 2017).

[51] NCAA, 12.8.1.7. 1.2., Division I Manual (2017).

[52] *NFL-NFLPA Collective Bargaining Agreement*, Art. VI, § 2(b) (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

[53] NCAA Bylaw 15.5.5.1 & 15.5.6.2.

to take the field or court and contribute to the team's competitive success comes at a substantial opportunity cost. For coaches, invariably in win-now mode,[54] carrying the deadweight of an NLI-restricted athlete is a burden many are unwilling to bear. This means college athletes who would receive an athletic scholarship absent the Basic Penalty are unlikely to receive financial assistance or will be forced to accept less aid and/or attend a less-preferred institution.

For elite college basketball players, the dilemma is even more serious: foregoing one year of collegiate competition is a non-starter, as athletes would become NBA draft-eligible when the penalty phase ended.[55] Remaining in the NCAA would entail massive opportunity costs and risk, and most athletes would likely elect to bypass college altogether. Faced with the decision of either returning to fixed-wage compensation at the collegiate level or (relatively) market-driven pay in the NBA, it seems probable that most elite-level basketball athletes would choose the latter.

And for the silent majority (the signees sports other than football and basketball), the NLI is equally as harmful.[56] For these "Olympic" sport athletes, the overwhelming majority of whom will not be pursuing a career in professional sports, the Basic Penalty strips a quarter of their playing eligibility during the peak of their athletic careers. That is one less year of scholarship money, camaraderie with teammates, opportunities for personal and professional growth, and chances to compete for individual and team championships, all because the athlete realized—as many 17and 18-year-olds do—that their initial choice was not their best or preferred one. As one former NLI official has

---

[54] San Diego State head football coach Rocky Long on the win-now attitude in collegiate athletics: "It's about making money. In order to finance athletic departments at the Division I college level there must be funds coming in from the revenue-producing sports. If you don't win or don't win pretty quickly, people don't buy tickets and you're not on TV." Kirk Kenney, *Why Coaches Feel Pressure to Win Now*, THE SAN DIEGO UNION TRIBUNE (Nov. 18, 2015, 11:00 AM), http://www.sandiegouniontribune.com/sports/aztecs/sdut-sdsu-aztecs-football-coaching-hirings-firings-2015nov18-story.html.

[55] *NBA-NBPA Collective Bargaining Agreement*, Art. X, §§ 1(b)(i)–(ii) (Jan. 19, 2017), http://3c90sm37lsaecdwtr32v9qof-wpengine.netdna-ssl.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf.

[56] *See* Staples, *supra* note 10.

conceded, "[t]here are sometimes valid reasons for changing one's mind."[57]

Given the consequences of not fulfilling the NLI, the document binds athletes to their institutions, though not in the legal way the document intends. Rather, the NLI ties athletes to institutions by *necessity*.[58] The deterrence effect of the Basic Penalty is so strong it becomes a poison pill provision, discouraging signees from matriculating at other institutions out of fear of the onerous penalties placed on transfer athletes.[59] Revealingly, restricting player movement is *exactly* what the creators of the NLI sought when masterminding the agreement.[60] Viewed from this perspective, the Basic Penalty can be seen for what it is: a labor control tool that rewards an institution's recruiting investment and keeps retained talent out of the hands of competing schools. Athletic transfers can be harmful to institutional interests in several respects, including the loss of the athlete's labor and the now-sunk costs of recruiting the player to the school.[61] It is these interests—talent retention and investment protection—the NLI seeks to safeguard at the expense of the athlete's academic, social, and personal interests, which may be better furthered at a different institution.

The NLI's Basic Penalty was not the first attempt to control and regulate player movement. The origins of the residency requirements incorporated in the NLI had been percolating through the NCAA's governance, legislative, and enforcement agenda for over seven decades before the NLI's creation in 1964.[62]

---

[57] COTTEN & WOLOHAN, *supra* note 49, at 412.

[58] *See* Scarbinsky, *supra* note 15.

[59] *See* Zach Helfand, *Is the College Letter of Intent the 'Worst Contract in American Sports'?*, L.A. TIMES (Feb. 13, 2015, 6:10 PM), http://www.latimes.com/sports/la-sp-0214-football-recruiting-lies-20150214-story.html.

[60] "[L]uring away a football player even after he was enrolled on another campus" was one of the "excesses" the creators of the NLI sought to end. *See* Hosick, *supra* note 3.

[61] *See* Steve Megargee, *Widespread Transfers Leave Plenty of Teams Lacking QB Depth*, THE SPOKESMAN-REVIEW (Sept. 7, 2017, 12:11 PM), http://www.spokesman.com/stories/2017/sep/07/widespread-transfers-leave-plenty-of-teams-lacking/.

[62] *See* Michelle Brutlag Hosick, *History of the National Letter of Intent*, NCAA.COM (Feb. 2, 2011, 4:00 PM),

II. THE GENESIS OF TRANSFER REGULATIONS IN COLLEGIATE ATHLETICS

For the first several decades of their existence, intercollegiate athletics were operated and controlled primarily by students.[63] As those sports became more lucrative, dangerous and arguably "abuse"-ridden, institutional faculties and administrations supplanted the control of the students (and the alumni groups that funded their efforts).[64] One of the principal "abuses" targeted by the earliest faculty and administration-led reform efforts was the "tramp athlete"—one who transferred between institutions primarily for athletic reasons. [65]

Emblematic of the "tramp athlete" was an episode involving West Virginia football player Fielding Yost. During the 1896 season, Yost left West Virginia and joined the Lafayette College team immediately before its game against the University of Pennsylvania (Penn). [66] Penn, which came into the contest riding a 36-game undefeated streak, lost 6-4 to Lafayette.[67] Yost then returned to West Virginia to finish his degree.[68] Yost's one-game stint with Lafayette was exactly the type of the player movement administrations attempted to block. Prior to the Yost episode, the Western Conference (the precursor to the modern-day Big Ten) met in 1895 and promulgated several athletic regulations, including one that required transfer students to have attended their current institution for at least a semester before becoming eligible for athletic competition.[69]

The institutions comprising what is now the Ivy League also took a lead role in reform efforts. In 1898, the Ivies, sans Yale, convened at Brown University to discuss "questions arising out of intercollegiate contests and the objectionable features

---

http://www.ncaa.com/news/ncaa/2011-02-02/history-national-letter-intent.

[63] RONALD A. SMITH, PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM 8–9 (2011).

[64] *Id.* at 22–23.

[65] *Id.* at 29.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at 28.

associated with them."[70] Chief among these was the "victory at all costs" mindset that had gripped college sports.[71] The post-mortem Brown Conference Report advocated for a crackdown on students who "entered the university for athletic purposes solely."[72] "Tramp" (transfer) athletes were one such group.[73] The Report recommended those students be required to matriculate for one full academic year before joining a school's athletic program.[74] This year-in-residence requirement, in some form, has governed player transfers ever since.

The Brown Conference Report, whose prescriptions were adopted by most of the Ivies, was not the end of the efforts to limit the freedoms of transfer athletes. In 1905—the same year that at least eighteen college football players died due to injuries sustained on the field—the muckraking magazine *McClure's* decried the "hiring of tramp athletes" in two articles on the commercialistic and cutthroat world of collegiate athletics.[75] Written by Henry Beach Needham, the first of the two exposés contrasted Columbia and Penn as polar opposites in the adoption and enforcement of the year-in-residence requirement.[76] Whereas Columbia's "rules . . . demand one year's residence of every 'student who has ever represented another college or university in an intercollegiate contest,'"[77] Penn regularly flaunted the regulations to gain a competitive advantage over its opponents (ironic, given the earlier episode involving Fielding Yost).[78] For Penn, the need to recruit players from other schools stemmed from its lack of adequate practice facilities for developing its own athletes.[79] Instead, the University let other schools develop quality players, and then offered "inducements" to lure them away from

---

[70] Henry Beach Needham, *The College Athlete: How Commercialism is Making Him a Professional*, MCCLURE'S MAG., June 1905, at 115.

[71] SMITH, *supra* note 63, at 31.

[72] *Id.* at 30.

[73] *Id.* at 29.

[74] *Id.* at 33.

[75] Needham, *supra* note 70; Henry Beach Needham, *The College Athlete: His Amateur Code: Its Evasion and Administration*, MCCLURE'S MAG., July 1905, at 260.

[76] Needham, *supra* note 70.

[77] *Id.* at 118.

[78] *Id.* at 127.

[79] *Id.*

their current campuses.[80] One example involved guard William Ellor, whom Penn "kidnapped" straight from a local prep school.[81] Upon hearing the news, one of Ellor's prep school administrators remarked:

> [L]ast week our best football player was kidnapped by the University of Pennsylvania coach . . . . This boy told me that he had been offered at Princeton a summer's board and tutoring if he would come there next year. One can only imagine what the University of Pennsylvania coach must have offered.[82]

A stranger transfer story involved a player named Andrew L. Smith, who began his collegiate career at Pennsylvania State College (now Penn State). Following his "magnificent" performance against Penn on Saturday, October 4, 1902, Smith was seen practicing *with* Penn the following Monday.[83] Under the year-in-residence rule, Smith was ineligible to compete for the Quakers in 1902, and returned to the gridiron in the fall of 1903.[84] It was then discovered that although he was practicing with the Penn squad during the remainder of the 1902 season, he had actually continued *playing* for Penn State that season.[85] Smith's saga inflamed the passions of the Philadelphia press, with the *Public Ledger* demanding that he "forever be debarred from Pennsylvania athletics . . . and should be expelled from the university."[86] Even Needham could not stay neutral on Smith's nomadism, referring to his story as "the sad feature of Pennsylvania athletics."[87]

The *McClure's* piece (disapprovingly) lists several more prominent players who Penn "drafted" from other schools.[88] Needham's tone and the backlash directed at Smith and Penn

---

[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 126.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 127.
[88] *Id.*

demonstrated that athletically motivated transfers were not only frowned upon, but considered one of the great scourges of intercollegiate sport. More importantly, the reason for the outcry revealed the true intent of the one-year residence rules. Few, if any, onlookers appeared disturbed about the transfer's impact on Ellor's or Smith's educational endeavors; rather, the chief concern was the impact on the relative competitiveness of the Penn football team.[89] The only logical conclusion one draws is that the earliest rules restricting the freedoms of transfer athletes were *not* primarily grounded in concerns for the athletes' educational development, but were designed to protect institutions' interests in retaining their talent.

But as of 1905, college athletics did not yet have the unity or regulatory structure to effectively promulgate and enforce the one-year-residency requirement and other eligibility rules on a national basis.[90] The carnage of that fall's football season was the impetus to push institutions to coordinate—and collude—with one another to set national rules and regulations.

With football players succumbing to their on-field injuries nearly every weekend during the 1905 football season, President Theodore Roosevelt summoned the Big Three—Harvard, Yale, and Princeton—to the White House to stem the brutality that had overtaken the game.[91] Although rules regarding on-field play and player safety were the focus of the meeting,[92] the mere act of multi-institutional coordination (by the nation's preeminent universities) would set an example for future agreements between schools on every conceivable type of rule, including transfer restrictions.

Other schools noticed the Big Three's reform attempts, and in December 1905, thirteen institutions met in New York at the invitation of NYU Chancellor Henry MacCracken.[93] Though not attended by the traditional football powers (including the Big Three), the MacCracken Conference was determined to seriously reform college football.[94] After convening for a second time in December 1905, the conference attendees formed the permanent Intercollegiate Athletic Association of the United States

---

[89] *Id.*
[90] *Id.* at 115–16.
[91] SMITH, *supra* note 63, at 43.
[92] *Id.* at 44.
[93] *Id.* at 47.
[94] *Id.*

(IAAUS).[95] The IAAUS was rebranded as the National College Athletic Association (NCAA) a year later.[96] Though severely lacking in, if not devoid of enforcement authority, the foundations for the modern-day cartel had been laid.

While formed primarily to address player safety in football, the NCAA also intended to curb athlete "migration" by restricting the freedoms of "tramp athletes."[97] This intent is reflected in the NCAA's original bylaws, passed in 1906.[98] Among them was this provision: "[t]here should be no participation if the athlete . . . had transferred and not remained athletically inactive until he attended for one year."[99] And while eligibility restrictions were somewhat relaxed during World War I, the notion that transfer athletes be required to complete a year-in-residence at their new institution prior to participating in intercollegiate athletics remained strong after the War.[100] In 1922, the NCAA promulgated nine "fundamental principles" intended to "curb athletic excess."[101] One of these "excesses" was the "athlete migrants."[102] Still without the ability to directly enforce its rules and regulations, the NCAA succeeded in encouraging athletic conferences to adopt and enforce its eligibility requirements, with a majority "limiting . . . migrant athletes [transfers] from immediate participation."[103] A year later, in 1923, the Big Three, which had not yet assented to NCAA governance, went a step further: transfer students who had played a sport at one the Big Three could *never* play that sport at another Big Three institution.[104] The principle of severely penalizing the intra-conference transfer—while never adopted by the NCAA—is still common practice for many institutions and conferences.[105]

---

[95] *Id.* at 48.
[96] *Id.*
[97] *Id.* at 29.
[98] *Id.* at 53–54.
[99] *Id.* at 54.
[100] *Id.* at 59.
[101] *Id.* at 62.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 100–01.
[105] *See, e.g.*, Southeastern Conference Bylaws 14.5.5, http://a.espncdn.com/photo/2014/0721/FINAL%20Bylaws%207.18.14.pdf (last visited Dec. 17, 2017); *Pac-12 Conference Handbook*, ER 4-3-b, http://compliance.pac-12.org/wp-content/uploads/2014/12/Pac-12-

Unlike definitions of "pay" and general eligibility requirements, transfer regulations have largely stood the test of time, notwithstanding legislative tweaking over the years.[106] Many transfer athletes—and all those in men's basketball and football—still must fulfill the "year-in-residence" at their new institution before becoming eligible for collegiate competition.[107] This requirement is set forth in NCAA Bylaw 14.5.1, which prohibits transfer athletes from competing for their new institution before completing "one full academic year of residence" (this bylaw is wholly separate from the NLI, which contains its own residency requirement).[108] While exceptions to the year-in-residence requirement exist, they are limited, and not available equally to all collegiate athletes, most notably football and basketball players.[109]

In sum: though proclaimed to be in the interests of athletes, the NCAA's transfer restrictions—upon which the NLI's Basic Penalty was likely modeled—appear to have been created

---

Intra-Conference-Transfer-Primer.pdf (last visited Dec. 17, 2017); Atlantic Coast Conference Bylaws Art. VI, http://grfx.cstv.com/photos/schools/bc/genrel/auto_pdf/2012-13/misc_non_event/2012_13_ACC.pdf (last visited Dec. 17, 2017); Big-12 Conference Bylaws 6.3, http://www.big12sports.com/fls/10410/pdfs/handbook/ConferenceHandbook.pdf (last visited Dec. 17, 2017); Andy Katz, *Big Ten Makes Changes to Transfer Rule*, ESPN (Apr. 19, 2012), http://www.espn.com/blog/collegebasketballnation/post/_/id/58173/big-ten-makes-changes-to-transfer-rule.

[106] For instance, the NCAA changed its regulations regarding the participation of graduate students in 2007 (*see* NCAA Bylaw 14.6), and recently removed the opportunity for certain athletes to file waivers to transfer and play immediately. *See* Nick Bromberg, *NCAA drops immediate eligibility*

hardship waiver for transfers, YAHOO! SPORTS (Mar. 18, 2015),

https://sports.yahoo.com/blogs/ncaaf-dr- saturday/ncaa-drops-immediate-eligibility- hardship-

waiver-for- transfers-191437627.html.

[107] NCAA Bylaw 14.5.1.

[108] *Id.*; *National Letter of Intent 2011-2012*, *supra* note 22.

[109] Athletes in the sports of baseball, basketball, FBS football and men's ice hockey are not eligible to pursue a waiver to transfer and play immediately. *See* NCAA Bylaw 14.5.5.2.10 ("One-Time Transfer Exception").

and enforced as talent retention mechanisms without regard to the athlete's academic career.

III. CHALLENGING THE VALIDITY OF THE NLI UNDER CONTRACT LAW

Despite the NLI's near-universal acceptance as a binding contract, it is plausible for an athlete to avoid the Basic Penalty by convincing a court there is no legal basis for treating the NLI as a valid contract. Contract law is state-specific, but its fundamentals, including contract formation, are consistent across the country.[110] To form a contract, there must be an offer, acceptance, consideration, and intent to be bound by the offer.[111]

The NLI arguably satisfies three of these criteria but lacks consideration. "Consideration may be either a (1) benefit conferred or agreed to be conferred upon the promisor or some other person; or (2) a detriment suffered or agreed to be suffered by the promisee or some other person."[112] "There is consideration for a contract if the promisee, being induced by the agreement, does anything legal that he or she is not bound to do, or refrains from doing anything that he or she has a right to do."[113] Consideration must also be "bargained-for," meaning the performance or return promise is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.[114]

Despite courts' reluctance to question the adequacy of consideration,[115] the NLI is not an enforceable contract because

---

[110] *See* American Airlines v. Wolens, 513 U.S. 219, 233 (1995).

[111] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981); REVISED ARIZONA JURY INSTRUCTIONS (Civil), (5th ed.) CONTRACT 3, DEFINITION AND FORMATION OF CONTRACT; VIRGINIA MODEL JURY INSTRUCTIONS-CIVIL, 45.010 (1993).

[112] WITKIN, SUMMARY OF CALIFORNIA LAW (10TH) CONTRACTS § 203 (2005) (string citing sources); RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. LAW INST. 1981).

[113] 17A Am. Jur. 2d *Contracts* § 101 (2017).

[114] RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (AM. LAW INST. 1981).

[115] *See, e.g.*, *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F. Supp. 985, 992 (N.D. Ga. 1982); Vance v. Connell, 529 P.2d

the institution suffers no detriment and the signing athlete receives no benefit. And even if we assume there is sufficient consideration to enforce the contract, the consideration was not bargained-for and therefore insufficient to support the contract.[116]

A. THERE IS NO CONSIDERATION

On its website, the CCA describes the NLI as an agreement where "[the athlete] agree[s] to attend the institution listed on the NLI for one academic year in exchange for that institution awarding athletics financial aid for one academic year."[117] But the Grant-in-Aid (athletics-based financial aid) is awarded by the institution in a *separate* contract.[118] The NLI does not provide the signing athlete with financial aid and the NLI expressly states the athlete need not sign the document to receive financial aid.[119] Further, NCAA bylaws do not require the athlete to sign the NLI to receive a Grant-in-Aid.[120] Therefore, an athletic scholarship is not "consideration" for the NLI. When the NLI is signed, the institution is not required to do anything it is not already bound to do, such as provide a Grant-in-Aid to the athlete, nor is it required to refrain from doing anything it has a right to do, such as refraining from recruiting other athletes for the same spot on the team.[121]

Revealingly, the NCAA bylaws describe the NLI as nothing more than a unilateral agreement, without consideration, to attend a particular institution:

1289, 1291 (1974); Irving Leasing Corp. v. M & H Tire Co., 16 Ohio App. 3d 191, 192, 475 N.E.2d 127, 129 (1984).

[116] 17A Am. Jur. 2d *Contracts* § 105 (2017) (explaining consideration is necessary for a valid contract).

[117] *NLI Frequently Asked Questions,* NATIONALLETTER.ORG, http://www.nationalletter.org/frequentlyAskedQuestions/bindingAgreement.html (last visited Nov. 19, 2017).

[118] *Financial Aid Requirement,* NATIONALLETTER.ORG, http://www.nationalletter.org/nliProvisions/financialAid.html (last visited Nov. 19, 2017).

[119] *Id.*; *NCAA Model Athletic Financial Aid Agreement,* https://www.ncaa.org/sites/default/files/ FinAidForm.pdf.

[120] *See* NCAA Bylaw 13.9.1 (describing requirement for a written offer of athletically related financial aid).

[121] *See generally Financial Aid Requirement*, *supra* note 118.

> "**National Letter of Intent**. The National Letter of Intent referred to in this bylaw is the official document administered by the Collegiate Commissioners Association and used by subscribing member institutions to establish the commitment of a prospective student-athlete to attend a particular institution."[122]

The athlete's gratuitous promise to attend an institution, without more, is insufficient consideration to support contract formation.[123] Since admission to the institution, a roster spot, financial aid, and NCAA eligibility is not attained by signing the NLI, the athlete (promisor) receives nothing from the institution (promisee) by signing the document. If the athlete signs *only* the NLI, he or she will not be admitted to the school, given a spot on the team, receive athletics-based financial aid, or be allowed to participate in NCAA events.[124] Those benefits are the subject of other contracts executed by the athlete with the institution or NCAA.[125] Recall that athletes sign the NLI *after or concurrent with*, not before, receiving offers of financial aid, and there is no duty to sign the NLI to obtain financial aid.[126] Because athletes do not receive the alleged consideration (athletics-based financial aid) from the institution in exchange for signing the NLI, there is no bargained for consideration and thus no contract—a promise to

---

[122] *See* NCAA Bylaw 13.02.12.

[123] *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt. d (AM. LAW INST. 1981) (describing lack of consideration for promise when consideration is based on preexisting duty); *see also* 3 Williston on Contracts § 7:5 (4th ed.); Carroll v. Lee, 712 P.2d 923, 926 (1986) (en banc) ("Adequate consideration consists of a benefit to the promisor and a detriment to the promise.") (internal citations omitted).

[124] *See* NCAA FORM 08-3a (Seven-part contract with the NCAA signed by the athlete covering (1) eligibility, (2) Buckley Amendment consent, (3) affirmation of status as an amateur athlete, (4) statement concerning the promotion of NCAA championships and other NCAA events, (5) results of drug tests, (6) previous involvement in NCAA rules violations, (7) an affirmation of valid and accurate information provided to the NCAA Eligibility Center and admissions office.).

[125] *Id.*

[126] *See Financial Aid Requirement*, *supra* note 118.

do nothing more than an existing obligation is insufficient consideration to support a contract.[127]

The voluntary nature of the NLI does not obviate the need for consideration.[128] The seminal California Supreme Court case, *Western Lithograph Co. v. Vanomar Producers*[129] is illustrative. In *Western Lithograph*, a label manufacturer contracted to sell products to a vendor for a certain price.[130] Unexpectedly, labor and material prices increased and the manufacturer asked the vendor to pay a higher price.[131] Vendor agreed.[132] After a dispute arose, the court held the contract to pay the higher price invalid because the manufacturer did not give consideration for the promise.[133] It was irrelevant, according to the court, that a new promise was made voluntarily and without duress.[134] The parties could have contracted for new price if new consideration was given, such as an earlier delivery date, or a novation (an entirely new contract).[135] Because the parties agreed to the price increase with no detriment to the manufacturer—other than what he was already obligated—the contract was unenforceable.[136]

Here, NLI-subscribing institutions face the same problem—there is no additional consideration for the promise to attend the institution. All changes in the relationship between the school and the signing athlete, including all benefits to the athlete

---

[127] *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 et seq. (AM. LAW INST. 1981); *Garcia v. World Savings*, 183 Cal.App.4th. 1031, 1038 (Cal. App. 2010); *U.S. for Use of Youngstown Welding and Engineering Co. v. Travelers Indem. Co*., 802 F.2d 1164, 1169 (9th Cir. 1986) (holding preexisting contractual duty was insufficient consideration for new contract); 1 Witkin, Summary 10th Contract § 218 (citing authority for proposition that doing or promising to do what one is already legally bound to do cannot be consideration for a promise).

[128] *See* Williams v. Hasshagen, 137 P. 9, 11 (1913) (holding a promise based on the "hope" that something will occur is invalid when nothing of value is given for the promise).

[129] W. Lithograph Co. V. Vanomar Producers, 197 P. 103 (1921).

[130] *Id.*

[131] *Id.* at 367.

[132] *Id.*

[133] *Id.* at 370.

[134] *Id.*

[135] *Id.*

[136] *Id.*

and detriment to the school, arise from entirely different contracts: the financial aid agreement and other NCAA documents.[137] Under those documents, the institution agrees to provide financial aid, admit the student to the institution (provided he or she meets admission criteria), and permits the student to participate in NCAA-sanctioned events.[138] Those agreements—not the NLI—trigger the school's duty to provide a Grant-in-Aid and all corresponding duties under NCAA rules related to the Grant-in-Aid award, such as limits on number of scholarships, team members, etc.[139] The NLI does not even guarantee the signee ancillary benefits such as a spot on the team or playing time,[140] or prohibit the institution from recruiting other athletes who play the same position or compete in the same event.[141] Coaches routinely continue to recruit other players to the detriment of the athlete bound by the NLI.[142]

In short, the NLI does nothing other than lock an athlete into attending a particular school for one year. Prospective college athletes need not and should not make this unilateral promise because it provides no tangible benefits.[143] Eugene Byrd, the former NLI administrator, concurred: "There are not many advantages for the students in signing the NLI . . . ."[144]

---

[137] *See Athletic Financial Aid Agreement*, *supra* note 119; NCAA Form 08-3a.

[138] *Athletic Financial Aid Agreement*, *supra* note 119.

[139] *Id.*

[140] *Binding Agreement FAQs*, NATIONALLETTER.ORG, http://www.nationalletter.org/frequentlyAskedQuestions/bindingAgreement.html# (last visited Sept. 4, 2017).

[141] *Id*.

[142] *See, e.g. Former NIU Punter Suing NCAA for "Unlawful" Transfer Rules,* DAILY CHRON., (Mar. 9, 2016) http://www.daily-chronicle.com/2016/03/09/former-niu-punter-suing-ncaa-for-unlawful-transfer-rules/a13qgmr/.

[143] There is at least a colorable argument the agreement is void as against public policy or an illegal contract—the former being more viable than the latter—but given the sound legal basis to challenge the NLI, any other challenge would likely supplement the main arguments rather that stand as a separate cause of action. *See generally* Williston on Contracts § 12:1 (4th ed.).

[144] COTTON AND WOLOHAN, *supra* note 49.

B. THE ALLEGED "BENEFITS" OF THE CONTRACT ARE NOT BARGAINED-FOR CONSIDERATION

At least one administrator at a Power 5 conference university has argued to the authors that the NLI's consideration is found in the Recruiting Ban that takes effect after the athlete signs the agreement.[145] The Recruiting Ban requires other schools to cease communications with athletes who have signed NLIs with another institution.[146] But the Recruiting Ban is not a benefit to the signee or a detriment to the signing institution. Signees do not benefit by *not* receiving Grant-in-Aid offers from other institutions. To the contrary, the signing institution is conferred an additional benefit while the athlete is harmed because other institutions—some of whom might be academically preferable or have a more desirable team, facilities, or coaching staff—cannot seek the athlete's services by offering additional benefits. This means the athlete might miss out on maximum financial aid awards or guarantees related to playing time or position.

The university nonetheless argued the Recruiting Ban prohibits other schools from "harassing" prospective athletes or inundating them with offers, but this reasoning is untenable.[147] The recruiting process is highly regulated[148] and harassment is likely not a realistic problem for most recruited athletes, especially those in non-revenue sports—most of whom are happy to be recruited by any school. Even highly recruited athletes in revenue sports who make clear they do not wish to be recruited[149] are not harassed by recruiters and are protected by NCAA rules, and state and local laws regarding harassment.[150] According to one Power 5 head coach interviewed for this article, recruiting harassment

---

[145] NLI Appellate Proceeding, Telephonic Hearing, December 19, 2016.

[146] *About the National Letter of Intent (NLI)*, *supra* note 25.

[147] NLI Appellate Proceeding, *supra* note 145.

[148] *See* 2017–18 NCAA Division I Manual, Bylaw 13 (Aug. 1, 2017).

[149] Steven Godfrey & Bud Elliott, *When College Football Coaches Use Negative Recruiting and Why*, SB Nation (Feb. 24, 2016), https://www.sbnation.com/college-football-recruiting/2016/2/24/11092648/negative-recruiting-college-football-coaches.

[150] *See* NCAA Bylaw 13.1 (governing contacts, including telephone calls with recruits); *See*, e.g., A.R.S. § 13-2921 (anti-harassment law for Arizona).

after an athlete has made an verbal commitment is not an issue in his (non-revenue) sport. Similarly, a college football journalist has recently reported, "most staffs are not badgering kids who tell them they do not want to continue to be recruited."[151]

More importantly, the Recruiting Ban is likely not a detriment to the institution, but in fact benefits the institution by reducing the school's recruiting costs and preventing other schools with superior offers of financial aid, facilities, coaches, teams, playing time, etc. from contacting the athlete. Byrd, the former NLI official, confirmed this, saying, "most of the value [of the NLI] is to the university in cutting costs by shortening the recruiting process."[152] The Recruiting Ban, moreover, does not require the signing institution to take any steps to prevent contact between the signee and other institutions.[153] There does not appear to be any "punishment" for a school that violates the Recruiting Ban, making it largely illusory.[154]

But even if the Recruiting Ban is arguably sufficient consideration for the contract, it still is not bargained-for consideration. The CCA's official publication describing the NLI makes clear that the consideration for the agreement is the promise of "athletics financial aid for one academic year" from the institution in exchange for the promise "to attend the institution full-time for one academic year."[155] It is unrealistic to believe the Recruiting Ban—which disadvantages signees by reducing their ability to maximize the financial benefits they receive—induced the promise to attend the institution. The Recruiting Ban is, at best, meaningless to athletes and not the bargained-for consideration for the NLI. And to the extent it is disputed whether the Recruiting Ban is bargained-for consideration, it is likely a question of fact

---

[151] Godfrey & Elliott, *supra* note 149.

[152] COTTON & WOLOHAN, *supra* note 49.

[153] Administrative Guidelines and Interpretations for the 2018-2019 National Letter of Intent http://www.nationalletter.org/documentLibrary/administrativeGuidelines.pdf (last visited Nov. 19, 2017).

[154] National Letter of Intent, NATIONALLETTER.ORG, http://www.nationalletter.org/index.html. (last visited Aug. 31, 2017).

[155] *About the National Letter of Intent*, NATIONALLETTER.ORG, http://www.nationalletter.org/aboutTheNli/index.html, (last visited Aug. 31, 2017).

to be determined by a jury who, given the unfair conditions of the adhesion contract, would likely be sympathetic to the athlete.[156]

One commentator has argued there is sufficient consideration because the institution is not obligated to provide financial aid and must forgo providing aid to others if financial aid is given to an athlete who signs an NLI.[157] This argument fails for two reasons. First, the argument is factually incorrect: the athlete does not receive athletic-based financial aid because he signs the NLI, nor is the institution precluded from offering aid to others because an athlete signs the NLI.[158] The institution's limitations regarding financial aid it can offer other prospective athletes arises when the athlete signs the *separate* contract for financial aid with the institution and executes other NCAA documents that allow the athlete to participate in NCAA-sanctioned events.[159] The athlete may sign the NLI and financial aid agreement simultaneously, but the former is not required to execute the latter.[160] And even if the athlete does sign, the NLI creates no legal detriment for the institution—the institution's legal obligations are the same whether there is an executed NLI or not.[161]

Second, the delivery of a separate financial aid agreement is not the bargained-for exchange.[162] According to every representation regarding the NLI, the bargained-for exchange is actual financial aid in exchange for attending the institution, not the delivery of a separate contract for financial aid.[163] And, once again, the institution is not delivering the financial aid agreement because the athlete signs the NLI—the athletics-based financial aid offer is given to the athlete *before or concurrent* to the signing

---

[156] Fire Ins. Ass'n v. Wickham, 141 U.S. 564, 581 (1891).

[157] Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by any Other Name*, 35 WAYNE L. REV. 1275, 1338–40 (1989).

[158] *Id*. at 1339.

[159] *See About the National Letter of Intent*, *supra* note 155.

[160] *See Financial Aid Requirement*, *supra* note 118.

[161] *See About the National Letter of Intent*, *supra* note 155.

[162] Voccola v. Forte, 139 A.3d 404, 413-14 (R.I. 2016). *See generally* 17 C.J.S. Contracts § 99 § 106 (consideration must be bargained for, meaning it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise.)

[163] *NLI Frequently Asked Questions,* NATIONALLETTER.ORG, http://www.nationalletter.org/frequentlyAskedQuestions/bindingAgreement.html. (last visited Aug. 31, 2017).

of the NLI[164] and is executable even if the NLI is unsigned.[165] Because the separate athletics-based financial aid agreement is the only document affecting the rights of the parties, the institution is not legally obligated to do anything or forgo any right due to the NLI.[166] Thus, there is no consideration based on the delivery of a separate financial aid agreement.[167]

A savvy administrator might argue the financial aid agreement is incorporated by reference into the NLI (or the NLI is incorporated into the financial aid agreement) and therefore constitutes consideration for the agreement.[168] But this argument is easily refuted. To be incorporated by reference "the reference must be clear and unequivocal and must be called to the attention of the other party, he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties."[169] Financial aid offers are separately negotiated agreements that do not mention the NLI and cannot be accepted by signing the NLI only.[170] Most financial aid agreements are also integrated documents, meaning the parties contractually agree no representations or promises have been made other than those set forth in the agreement. Woods' financial aid agreement with State University, for example, states: "This agreement represents the final and entire understanding between

---

[164] NLI, ¶2; *see* Leone v. Precision Plumbing and Heating of Southern Arizona, Inc., 591 P.2d 1002 (Ariz. Ct. App. 1979) (holding the performance, or promise to perform, an existing legal obligation or an act that the promisor is bound to perform is not valid consideration unless additional consideration is given.).

[165] *Id*. at Intro.

[166] *See supra* text accompanying notes 159–61.

[167] While not completely frivolous, schools would be hard-pressed to make these nuanced legal arguments in a public venue. The institution would have to argue the student athlete must remain in school or forgo a significant portion of his collegiate athletic career not because he received athletics-based financial aid, but because other schools agreed not to contact him to give him more scholarship money, playing time, etc. or because his financial aid offer, as is customary, was delivered to him before he agreed to attend the university.

[168] *See* Weatherguard Roofing Co. v. D.R. Ward Constr. Co., 152 P.3d at 1229 (Ariz. Ct. App. 2007) (citing 17A C.J.S. Contracts § 199 at 136 (1963).

[169] *Id.*

[170] *Athletic Financial Aid Agreement*, *supra* note 119.

the parties." Thus, the financial aid agreement explicitly precludes integration of the NLI. Even if this language is absent from the financial aid agreement, the NLI states the athlete need not sign the document to receive financial aid, further disclaiming any integration into the financial aid agreement.[171] Because the financial aid documents and the NLI expressly state they operate independently of one another, they are not integrated. The acceptance of one document has no bearing on the acceptance of the other, and the mere temporal connection between the athlete signing the NLI and the financial aid form is not enough to overcome the integrated nature of either document.[172]

Framing the Recruiting Ban as beneficial to prospective college athletes illustrates a fundamental problem with the NLI and similar NCAA rules. On the whole, these regulations subjugate an athlete's athletic and academic interests to the institution's competitive and financial goals. The aim of these restrictions is clearly not educational, because once they have signed the NLI, athletes are penalized for transferring to another school with better educational or athletic opportunities. A school's ability to offer a recruit an education in exchange for their labor is a once-in-a-lifetime opportunity that can change the recruit's life.[173] But the Recruiting Ban limits athletes' educational opportunities in favor of the school's interest in having the athlete compete for the institution. Prohibiting in-season transfers or even transfers during the first-year is not inherently unreasonable. But after the initial year is complete and assuming education is the primary concern—as the NCAA claims it is—there is no basis to limit an athlete's efforts to maximize his ability to receive a higher-quality education by allowing unrestricted, penalty-free transfers. The Basic Penalty and Recruiting Ban—rules designed to further institutions' athletic interests—are nothing more than thinly-veiled restrictions on NLI signees' educational mobility.

---

[171] NLI, Introduction Statement ("No prospective athlete or parent is required to sign the NLI for a prospective student-athlete to receive athletics aid and participate in intercollegiate athletics.").

[172] *See* U.S. Sprint Commc'n Co., Ltd. v. Comm'r of Revenue, 578 N.W.2d 752 (Minn. 1998) (holding there is no consideration unless both parties to a contract have adopted it as such.") Here, the institution is not promising to give financial aid as a result of the NLI.

[173] *See* Hosick, *supra* note 3.

C. THE NLI'S BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

Even if the NLI is a valid contract, signees can challenge the Basic Penalty by claiming the NLI release process, including the initial request and subsequent appeals permitted by the Program's rules, violates the covenant of good faith and fair dealing. Described below, the release process is fundamentally unfair to signees and is devoid of the basic elements of due process.[174]

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcements."[175] The covenant requires the parties to exercise discretion given to it under the contract in an objectively reasonable manner, and requires "neither party do anything that prevents the other party from receiving the benefits of their agreement." [176]

Here, signees seeking to transfer are given the right to secure a release from the NLI, but the process is completely one-sided and frustrates the contractual right to obtain a release from the agreement. The initial request for a release from the NLI is submitted to the institution and evaluated by the institution's Director of Athletics and compliance department.[177] There are no objective standards governing the institution's evaluation of this release request. The CCA gives the institution sole "discretion to grant a release or not" on a "case-by-case basis."[178]

The CCA feebly attempts to create a standard by stating there must be "extenuating circumstances" [179] justifying the

---

[174] RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e (AM. LAW INST. 1979). (recognizing the abuse of discretion to determine compliance or termination of a contract violates the covenant.

[175] *Id*.

[176] *Id*.; *see also* REVISED ARIZ. JURY INSTRUCTIONS (CIVIL), 5TH CONTRACTS 16.

[177] *NLI Release Request Instructions for the NLI Signee*, NATIONALLETTER.ORG, http://www.nationalletter.org/releaseAndAppeals/releaseInstructions.pdf (last visited Dec. 20, 2017).

[178] Quick Reference Guide to the NLI, NATIONALLETTER.ORG, http://www.nationalletter.org/documentLibrary/nli-guide-2017-18.pdf (last visited Dec. 20, 2017).

[179] *Id.*

release, yet fails to define which circumstances are "extenuating." The CCA gives three examples of *possibly* extenuating circumstances: "illness of the student, illness or death of a parent, or financial hardship of the student's family which prevent the student from attending the signing institution," later confirming these are just examples of what "may" constitute an extenuating circumstance.[180] Confirming there is no contract, the CCA states: "just as the NLI is a voluntary agreement, granting a complete release is voluntary."[181]

The only objective guideline is that a coaching change is not a basis to request a release from the NLI,[182] yet another standard that favors the financial and competitive interests of the institution over those of the athlete. The hypocrisy of the NLI is no more evident than in this rule: a coach can leave freely for better opportunities but the student the coach recruits must remain or suffer the Basic Penalty.[183]

Notably, there is no duty that the institution investigate after receiving an NLI release request.[184] This is true even if the extenuating circumstances cited by the athlete involve allegations of misconduct by the institution, its employees, coaches, or other athletes.[185] And if the institution voluntarily investigates, there is no requirement the institution use a neutral party (or even someone not affiliated with the athletics department) to investigate.[186] There is no hearing, and no mechanism to compel testimony from current coaches, staff, employees or students.[187] After submitting the request, including whatever information the athlete can collect on his own (without the ability compel testimony or document production), the signee receives the

---

[180] *Asking for an NLI Release FAQs*, NATIONALLETTER.ORG, http://www.nationalletter.org/frequentlyAskedQuestions/askingForARelease.html (last visited Dec. 20, 2017).

[181] *Id.*

[182] *See Coaching Changes,* NATIONALLETTER.ORG, http://www.nationalletter.org/nliProvisions/coachingChange.html (last visited Dec. 20, 2017).

[183] *See id.*

[184] *NLI Appeals Process*, *supra* note 12.

[185] *See id.*

[186] *See id.*

[187] *See id.*

institution's decision.[188] The institution does not have to explain how it reached the decision or detail the basis for the outcome.[189]

If the request is denied, there is an appeals process administered by the NLI Program.[190] The NLI website sets forth deadlines for filing the appeal and general instructions on how to file, but—once again—there are no substantive standards governing the appeal.[191] The appeal is sent to a secretive "NLI Committee," with no explanation of how the committee is chosen or who comprises it.[192] There does not appear to be a student representative on the NLI committee, or any person not affiliated with the NCAA or an NLI member institution.[193] The athlete seeking a release is asked to provide "extenuating circumstances" warranting a "reduction of the NLI Penalty" and supporting documentation, but, like at the institutional level, there is no explanation of what exactly constitutes an extenuating circumstance or how extenuating circumstances are evaluated.[194]

The institution is given a chance to respond to the appeal, after which the NLI Committee reviews the materials and issues its decision.[195] There is no hearing or opportunity for the athlete to compel testimony or confront an institution's representative regarding the circumstances surrounding the request for release.[196] And like the institutional appeal, there is no investigation by the NLI Committee.[197] The Committee only considers materials submitted by the parties.[198]

If the decision is adverse to the athlete seeking a release, there is an opportunity for a second appeal.[199] Like the first, the signee is afforded no substantive due process and little procedural due process.[200] The athlete may provide new supporting

---

[188] *NLI Release Request Instructions for the NLI Signee*, *supra* note 177.

[189] *See id.*

[190] *NLI Appeals Process*, *supra* note 12.

[191] *See id.*

[192] *See id.*

[193] *See id.*

[194] *See Asking for an NLI Release FAQs*, *supra* note 180.

[195] *NLI Appeals Process*, *supra* note 12.

[196] *See id.*

[197] *See id.*

[198] *See id.*

[199] *Id.*

[200] *See id.*

documents of extenuating circumstances, and the school is once again given the opportunity to respond.[201]

The "NLI Appeals Committee is a separate body from the previous NLI Committee" and conducts its "own review of the information provided."[202] The athlete, for the first time, may "speak to the Committee members via telephone conference," but the proceedings are not recorded or otherwise available for review.[203] Signees may not call witnesses, and there is no requirement the school appear at the telephonic conference.[204] The composition of the NLI Appeals Committee is provided to the athlete before the hearing, but the members of the Committee and how Committee members are chosen is not publicized.[205]

Like the first appeals process, the NLI Appeals Committee does not conduct its own investigation, and its decision is based exclusively on materials (including any testimony) provided by the institution and athlete (who still has no mechanism to collect or compel testimony from third parties).[206] The "standard" is the same: the NLI Appeals Committee may "voluntarily" release the athlete from the NLI, but there is no requirement the Committee do so under any circumstance.[207]

To be fair, many release requests are granted each year.[208] But the standard-less and secretive process of "voluntarily" releasing signees at the institution's or NLI committee's sole discretion is not an exercise in good faith when students' requests are denied.[209] An athlete who desires a higher-quality or less

---

[201] *See id.*

[202] *Id.*

[203] *Id.*

[204] *See id.*

[205] *See id.*

[206] *See id.*

[207] *See id.*

[208] *See* Glier, *supra* note 14 (According to an NCAA official who oversees the NLI Program, between 96 and 98 percent of release requests are granted.).

[209] *See* Rawlings v. Apodaca, 726 P.2d 565, 572–73 (Ariz. 1986) (en banc) (recognizing adoption of system that unreasonably denies contractual benefits violates covenant of good faith and fair dealing); Bike Fashion Corp. v. Kramer, 46 P.3d 431, 435 (Ariz. Ct. App. 2002) (holding parties breach the implied covenant by exercising "express discretion in a way inconsistent with a party's reasonable expectations and by acting in ways not expressly excluded by the

expensive education, for example, is not guaranteed a release for "extenuating circumstances." [210] The arguments will be fact specific, but many signees whose release requests are denied can successfully argue the denial breached the covenant of good faith and fair dealing (assuming the NLI is a contract) because the appeals process lacked fundamental due process.[211] If successful, the signee can seek damages and require, or at least pressure, the institution to grant the release.[212] An ambitious athlete could also seek an order enjoining the use of the current, unfair appeals process and requiring the CCA to reform the appellate procedures.[213]

Similarly, institutions that mislead athletes through their employees, staff, or coaches regarding any substantive issue that tends to frustrate the NLI agreement, such as playing time, training facilities, educational opportunities, etc., may be liable for breaching the covenant of good faith and fair dealing. [214] Assuming the NLI is a valid contract, the institution must exercise its discretion given under the contract in good faith when dealing with signees. For example, if a coach knew he or she was leaving the institution and misled the prospective athlete to believe they were remaining as inducement to sign the NLI, the athlete would

---

contract's terms but which nevertheless bear adversely on the party's reasonable expected benefits of the bargain.").

[210] *See NLI Appeals Process,* NATIONALLETTER.ORG, http://www.nationalletter.org/documentLibrary /appealsProcessSheet100110.pdf.

[211] *See* Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1443 (7th Cir. 1992) (stating that the exercise of discretion under contract must be in good faith even when contract gives defendant full authority to complete the promise).

[212] *See* Restatement (Second) of Contracts § 357 (1981) (describing availability of specific performance and injunction).

[213] *See* Rest. (2d) of Contracts § 258 (describing availability of injunctive relief for breach of contract); Fed. R. Civ. P. 23(b)(2) (defining injunctive relief class).

[214] *See* Coulter v. Grant Thornton, LLP, 388 P.3d 834, 842 (Ariz. Ct. App. 2017) (holding parties breach covenant by denying the other party the reasonably expected benefits of the contract.) (internal citations omitted). Potential plaintiffs should be aware that some states do not permit claims for breach of the covenant of good faith and fair dealing and others severely limit the claims. *See, e.g.*, English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983).

likely have a claim for breach of the covenant of good faith and fair dealing notwithstanding the NLI provision stating coaching changes are not a basis for NLI releases. The coach's misleading behavior violates the covenant even if the athlete is bound to the contractual provision;[215] the contract (if there is one) does not relieve the coach from telling the truth nor immunize a coach for intentionally misleading recruits. If the coach lies and breaches the covenant, the remedy may be limited to damages, but the economic pressure may be enough to force the institution into a full release.[216] Depending on the egregiousness of the institution's conduct, some courts allow tort damages for breach of the duty of good faith and fair dealing; this means that signees may be able to seek punitive damages in certain jurisdictions under the right circumstances.[217]

In short, a claim for breach of the covenant of good faith and fair dealing may help NLI signees avoid the Basic Penalty.

D. THE NLI IS AN UNENFORCEABLE COVENANT NOT TO COMPETE

As regulators of uncompetitive behavior, courts are routinely presented with cases regarding covenants not to compete. These covenants, often included in employment contracts, involve promises "not to engage in the same type of business for a stated time in the same market as the buyer, partner or employer."[218]

The residency requirement of the NLI's Basic Penalty effectively functions as a covenant not to compete. These

---

[215] Bike Fashion Corp. v. Kramer, 46 P.3d 431, 435 (Ariz. Ct. App. 2002).

[216] Restatement (Second) of Contracts § 359 (recognizing that specific performance or an injunction is generally not permitted if damages are adequate to protect the expectation interests of the injured party).

[217] *See, e.g.*, Dodge v. Fid. & Deposit Co. of Maryland, 778 P.2d 1240, 1242–43 (Ariz. 1989) (holding tort damages were available in a bad faith action against a surety on a contractor's performance bond); *see also* Nelson v. Phoenix Resort Corp., 181 Ariz. 188, 197, 888 P.2d 1375, 1384 (Ct. App. 1994) (holding tort damages were no generally available in a bad faith action by an employee against an employer.).

[218] *Noncompetition covenant*, BLACK'S LAW DICTIONARY (10th ed. 2014).

covenants usually consist of two elements: temporal and geographic restrictions.[219] The NLI's Basic Penalty features both. Athletes who fail to complete one academic year at the institution with which they signed and subsequently enroll at another NLI-subscribing school are forbidden from participation in "intercollegiate athletics" for a "full academic year" at the new institution (approximately nine months). [220] The geographic restriction extends to all intercollegiate athletic programs "participating in the NLI Program" (approximately 650 institutions across the NCAA's Divisions I and II, including all Power 5 conferences).[221] An analysis of how covenants not to compete are treated in the employment context illustrates the NLI's fundamental unfairness.

1. COVENANTS NOT TO COMPETE, GENERALLY

In most states, covenants not to compete are enforced only if they are no more restrictive than necessary to safeguard an "employer's legitimately protectable interests." [222] An entity's

---

[219] Valley Med. Specialists v. Farber, 982 P.2d 1277, 1284 (Ariz. 1999).

[220] *Basic Penalty*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/nliProvisions/penaltyBasic.html (last visited Nov. 13, 2017).

[221] *About the National Letter of Intent (NLI)*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html (last visited Nov. 13, 2017).

[222] Amex Distrib. Co. v. Mascari, 724 P.2d 596, 601 (Ariz. Ct. App. 1986), citing Am. Credit Bureau, Inc. v. Carter, 462 P.2d 838, 840 (Ariz. Ct. App. 1969). *See also* Nasco Inc. v. Gimbert, 239 Ga. 675, 676-677 (S. Ct. Ga. 1977) (holding that a nondisclosure covenant was unnecessarily restrictive when it "prohibit[ed] disclosure of information not needed for the protection of employer's legitimate business interests."); Sheline v. Dun & Bradstreet, Inc., WL 128494, at 3 (N.D. Texas 1991) (restating that under Texas law, covenants not to compete will be upheld if the "scope of activity to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promise."); *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 21 (2015) (finding that "states require that the restrictions in [a non-compete covenant] are reasonable in scope and tailored to protect legitimate business interests.").

interest in insulating itself from competition is not a protectable interest.[223] Courts also recognize the enforcement of such covenants requires sufficient consideration for the party against whom the covenant is enforced.[224] Covenants are not enforced if they unduly encroach on the party's right to contract, or if they offend public policy.[225] Covenants in employee contracts are "not looked upon with favor"[226] by the courts and are " strictly construed against the employer."[227] In most states, while non-compete covenants are not illegal *per se*,[228] they must be reasonable as to duration and location[229] and must be contained

---

[223] *Farber*, 982 P.2d at 1281 ("To be enforced, the restriction must do more than simply prohibit fair competition by the employee."). *See also* Vlasin v. Loen Johnson & Co., Inc., 455 N.W.2d 772, 775-76 (S. Ct. Neb. 1990).

[224] *Mascari*, 724 P.2d at 601 ("It is true that the courts will not enforce a covenant not to compete given without consideration…"). *See also* Lucas-Insercto Pharm. Printing Co. of Maryland, LLC v. Salzano, 124 F. Supp. 2d 27 (2000) (restating that under Puerto Rico law, covenants not to compete were valid only when "the employer offers a consideration other than mere job tenure in exchange for the employee signing the non-competition covenant.").

[225] *Carter*, 462 P.2d at 840.

[226] Federated Mut. Ins. Co. v. Bennett, 818 S.W.2d. 596, 597 (Ark. Ct. App. 1991).

[227] *Farber*, 982 P.2d at 1281. If college athletes in Arizona were to be deemed employees, restraints on their future employment in similar work would be "reasonable in duration for the time necessary for the employer to put a new employee on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers." *See*, *e.g.*, Bed Mart, Inc. v. Kelly, 45 P.3d 1219 (Ariz. Ct. App. 2002); Richardson v. Paxton Co. 127 S.E.2d 113 (S. Ct. Va. 1962).

[228] *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenant Not to Compete Agreements, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 753, 757 (2011) (finding that the majority of states allow some enforcement of non-compete covenants).

[229] Wright v. Palmer, 464 P.2d 363, 365 (Ariz. Ct. App. 1970). *See also* Jackson Hewitt, Inc. v. Childress, 2008 WL 199539, at 5 (D. N.J. 2008) ("Most courts have deemed covenants not to compete to be legally binding so long as the clause contains reasonable limitations regarding the relevant geographical area and time period."); Armstrong v. Cape Girardeau Physician Assocs., 49 S.W.3d 821, 825 (Mo. Ct. App. 2001) ("Generally because covenants not to compete are considered restraints on trade, they are presumptively void and are

within an otherwise valid contract[230] bargained in good faith.[231] Other jurisdictions prohibit covenants longer than a certain period of time.[232] When viewed in light of these principles, the NLI's Basic Penalty is both unenforceable and unreasonable.

2. *APPLICATION TO THE NATIONAL LETTER OF INTENT*

As described in Section IV, the NLI is not a valid contract.[233] But even if the NLI were a valid agreement, the Basic Penalty's residency requirement may still be unenforceable, as it unreasonably restricts the economic rights of signees. It is also broader than necessary to safeguard legitimate institutional interests. The case *Valley Medical Specialists v. Farber*[234] is instructive regarding how courts might view a challenge to the Basic Penalty—particularly in states without statutory prohibitions on non-compete covenants.[235] Assuming our Sara Woods signed the NLI with an institution located in Arizona, she could have relied on this authority in the release process or a civil suit.

In *Farber*, the Arizona Supreme Court considered a medical group's challenge to one of its ex-physician's breach of

---

enforceable only to the extent that they are demonstratively reasonable.").

[230] *Carter*, 462 P.2d at 840.

[231] System Concepts, Inc. v. Dixon, 669 P.2d 421, 425–26 (Utah 1983).

[232] Upchurch v. USTNet, Inc., 836 F.Supp 737, 739 (D. Oregon 1993) (Louisiana state law (La.Rev.Stat. § 23:921(C)) prohibits non-compete covenants exceeding two years). *See also* Lucas-Insercto Pharm. Printing Co. of Maryland, LLC v. Salzano, 124 F. Supp. 2d 27 (2000) (Puerto Rico law prohibits restrictive covenants exceeding 12 months).

[233] *See infra* pp. 44–51.

[234] Valley Med. Specialists v. Farber, 982 P.2d 1277, 1281 (Ariz. 1999)..

[235] *See, e.g.*, CAL. BUS. & PROF. CODE § 16600 (West 2014) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."); FLA. STAT. ANN. § 542.33; NEV. REV. STAT., § 613.200; OR. REV. STAT. § 653.295; TENN. CODE ANN. § 47-25-101; WIS. STAT. ANN. § 103.465.

his non-compete agreement.[236] The agreement forbid the physician, a pulmonologist, from practicing medicine for three years and within a five-mile radius of the medical group's offices if he left.[237] The physician subsequently left the medical group and restarted his pulmonology work within the durational and geographic bounds imposed by the covenant.[238] The medical group sued, alleging breach of contract.[239] After conflicting rulings in the trial and appellate courts, the Arizona Supreme Court reinstituted the findings of the trial court, ruling that both the durational and locational aspects of the covenant went far beyond what was necessary to protect the interests of the medical group and were therefore unreasonable.[240]

The NLI's Basic Penalty's sweeping restrictions are similarly flawed. Regarding the durational limits imposed, the *Farber* covenant, which lasted three years, appears more restrictive than the Basic Penalty, which lasts only one.[241] However, as *Farber* recognizes: "Reasonableness is a fact-intensive inquiry that depends on weighing the totality of the circumstances,"[242] and therefore any court reviewing the Basic Penalty's residency requirement must consider the realities of the collegiate athletic market. Whereas a physician's career may last 30 years or more,[243] the college athlete has just five years of eligibility and can only compete in four seasons of athletics within that time period.[244] While the *Farber* covenant affected approximately 10 percent of the physician's career, the Basic Penalty impacts a quarter of the athlete's career.[245] Seen from this

---

[236] *Farber*, 982 P.2d at 1280.

[237] *Id.*at 1279.

[238] *Id.*

[239] *Id.* at 1280.

[240] *Id.* at 1285–86.

[241] *Basic Penalty*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/nliProvisions/penaltyBasic.html (last visited Nov. 2, 2017).

[242] *Farber*, 982 P.2d at 1281.

[243] Beth Greenwood, *The Average Length of Doctors' Careers*, HOUSTON CHRONICLE, http://work.chron.com/average-length-doctors-careers-13376.html (last visited Nov. 2, 2017).

[244] *Transfer Terms*, NCAA, http://www.ncaa.org/student-athletes/current/transfer-terms (last visited Nov. 2, 2017).

[245] Applying basic division principals to the durational limitations and the career lengths of both physicians and college

angle, the durational restrictions of the NLI are at least as great as those presented in *Farber*. Further, most jurisdictions have held that temporal restrictions in non-compete covenants should be connected in some way to the "amount of time needed by the former employer to re-establish and solidify its relationships with its customers."[246] There is no evidence suggesting increased movement amongst institutions by college athletes has any deleterious effect on consumer appeal for college sports, and so it is unclear if an athletic department's relationships with its customers need be re-established or re-solidified after a player departs.

Geographically, the Basic Penalty is exceedingly broad, far more so than the *Farber* covenant, covering more than 650 institutions of higher education across the United States. While the *Farber* covenant was exclusively regional—covering approximately 235 square miles[247]—the Basic Penalty is national in scope,[248] placing onerous penalties on athletes for matriculating to a large majority of NCAA Division I and Division II institutions, and all schools within the market for top athletic talent.[249] Because college athletes essentially qualify as employees[250] and thus "cannot be prevented from plying their

---

athletes, as discussed in the preceding sentences, yields the percentage impact on each group.

[246] *See* Orkin Exterminating Co. v. Walker, 251 Ga. 536, 538 (1983); *see also* Arpac Corp. v. Murray, 589 N.E.2d 640 (Ill. App. Ct. 1992).

[247] *Farber*, 982 P.2d at 1280.

[248] As indicated by the title of the document, the *National* Letter of Intent applies to institutions throughout the nation. The Basic Penalty is applicable to all who sign a National Letter of Intent, thus it can be inferred that the Basic Penalty applies nationally.

[249] *See Basic Penalty*, *supra* note 243; *About the National Letter of Intent (NLI)*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html (last visited Nov. 2, 2017).

[250] Memorandum GC 17-01, Nat'l Labor Relations Board Office of the Gen. Counsel (Jan. 31, 2017) (on file with author) (finding that "scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act.").

trades by blanket post-employment restraints," [251] the Basic Penalty's geographic restrictions are likely unreasonable and unenforceable.

The class of forbidden activities outlined in the Basic Penalty compares favorably to those in the *Farber* covenant. Even though an athlete signs the NLI intending to compete in a particular sport, the Basic Penalty prevents any participation in "intercollegiate athletics" during the residency period. Ostensibly, this includes participation in *any* athletic program, school sponsored or not, that engages in inter-collegiate competition. This prohibition on competition in *all* sports is nearly identical to the restrictions imposed on the physician in *Farber*: The physician was prohibited from rendering any medical services, [252] not just those incidental to his specialty (pulmonology). The Court struck down this sweeping language as contrary to public policy. [253] It could be argued that the Basic Penalty contravenes public policy as well, as it interferes with the distribution of scholarships providing access to higher education—which is indisputably in the public interest. Viewed in totality, the Basic Penalty is not only similar to other restrictive covenants, but in some aspects, is more onerous than those previously invalidated in Arizona and other states. [254]

These restrictions would then be weighed against the university's interests to determine whether the covenant was more

---

[251] Chavers v. Copy Products Co., Inc., of Mobile, 519 So. 2d 942, 945 (Ala. 1988). Table T1.3

[252] *Farber*, 982 P.2d at 1284.

[253] *Id.* at 1286. Other jurisdictions have also found these universal restrictions invalid at common law. *See* Fields v. Rainbow Int'l Carpet Dyeing and Cleaning Co., 380 S.E.2d 693, 693 (Ga. 1989) (holding that a "a restriction of employment in a business 'in any capacity' is overbroad and unreasonable.").

[254] *See, e.g.*, FLA. STAT. § 542.335(1)(d) (If the employer's legitimate business interests do not include trade secrets, restraints of six months or less are presumed reasonable in time, while restraints greater than two years in duration are presumed unreasonable); Birmingham Television Corp. v. DeRamus, 502 So. 2d 761, 764 (Ala. Civ. App. 1986) (invalidating six month-long non-compete covenant); Boch Toyota, Inc. v. Klimoski, 18 Mass. L. Rptr. 80, *2 (Mass. Super. 2004) (upholding a covenant not to compete spanning a duration of twelve months and a geographic scope of thirty-five miles); Baker v. Hooper, 50 S.W.3d 463, 469–70 (Tenn. Ct. App. 2001) (court reduced six-month covenant to two months).

restrictive than necessary.[255] Institutional interests would likely fall into two general categories: economic and philosophical. Schools could assert an interest in protecting the continuity of their athletic teams and argue, as the NCAA did in *Pugh*,[256] that unregulated player movement would decrease the commercial appeal of their athletic contests, perhaps resulting in a loss of revenue from ticket holders, donors, and broadcasting partners. Philosophically, institutions could claim the Basic Penalty safeguards the principle of amateurism, which views college athletics as an integral part of the athlete's educational and personal development. Transferring between institutions for reasons solely related to athletics, schools may argue, is injurious to the "collegiate model" adhered to by the NCAA and its membership. Institutions could also explain the year-in-residence requirement as a benefit to athletes in easing the academic, athletic, social, and personal transition between institutions. A court considering a challenge to the Basic Penalty would be tasked with assessing whether these interests warranted the degree of restriction contained in the NLI. If the institutional interests did not outweigh the regulations placed on athletes, a court could invalidate the Basic Penalty.

These institutional interests, though valid at first glance, are unsupportable. There are no data establishing a connection between consumer appeal for collegiate athletics and athletes' freedom of movement. In other words, there is nothing to suggest that the absence of the Basic Penalty's restrictions would affect the public's interest in college sports. Moreover, the Basic Penalty lacks an exception for exceptionally talented athletes whose academic record suggests they will have no problem adjusting to a new school—undercutting any argument supporting the Basic Penalty's academic benefits.

Another interest institutions could (and often do) present in justifying the restrictions of the Basic Penalty are the competitive implications of permitting athletes to transfer and play immediately. Former Wisconsin men's basketball coach Bo

---

[255] *See* NBZ, Inc. v. Pilarski, 520 N.W.2d 93 (Wis. Ct. App. 1994).

[256] Brief in Support of Motion for Partial Dismissal of Plaintiff's Complaint at 8, *Pugh v. NCAA*, No. 1:15-cv-1747, 2016 WL 5394408 (S.D. Ind. Sept. 27, 2016) No. 44-01747, 2016 WL 1593577, at *Section II(A)(1).

Ryan's justification for blocking one athlete's transfer: "[w]e don't want a young man to take our playbook and go to the next school"[257]—is emblematic of this competitive interest. However, it is one most courts would flatly reject. In outlining the state judiciary's history on evaluating non-compete covenants, the *Farber* court concluded "a covenant not to compete is invalid unless it protects some legitimate interest beyond the employer's desire to protect itself from competition."[258] In light of that pronouncement, recall the justification State University gave to Sara Woods in denying her NLI release request: "[State University] will not be releasing [Sara] in order to restrict her from immediately competing at a [conference] institution or an institution against whom we are scheduled to compete this academic year."[259] The reasoning offered by State University in denying Woods her release mirrors that which the *Farber* court wrote could not justify non-compete covenants. In blocking Woods' transfer, State University reveals that its primary concern is safeguarding the competitive success of the team Woods would have otherwise competed on—a goal wholly incompatible with both state and federal antitrust law, as well as the public policy aims of non-compete covenant jurisprudence.[260] Overall, when applying the holdings in *Farber* and its peers to the NLI's Basic Penalty, the provision cannot withstand scrutiny.

---

[257] *See infra* note 352. Institutions could argue that playbooks and other team- or program-specific knowledge gleaned from one's athletic participation qualify as trade secrets, and that a residency requirement prevents this information from being used against teams in the short term. This issue is beyond the scope of this article. *See* Michael McCann, *Could 'Wakeyleaks' Scandal Lead to Lawsuit, Criminal Charges?*, SPORTS ILLUSTRATED, (Dec. 14, 2016), https://www.si.com/college-football/2016/12/14/wake-forest-football-leak-illegal-louisville.

[258] *Farber*, 982 P.2d at 1281.

[259] Woods, *supra* note 6.

[260] The intent of judicial regulation on restrictive covenants is to invalidate those covenants that are not tailored as narrowly possible to maximize economic freedom while also protecting the enforcer's legitimate interests. *See* Am. Credit Bureau, Inc. v. Carter, 462 P.2d 838, 840 (Ariz. Ct. App. 1969).

IV. THE NLI AS AN ACT OF CONSUMER FRAUD: A BRIEF DISCUSSION

Depending on the circumstances of an athlete's recruitment, contract claims may not be the only legal basis to invalidate the NLI. Common law tort claims and state statutes related to fraud and unfair and deceptive practices may give NLI signees another legal avenue to avoid the Basic Penalty. Athletes misled by the institution that recruited them would be in the best position to challenge the NLI on these tort and statutory theories. The athletic recruiting realm is particularly ripe for such challenges, as coaches routinely make substantive promises they cannot (or do not) keep during the recruiting process regarding various issues, including financial aid, playing time, and their intent to remain with the program throughout the athlete's career.[261] These promises differ from athlete to athlete, meaning the theories are unlikely to form a strong class case—but could be fruitful legal strategy in individual cases.

A. COMMON LAW CLAIMS

The recent case *Eppley v. Univ. of Delaware*[262] is instructive regarding tort-based common law challenges to contracts between athletes and schools. In *Eppley*, a field hockey recruit was promised a series of partial scholarships at the

---

[261] *See* Eppley v. Univ. of Del., No. 13-cv-99 (GMS), 2015 WL156754 (D. Del. Jan. 12, 2015) (coach promised athlete certain scholarship amounts during college career); Bret Stretlow, *Headline-making Kansas State Receiver Corey Sutton Plans to Transfer to App State*, WINSTON-SALEM (NC) JOURNAL (June 23, 2017), http://www.journalnow.com/sports/asu/app_trail/headline-making-kansas-state-receiver-corey-sutton-plans-to-transfer/article_e5ecb838-586e-11e7-ad6f-1f9fba30957a.html (last visited Nov. 13, 2017) (player transferred after coaching staff "didn't follow through on promises regarding playing time"); Zach Helfand, *Is the College Letter of Intent the 'Worst Contract in American Sports'?*, L.A. TIMES (Feb. 13, 2015, 6:10 PM), http://www.latimes.com/sports/la-sp-0214-football-recruiting-lies-20150214-story.html (last visited Nov. 13, 2017) ("There were just too many coaches leaving the day after signing day. It made it so obvious, that everybody knew this was occurring and they were just waiting to lock these kids in.").

[262] *Eppley*, 2015 WL156754, at *1–2

University of Delaware.[263] During her freshman season, her aid would be 35% of a full scholarship, with the award increasing to 75% her sophomore season, and 75% or more during her junior and senior years.[264] The athlete and her family received this offer orally from the program's head coach, and later verified the offer in writing.[265] Spurred by these promises, Eppley signed an NLI and a one-year financial aid agreement expressly disclaiming all previous agreements.[266] During Eppley's freshman year, the coach who originally recruited her retired, and the new coach reduced her aid to 20% (of a full scholarship).[267] After the University denied her appeal, she sued in federal court, alleging negligent misrepresentation and fraudulent inducement.[268] The trial court found Eppley had not established either claim under Delaware law, which required the existence of a fiduciary relationship to prove negligent misrepresentation.[269] The court further found that she disclaimed all previous agreements when she signed her financial aid agreement.[270]

Despite its holding, *Eppley* is not a bar for other athletes seeking relief from the NLI and the Basic Penalty. First, many states do not require a fiduciary duty to support a negligent misrepresentation claim.[271] Generally, parties owe a duty of ordinary care—a relatively easy hurdle to meet when the parties are sophisticated institutions dealing with young athletes, many of who are under the age of consent.[272] Without a need to show a fiduciary duty, the elements are easily met: the coach provided false information; she knew or should have known she was retiring and therefore could not fulfill her promise; she intended

---

[263] *Id.* at *2.
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.* at *2–3.
[269] *Id.* at *4.
[270] *Id.* at *4–5.
[271] *See* St. Joseph's Hosp. and Med. Ctr. v. Reserve Life Ins. Co., 154 Ariz. 307, 312 (Ariz. 1987); RESTATEMENT (SECOND) OF TORTS § 552(1) (1997).
[272] Van Buren v. Pima Cmty. Coll. Dist. Bd., 113 Ariz. 85, 87 (Ariz. 1976) (quoting West v. Soto, 85 Ariz. 255, 261 (Ariz. 1959)).

that Eppley rely on her promise; and Eppley was damaged by the false information.[273]

Even if the NLI signee must show a fiduciary or special relationship, a court could find there was a relationship of "trust or confidence between the parties" sufficient to rise to the level of a special relationship.[274] In *Eppley*, the "[plaintiff] made no attempt to satisfy the elements of [negligent misrepresentation], and failed to show a fiduciary relationship."[275] This is unfortunate, because the cases cited by the *Eppley* court—which found no fiduciary or special relationship—involved "sophisticated entities advised by capable counsel."[276] No such circumstances exist with the NLI; the parties have disparate bargaining power and one party is often under the age of consent. The entire recruiting process, moreover, is centered on nurturing trust and confidence between player and coach. It is therefore unlikely other courts will find *Eppley* persuasive in potential NLI litigation.

Second, most claims will arise from intentional conduct, not negligence. Coaches, administrators, and staff often make affirmative misrepresentations, or omit material facts, to induce prospective athletes to sign the NLI.[277] Notwithstanding *Eppley*, inducing a party to sign a contract is an actionable claim in many jurisdictions even if the contract contains an integration clause disavowing all other agreements.[278]

---

[273] *See* Arizona Title Ins. & Tr. Co. v. O'Malley Lumber Co., 14 Ariz. App. 486 (Ariz. Ct. App. 1971) (holding negligent misrepresentation is "committed by the giving of false information intended for the guidance of others and justifiably relied upon by them causing damages if the giver of the false information fails to exercise reasonable care or competence in obtaining or communicating the information") (citing St. Joseph's Hosp. and Med. Ctr. V. Reserve Life Ins. Co., 154 Ariz. 218, 222, 540 P.2d 690, 694 (1975)).

[274] Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., No. 88-CV-819, 1992 WL 121726, at *17 (N.D.N.Y. May 23, 1992).

[275] *Eppley*, 2015 WL156754, at *4

[276] *Id.*

[277] *See* Katherine Sulentic, *Running Backs, Recruiting, and Remedies: College Football Coaches, Recruits, and the Negligent and Fraudulent Misrepresentations*, 14 Roger Williams U. L. Rev. 127 (2009).

[278] *Cabinet Distributors, Inc. v. Redmond,* 965 S.W.2d 309, 314 (Mo. App. E.D. 1998); *Lollar v. A.O. Smith Harvestore Prods.,*

If the administration misrepresented a material fact to the prospective athlete, he or she would likely have a claim for common law fraud. The elements of fraud are well known:

> (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.[279]

The fraud claims will be fact-specific, but misrepresentations, including material omissions, by the institution may be actionable.[280]

For example, if the coaching staff told a prospective basketball player he was guaranteed to start at point guard to induce him to sign an NLI and accept a scholarship, but then recruited another player who was given the starting position instead, the first player would have a valid claim based on the affirmative misrepresentation. The player could claim he was told he would start at point guard and the material omission was that the school was recruiting other players who would be given the starting point guard position. Assuming the school's fraud induced the player to forgo other, better offers of a full scholarship or guarantees related to playing time or position, the athlete would likely have a valid cause of action.[281] The signee could also claim all consequential damages and, depending on the circumstances, may even be able to claim punitive damages.[282] These claims, coupled with a claim for injunctive relief, could bring economic

---

Inc., 795 S.W.2d 441, 448–49 (Mo. App. W.D. 1990); *Essex v. Getty Oil Co.,* 661 S.W.2d 544, 549 (Mo. App. W.D. 1983).

[279] Moore v. Myers, 31 Ariz. 347, 354 (1927).

[280] *See* Haisch v. Allstate Ins. Co., 5 P.3d 940, 944 (Ariz. Ct. App. 2000) (recognizing common law fraud claim for omission of material information).

[281] *Id.*

[282] Echols v. Beauty Built Homes, Inc., 132 Ariz. 498, 501–02, 647 P.2d 629, 632–33 (1982) (describing when punitive damages are appropriate based on fraud).

pressure on the school to release the athlete from the NLI and, if successful, may allow the court to release the athlete from the NLI and award damages to the signee.

B. STATUTORY CLAIMS

While common law causes of action form a formidable base to any complaint, there are often equally or more effective causes of action based in state statutes designed to address unfair acts and practices, [283] deceptive acts or practices, [284]

---

[283] *See, e.g.*, ALASKA STAT. § 45.50.471(a) (2017) (prohibiting unfair acts that are against public policy, immoral, unethical, oppressive, or unscrupulous; acts need not be deceptive to be considered unfair); State v. O'Neill Investigations, Inc., 609 P.2d 520, 535 (Alaska 1980) (holding the act or practice need not be deceptive to be considered "unfair") (quoting FTC v. Sperry & Hutchinson, Co., 405 U.S. 233, 244–45 n.5 (1972)). Analyzing each potentially applicable is beyond the scope of this article and highly dependent on where the case is file and, more importantly, the facts leading to the lawsuit. A partial list of states with statutes governing unfair acts and practices who also have a significant number of universities who may abuse the NLI process include: California (CAL. BUS. & PROF. CODE § 17200 (West 2016)); Florida (FLA. STAT. § 501.204(1) (2017)); Illinois (815 ILL. COMP. STAT. ANN. 505/2 (West 2017)); Nebraska (NEB. REV. STAT. § 59-1602 (2017)); and Missouri (MO. REV. STAT. § 407.020(1) (2017)).

[284] *See, e.g.*, ARK. CODE ANN. § 4-88-107(a)(10) (2017) (prohibiting deceptive trade practices). Although Arkansas courts have not construed the meaning of the "deceptive," the Act is liberally construed to protect consumers. State *ex rel.* Bryant v. R&A Inv. Co., 985 S.W.2d 299, 302-03 (Ark. 1999); a partial list of other states that preclude deceptive practices with universities who may abuse the NLI process include: Kansas, KAN. STAT. ANN. § 50-626(a) (2017); Minnesota, MINN. STAT. § 325F.69(1) (2017); and New York, N.Y. GEN. BUS. LAW § 349(a) (McKinney 2014). Also note that many state statutes prohibit unfair and deceptive conduct, although the two concepts are fundamentally different. *See e.g.*, HAW. REV. STAT. § 480-2(a) (2017) (prohibiting "unfair or deceptive acts or practices"); Chroniak v. Golden Inv. Corp., 983 F.2d 1140, 1146 (1st Cir. 1993) (defining unfair and deceptive conduct) (quoting N.H. REV. STAT. ANN. § 358-A:2 (LexisNexis 2017)).

misrepresentations or omissions,[285] and unconscionable acts or practices[286]—almost all of which are liberally construed in favor of the plaintiff.[287]

For example, assume our tennis player Woods lived in Arizona and signed an NLI to attend Arizona State University. She may have a viable claim under Arizona's Consumer Fraud Act ("AFCA") against the University, its coaches, or the CCA based on the coaches' conduct.[288] Passed in 1967, the Act reads:

> The act, use or employment by any person of any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice. [289]

---

[285] *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-1522(A) (2013). Virtually all states have a consumer fraud statute prohibiting misrepresentations and omissions in consumer transactions. *See* CAROLYN L. CARTER, CONSUMER PROTECTION IN THE UNITED STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (2009), https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf.

[286] *See* TEX. BUS. & COM. CODE ANN. § 17.45(5) (West 2017); TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (West 2005).

[287] *See generally* Keegan v. Am. Honda Motor Co., 838 F. Supp. 2d 929, 958 (C.D. Cal. 2012) (acknowledging state consumer protection statutes are generally construed liberally); Holeman v. Neils, 803 F. Supp. 237, 242 (D. Ariz. 1992) (recognizing ACFA is intended to eliminate unlawful practices in merchant-consumer transactions and acknowledging there is a private right of action inherent in the statute).

[288] Lorona v. Ariz. Summit Law Sch., LLC, 151 F. Supp. 3d 978, 994 (D. Ariz. 2015) (dismissing consumer fraud claim on the merits, but recognizing cause of action under ACFA for false representations inducing students to matriculate at private law school). Issues of sovereign immunity, jurisdiction, and agency are beyond the scope of this article, but should be considered before filing any complaint and choosing proper defendants.

[289] ARIZ. REV. STAT. ANN. § 44-1522(A) (West 2013).

The statute was enacted to give aggrieved consumers a "remedy to counteract the disproportionate bargaining power often present in consumer transactions."[290] Given the NLI's adhesionary nature, athletes who execute a sham contract (most as minors) to "purchase" a college education with their athletic talent are precisely the population the statute intends to protect. [291]

Regarding Woods, if the coach who recruited her to State concealed he had no intent to remain or affirmatively stated he would remain at the school during her collegiate career, and she relied on the coach's promises to stay, she could make a colorable claim under the ACFA.[292] Under the statute's plain language, "advertisement" includes "solicitation[s] . . . oral or written"[293] to encourage or persuade another to obtain a share of "merchandise," which includes goods and services.[294] Because the *sine qua non* of recruiting is oral and written "solicitation," and a university education is a good or service, the statute should apply and create a cause of action for Woods.[295] It does not matter that the parties did not exchange money, as the statute covers any form of consideration, including the exchange of services.[296]

---

[290] Waste Mfg. & Leasing Corp. v. Hambicki, 900 P.2d 1220, 1224 (Ariz. Ct. App. 1995).

[291] Sullivan v. Pulte Home Corp., 290 P.3d 446, 454 (Ariz. Ct. App. 2012) (recognizing purpose of ACFA is to provide injured consumers with remedy to counteract disproportionate bargaining power present in consumer transactions), *vacated in part on other grounds*, 306 P.3d 1 (2013).

[292] Loomis v. U.S. Bank Home Mortg., 912 F. Supp. 2d 848, 856 (D. Ariz. 2012) (recognizing elements of ACFA claims: a false promise or misrepresentation made in connection with sale of merchandise and plaintiffs' resulting and proximate injury); Cheatham v. ADT Corp., 161 F. Supp. 3d 815, 830 (D. Ariz. 2016) (recognizing omission is actionable under ACFA and need only be material and made with intent that consumer rely).

[293] ARIZ. REV. STAT. ANN. § 44-1521(1) (West 2014).

[294] ARIZ. REV. STAT. ANN. § 44-1521(5) (West 2014).

[295] Haisch v. Allstate Ins. Co., 5 P.3d 940, 944 (Ariz. Ct. App. 2000) (holding merchandise includes sale or advertisement of services).

[296] ARIZ. REV. STAT. ANN. § 44-1521(7) (West 2014) ("'Sale' means any sale, offer for sale or attempt to sell any merchandise for *any consideration*….") (emphasis added).

Unfortunately, the recruiting process is ripe with misrepresentations,[297] but it is beyond the scope of this article to address every conceivable misrepresentation or unfair or deceptive act that might take place. It is also impossible to anticipate every defense an institution may assert. For illustrative purposes only, colorable defenses would likely include arguments such as the applicable statute does not cover transactions between schools and athletes; the athlete did not reasonably rely on the promises; there is no proof of the alleged misrepresentation; or that the athlete was not damaged. The defenses to these arguments will be fact-specific and tailored to the statute's plain language, facts, and relevant case law.

But suffice to say, state statutes provide a valuable tool to fight the NLI. Additionally, unlike contract claims in most jurisdictions, enhanced damages are often available under remedial consumer protection statutes, such as punitive damages, minimum damages, trebled damages, and attorney's fees and costs, depending on the nature of the misrepresentations.[298] Signees seeking to avoid the NLI penalty would be wise to review the applicable state statutes when constructing their arguments in the administrative and/or legal setting.

V. THE ANTITRUST LIABILITY OF TRANSFER REGULATIONS

As witnessed by the forgoing history of transfer regulations in college athletics, the "year-in-residence" principle predates the NLI by decades, and was incorporated into the agreement as the Basic Penalty. The residency requirement deters the movement of athletes between schools, safeguarding institutions' recruiting investments and accumulation of talent. In its absence, athletes could re-matriculate—without onerous penalties—at an institution that better met their personal,

---

[297] *See, e.g.*, John Talty, *8 Common Lies Couches Tell Recruits*, AL.COM (Aug. 11, 2014, 1:55 PM), http://www.al.com/sports/index.ssf/2014/08/dana_holgorsen_says_coaches_li.html.

[298] In Arizona, for example, punitive damages may be properly awarded for violations of the ACFA if "the wrongdoer should be consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous, oppressive or intolerable in that it creates a substantial risk of tremendous harm to others." Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 679 (Ariz. 1986).

academic, and athletic preferences, resulting in a more optimal pairing of player and school without unnecessarily restraining trade. Further, the Basic Penalty stripping transferring athletes of one year of eligibility[299] acts as a group boycott against these players: it is a concerted refusal to deal with a class of athletes who could otherwise exchange their athletic labor for a grant-in-aid for another year. This labor-for-scholarship exchange is the foundation of the NCAA economy, and therefore the NLI restrains trade in the market for collegiate athletic talent.

This line of reasoning has been used to attack the NCAA's transfer rules, but not the NLI's, on antitrust grounds.[300] After reviewing the applicability of the Sherman Act to the collegiate athletic marketplace, we evaluate whether a suit patterned off plaintiffs' arguments in the recent *Pugh v. NCAA*,[301] *Deppe v. NCAA*[302] and *Vassar v. NCAA*[303] cases could invalidate the NLI's Basic Penalty as a matter of antitrust law.

Preliminarily, we reiterate that the CCA—not the NCAA—governs the NLI Program.[304] Any NLI-related antitrust litigation would primarily target the CCA and its member conferences, though the NCAA may be a co-conspirator due to its administration of the program. We review and discuss *NCAA-related* litigation here for several reasons, including the similarity of the transfer regulations promulgated by both entities (which makes NCAA case law instructive on how the courts might handle challenges to the Basic Penalty) and the large overlap in

---

[299] "I understand I shall be charged with the loss of one season of intercollegiate athletics competition in all sports. This is in addition to any seasons of competition expended at any institution." *National Letter of Intent 2011-2012*, Provision 4, NAT'L LETTER OF INTENT, https://sc.cnbcfm.com/applications/cnbc.com/resources/editorialfiles/2012/05/03/2226580_NLI_2010_2011.pdf (last visited Dec. 20, 2017).

[300] Justin Sievert, *NCAA Legislation Will Continue to Be Attacked Under Antitrust Law*, SPORTING NEWS (Mar. 17, 2016), http://www.sportingnews.com/ncaa-football/news/ncaa-legislation-antitrust-lawsuit-law-sherman-antitrust-act-mark-emmert/1qhywyk6qhxxo16byd7g0xceq7.

[301] Pugh v. NCAA, No. 1:15-cv-1747, 2016 WL 5394408, at *1 (S.D. Ind. Sept. 27, 2016).

[302] No. 1:16-cv-00528-TWP-DKL, 2017 WL 897307 (S.D. Ind. Mar. 6, 2017).

[303] No. 1:16-cv-10590, (N.D. Ill. Nov. 14, 2016).

[304] *About the National Letter of Intent (NLI)*, *supra* note 25.

membership between the two (conferences in the CCA compromise over half of the NCAA's membership).

A. THE INTENT AND APPLICABILITY OF THE SHERMAN ANTITRUST ACT

Section 1 of the Sherman Antitrust Act declares "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" to be illegal.[305] Section 2 prohibits monopolies and attempted monopolization.[306] The courts have interpreted Section 1 as not prohibiting any restraint of trade, but only those deemed "unreasonable."[307]

As the U.S. Supreme Court held in *NCAA v. Board of Regents*[308] and the U.S. Court of Appeals for the Ninth Circuit held in *O'Bannon v. NCAA*,[309] the regulations promulgated and enforced by the NCAA are subject to the Sherman Act.[310] In *Board of Regents*, the Court found the NCAA had fashioned a "horizontal restraint" in the market for television broadcasts, forbidding institutions from "competing against each other on the basis of price or kind of television rights that can be offered to broadcasters."[311] The NCAA's television plan subjected neither the output (number of games) nor the price of those telecasts to competitive market forces, contravening the intent of the Sherman Act.[312] The Ninth Circuit made a similar finding in *O'Bannon*, albeit regarding different restraints. Reviewing the NCAA's limits

---

[305] 15 U.S.C. § 1 (2004).

[306] *Id.* at § 2.

[307] *See, e.g.*, Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 342-43 (1982); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–88 (1978); Bd. of Trade of City of Chi. v. United States, 246 U.S. 231, 238 (1918).

[308] 468 U.S. 85 (1984).

[309] 802 F.3d 1049 (9th Cir. 2015).

[310] *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 120. The Court's discussion of the "legitimate [purposes]" of the challenged restraint show the Court did intend for the Sherman Act to apply to the NCAA's conduct and regulations. *See* Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 339 (7th Cir. 2012) (holding that "no procompetitive justifications would be necessary for noncommercial activity to which the Sherman Act does not apply"); *O'Bannon*, 802 F.3d at 1079 (holding the "NCAA is not above the antitrust laws").

[311] *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 99.

[312] *Id.*

on maximum-allowable financial aid to athletes, the *O'Bannon* court found these rules to "clearly regulate the terms of commercial transactions between athletic recruits and their chosen schools"[313] and exhorted the judiciary to "not shy away from" applying the Sherman Act to the NCAA's conduct.[314]

Both the *Board of Regents* and *O'Bannon* courts assessed the challenged NCAA bylaws through a burden-shifting balancing test known as the "Rule of Reason."[315] If a restraint cannot be deemed unlawful *per se* (usually naked horizontal agreements on price[316] or group boycotts[317]), courts generally analyze the alleged anticompetitive conduct through "Rule of Reason analysis."[318] The initial burden falls on the plaintiff, who must show the challenged restraint produces an anticompetitive impact in a particular market.[319] The burden then shifts to the defendant to show the restraint's competition-enhancing effects.[320] If pro-competitive justifications are established, plaintiffs must then demonstrate that the restraints are either unnecessary to achieve the pro-competitive goals or can be significantly less restrictive while maintaining their overall effect.[321] With these requirements satisfied, courts will then assess whether the pro-competitive effects of the restraints outweigh the harms to competition; if they do not, restraints can be enjoined.[322]

B. RECENT TRANSFER REGULATION CASE LAW

---

[313] *O'Bannon*, 802 F.3d at 1065.

[314] *Id*. at 1079.

[315] *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 103; *O'Bannon*, 802 F.3d at 1064.

[316] Herbert J. Hovenkamp, *The Rule of Reason*, U. PA. L. SCH. FAC. SCHOLARSHIP 1778 (2017), http://scholarship.law.upenn.edu/faculty_scholarship/1778.

[317] *Id.*

[318] Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, 1 ABA SECTION OF ANTITRUST LAW (n. 2) 1 (2013), https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at303000_ebulletin_20130122.authcheckdam.pdf.

[319] *Id.* at 2. In a recent study of antitrust challenges, approximately 90 percent of suits failed at this stage. *Id.*

[320] *Id.*

[321] *Id.*

[322] *Id.*

Challenges to the NCAA's compensation rules and broadcasting regulations are not the only arenas in which player-plaintiffs have attempted to bring the Sherman Act's proscriptions to bear. Since the early 1980s, the NCAA and its member conferences have faced numerous legal challenges to their transfer restrictions.[323] In recent years, these suits have been grounded exclusively in Sherman Act claims.[324] Although largely unsuccessful to date, these cases formulate a useful legal roadmap for potential antitrust challenges to the NLI's Basic Penalty provision.[325]

1. PUGH V. NCAA

Devin Pugh began his college football career at Weber State, a member of Division I's Football Championship Subdivision (FCS).[326] Following his sophomore season, the school's coaching staff informed Pugh that his athletic scholarship would not be renewed.[327] Looking to continue his career elsewhere, Pugh sought a waiver from the NCAA to transfer and play immediately, but was denied.[328] Because he was not eligible to play immediately, interest from Division I schools evaporated, and Pugh ultimately attended a Division II institution on a

---

[323] *See, e.g.*, Weiss v. E. Coll. Athletic Conference, 563 F. Supp. 192 (E.D. Pa. 1983); English v. Nat'l Collegiate Athletic Ass'n, 439 So. 2d 1218, 1224 (La. Ct. App. 1983) (holding that despite NCAA's engagement in interstate commerce, transfer restrictions were appropriate, as they safeguarded athletes from the "evils of recruiting".); McHale v. Cornell Univ., 620 F. Supp. 67 (N.D.N.Y. 1985); Graham v. Nat'l Collegiate Athletic Ass'n, 804 F.2d 953 (6th Cir. 1986).

[324] *See, e.g.*, Pugh v. Nat'l Collegiate Athletic Ass'n, No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408 (S.D. Ind. Sept. 27, 2016).

[325] Again, these suits have challenged the NCAA's regulations on player transfers, not the NLI's Basic Penalty. We review this litigation here due to the NCAA's transfer regulations' similarity to the NLI's Basic Penalty. *Id.*

[326] Class Action Complaint at 23, Pugh v. Nat'l Collegiate Athletic Ass'n, (No. 1:15-cv-01747-TWP-DKL), 2015 WL 9914324 (S.D. Ind. Nov. 5, 2015).

[327] *Id.* at 3.

[328] *Id.*

financial aid package that resulted in greater out-of-pocket expenses.[329]

Pugh filed a class action lawsuit against the NCAA in November 2015, alleging the NCAA year-in-residence requirement "functions as a penalty imposed upon Division I football players for switching schools"[330] in violation of the Sherman Act. Pugh further alleged that, absent the requirement, school selection and player recruiting would be driven exclusively by determinations of value and fit and not constrained by artificial barriers like the residency rule.[331] The NCAA moved to dismiss Pugh's lawsuit, arguing the year-in-residence requirement was a noncommercial eligibility rule, and therefore outside the jurisdiction of the Sherman Act.[332] The NCAA further argued that even if the year-in-residence rule was within the ambit of the Sherman Act, the transfer regulations were pro-competitive insofar as they melded players' academic and athletic endeavors.[333]

The Southern Indiana District Court found for the NCAA,.[334] The court held that because the transfer bylaws were found in the "Academic Eligibility" chapter of the NCAA manual and the word "eligible" appears in the language of the bylaw itself, the rule was entitled to the presumption of pro-competitiveness accorded to all NCAA bylaws governing player eligibility.[335]

2. DEPPE V. NCAA

In March 2016, Peter Deppe filed a suit nearly identical to Pugh's in the same Southern District of Indiana court.[336] Deppe, a punter, was initially a walk-on at Northern Illinois University

---

[329] *Id.*

[330] *Id.* at 18.

[331] *Id.* at 19.

[332] Pugh v. Nat'l Collegiate Athletic Ass'n, No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408, at *4 (S.D. Ind. Sept. 27, 2016).

[333] *Id.* at *5.

[334] *Id.* at *6.

[335] *Id.* at *5 (holding that "NCAA eligibility bylaws are 'presumptively pro-competitive' and, therefore, do not violate the Sherman Act.").

[336] Deppe v. Nat'l Collegiate Athletic Ass'n, No. 1:16-cv-00528-TWP-DKL, 2017 WL 897307 (S.D. Ind. Mar. 6, 2017).

(NIU) but was told that he would receive a scholarship in his second semester at the school.[337] That promise never came to fruition, and Deppe sought to transfer.[338] Like Pugh, Deppe was valuable to other Division I schools only if he could become eligible to compete without fulfilling the year-in-residence requirement.[339] Unable to secure a waiver to avoid the residency requirement, Deppe never played another down of college football.[340]

In his complaint, Deppe argued the transfer rules "unreasonably restrained" the competition NCAA members would have engaged in for his athletic services.[341] Pinned to him like a scarlet letter, Deppe alleged the year-in-residence requirement was within the scope of the Sherman Act because of its impact on "the interstate movement of students and the interstate flow of substantial funds (including, but not limited to, tuition, room and board, and mandatory fees)."[342] Similar to its response in *Pugh*, the NCAA maintained that the transfer rules governed eligibility, and that any downstream effects on financial aid were irrelevant.[343] "Economic motivations or consequences alone are not sufficient to make a non-commercial restraint subject to the Sherman Act,"[344] the NCAA wrote, citing the Sixth Circuit's decision in *Bassett v. NCAA*.[345]

---

[337] Class Action Complaint at 4, Deppe v. Nat'l Collegiate Athletic Ass'n, (No. 1:16-cv-00528-WTL-MPB), 2016 WL 888119 (S.D. Ind. Mar. 8, 2016).

[338] *Id.*

[339] *Id.* at 7.

[340] *Id.*

[341] *Id.* at 29.

[342] *Id.*

[343] Brief in Support of Motion for Partial Dismissal and to Strike Irrelevant Allegations of Plaintiff's Complaint at 11–12, Deppe v. Nat'l Collegiate Athletic Ass'n, No. 1:16-cv-00528-WTL-TAB, 2016 WL 7645137 (S.D. Ind. Apr. 14, 2016).

[344] *Id.* at 13.

[345] 528 F.3d 426 (6th Cir. 2008) (holding that the non-commercial nature of the NCAA's prohibitions on "improper inducements and academic fraud" immunized any punishments stemming from the enforcement of those bylaws under the antitrust laws).

Relying once again on the presumptive pro-competitiveness of the NCAA's eligibility regulations,[346] the Southern District of Indiana court summarily dismissed Deppe's challenge of the year-in-residence rule.[347] Deppe appealed the district court's judgment, and the case is currently pending before the Seventh Circuit Court of Appeals.[348]

3. VASSAR V. NCAA AND NORTHWESTERN UNIVERSITY

The most recent suit targeting the NCAA's transfer restrictions—and the year-in-residence requirement in particular—was filed by former Northwestern University basketball player Johnnie Vassar in November 2016.[349] Vassar first enrolled at Northwestern in 2014 after being offered a multi-year athletic grant-in-aid,[350] but was later "run off" the team after falling out of favor with his coaches.[351] Vassar attempted to transfer, but the looming year-in-residence requirement undercut the market for his services.[352] Effectively stripped of Division I transfer options, Vassar remained at Northwestern—but was denied access to the school's athletic training facilities and other benefits attached to his scholarship, forcing him to take out loans to cover his costs.[353]

In November 2016, Vassar sued Northwestern and the NCAA in the Northern District of Illinois.[354] In his class action complaint, Vassar argued that the absence of the year-in-residence requirement would inevitably result in an "optimal and most

---

[346] Deppe v. NCAA, No. 1:16-cv-00528, 2017 WL 897307, at *3 (S.D. Ind. Mar. 6, 2017).

[347] *Id.* at *4.

[348] Deppe v. NCAA,Case No. 17-1711. *See Vassar v. National Collegiate Athletic Association (ncaa) et al*, DOCKET BIRD, https://www.docketbird.com/court-cases/Vassar-v-National-Collegiate-Athletic-Assocaition-ncaa-et-al/ilnd-1:2016-cv-10590 (last visited Feb. 19, 2018).

[349] Class Action Complaint at 1, Vassar v. NCAA, No. 1:16-cv-10590, (N.D.Ill. Nov. 14, 2016).

[350] *Id.* at 4.

[351] *Id.* at 10.

[352] *Id.* at 3.

[353] *Id.* at 22–23.

[354] *Id.* at 1.

efficient matching of schools and players,"[355] since neither school nor athlete would be forced to consider an external restraint (residency requirement) in the recruiting process. Preempting the NCAA's academic justifications for the transfer regulations, Vassar's complaint quoted now-former Wisconsin men's basketball coach Bo Ryan's explanation for blocking the transfer of one of his athletes: "We don't want a young man to take our playbook and go to the next school."[356]

In its motion to dismiss, the NCAA again pointed to the classification of the transfer regulations as "eligibility rules," which granted them the veil of pro-competitiveness and shielded them from Sherman Act scrutiny.[357] Vassar pushed back against those claims in his reply brief, arguing that the transfer regulations at issue did govern commercial activity, because they impacted the disbursement of financial aid to transfer athletes.[358]

The *Vassar* litigation is ongoing, with all parties agreeing that the outcome of the *Deppe* case will be determinative of Vassar's antitrust claims.[359]

C. THE SHERMAN ACT'S APPLICABILITY TO NLI'S BASIC PENALTY AND A ROADMAP FOR NLI ANTITRUST LITIGATION

The NLI's Basic Penalty provision carries similar, if not greater antitrust vulnerabilities than the NCAA's year-in-residence requirement. While the Basic Penalty's residency requirement has all the hallmarks of NCAA's rule, its eligibility reduction clause is a more blatant restraint of trade than any other NCAA rule. Given the preceding case law and the economic realities of the NLI, similar Sherman Act challenges could be brought against the Basic Penalty.

---

[355] *Id.* at 32.

[356] *Id.* at 36.

[357] Brief in Support of Motion for Partial Dismissal of Plaintiff's Complaint at 6, Vassar v. NCAA, No. 1:16-cv-10590, (N.D. Ill. Jan. 31, 2017).

[358] Memorandum in Opposition Motion for Partial Dismissal of Plaintiff's Complaint at 22, *Vassar v. NCAA*, No. 1:16-cv-10590, (N.D. Ill. Aug. 25, 2017) No. 32-10590.

[359] *See Vassar v. National Collegiate Athletic Association (ncaa) et al*, DOCKET BIRD, https://www.docketbird.com/court-cases/Vassar-v-National-Collegiate-Athletic-Assocaition-ncaa-et-al/ilnd-1:2016-cv-10590 (last visited Feb. 19, 2018).

1. PROVING A "CONTRACT, COMBINATION, OR CONSPIRACY"

The initial threshold of establishing a violation of Section 1 of the Sherman Act is the pleading of a "contract, combination . . . or conspiracy".[360] "Contracts" in constraint of trade are formal agreements between two or more economic actors that "limit the free exercise of business or trade."[361] "Combinations" and "conspiracies" are marked by a "conscious commitment to a common scheme designed to achieve an unlawful objective."[362] Unlike the NCAA, whose bylaws are publicly available, there is no explicit, industry-wide contract to use the NLI. However, there is parallel conduct in the use of the NLI, with over 650 NCAA institutions participating in the program.[363] Moreover, there is a clear connection between the NCAA, a monopoly, and the CCA, as demonstrated by their overlapping memberships, common purposes, and shared interests. In effect, the CCA is a subset of the NCAA's cartel, whose members have formed an internal entity to informally further their interests. Given this structure, "conscious parallelism" may be a more apt term for institutions' concurrent use of the NLI. While parallelism, out of context, is usually insufficient to prove a conspiracy,[364] "opportunities for meetings among the alleged conspirators . . . may be sufficient to permit an inference of conspiracy" (recall that the CAA meets twice yearly for group forums).[365] Other "plus factors" which, if present, could lead to the presumption of an agreement include

---

[360] Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001).

[361] *Contract in restraint of trade*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[362] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984).

[363] *See About the National Letter of Intent (NLI)*, NATIONAL LETTER OF INTENT (2016), http://www.nationalletter.org/aboutthenli/index.html.

[364] *See, e.g.*, Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 540–41 (1954).

[365] Howard Feller, *A Primer on Antitrust Principles*, ASSOCIATION OF CORPORATE COUNSEL NATIONAL CAPITAL REGIONAL PROGRAM 7 (May 18, 2015), https://www.acc.com/chapters/ncr/upload/Antitrust-Compliance-Training-Program-5-18-and-6-2-2015-Materials.pdf.

incentives to collude and multiple equivalent offers from competitors ("coincidence" factors). [366] Additionally, some conferences have specific agreements to use the NLI on a conference-wide basis, [367] strengthening the evidence that widespread use of the NLI is made possible by a contract, combination, and/or conspiracy.

Defendants in NLI litigation (likely the CCA, member conferences, and possibly the NCAA) could rebut these allegations in several ways. Unlike the NCAA's year-in-residence rule, which has been agreed to and promulgated publicly by the member institutions, the NLI Program operates under no such overtly collusive agreement. The CCA could paint itself as a voluntary trade association—devoid of market-controlling or enforcement authority—offering a voluntary agreement that athletes can voluntarily sign. By highlighting its relative impotence and looser organization vis-à-vis the NCAA, the CCA could assert that no underlying contract, combination or conspiracy is present in the NLI Program.

2. ESTABLISHING AN UNREASONABLE RESTRAINT OF TRADE

A challenge to the NLI's Basic Penalty also must show the NLI acts as an unreasonable restraint of trade or commerce. "Trade" is the "buying or selling of goods and services." [368] "Commerce" is construed to include "almost every activity from which [an] actor anticipates economic gain."[369] As illustrated in *Pugh*, *Deppe*, and *Vassar*, this hurdle would be the toughest for any antitrust challenge to the Basic Penalty to overcome. Relative

---

[366] George A. Hay, *Horizontal Agreements: Concept and Proof*, THE ANTITRUST BULLETIN, Vol. 51, No. 4 (2006), at 884–87.

[367] *Letters of Intent*, 2017–18 PAC-12 CONFERENCE HANDBOOK, http://compliance.pac-12.org/wp-content/uploads/2017/07/2017-18-P12-Handbook.v3.compliance-corner.pdf. The Pac-12 has subscribed to the NLI Program continuously since 1966. *Id.*, at 26; Big 12 Conference Bylaw 6.1.1.1, at 32 http://www.big12sports.com/fls/10410/pdfs/handbook/ConferenceHandbook.pdf (last visited Dec. 23, 2017).

Mid-American Conference Bylaw 7.01–7.04, at 54 http://grfx.cstv.com/photos/schools/mac/genrel/auto_pdf/compliance-bylaws.pdf (last visited Dec. 23, 2017).

[368] *Trade,* BLACK'S LAW DICTIONARY (10th ed. 2014).

[369] *See* Agnew v. NCAA, 683 F.3d 328, 340 (7th Cir. 2012).

to the NCAA's transfer regulations, however, the Basic Penalty is far more restrictive overall and does not enjoy the precedent relied on by the NCAA.

By way of review: the NLI can (but is unnecessary to) facilitate the exchange of an athlete's labor for an athletic scholarship and other ancillary benefits.[370] This labor-for-scholarship exchange is the cornerstone of the NCAA economy—without it, none of the billions in revenue collected annually by the NCAA and its member institutions could be generated.[371] The Basic Penalty, like the NCAA's year-in-residence requirement, heavily deters (though does not prohibit) institutions from engaging in these exchanges with transfer athletes.[372] Players who cannot immediately contribute to a program's competitive success are disadvantaged in this labor market, and are often shut out of the Division I market altogether.[373] In practical terms, this means coaches are more likely to award their limited pool of scholarships to athletes immediately eligible for competition, rather than on players who must wait a year before providing the full extent of their athletic labor. Moreover, the NLI's Recruiting Ban means institutions must discontinue their recruiting of NLI signees, cutting off the competition for those players' services that would otherwise occur. In each labor-for-scholarship exchange, the athlete anticipates "economic gain" through the educational expenses they have avoided. Therefore, the Basic Penalty is inextricably tied to commerce and commercial activity. To argue otherwise is to ignore the economic realities that underpin collegiate athletics and the downstream effects of the Basic Penalty provision. Though the courts have soundly rejected this

---

[370] *See supra* Section IV.A.

[371] In the last two fiscal years for which its federal tax returns are available (2014 and 2015), the NCAA itself generated over $1.9 billion in combined revenue. Steve Berkowitz, *NCAA Spends $25 Million on Outside Legal Fees, Double from Previous Year*, USA TODAY SPORTS (June 11, 2016), https://www.usatoday.com/story/sports/college/2016/06/11/ncaa-legal-fees-obannon/85772006/.

[372] *See* Zach Barnett, *A federal lawsuit is challenging the NCAA's transfer rules – and cites the coaching market as evidence*, FOOTBALL SCOOP (Mar. 10, 2016), http://footballscoop.com/news/a-federal-lawsuit-is-challenging-the-ncaas-transfer-rules-and-cites-the-coaching-market-as-evidence/.

[373] *See id.*

theory in the context of the NCAA's transfer rules,[374] other jurisdictions may not apply the oft-invoked presumption of pro-competitiveness so readily.[375]

But there is a stronger indicator of the Basic Penalty's restraint of trade: it acts as a group boycott. The Basic Penalty prohibits athletes not only from competing in intercollegiate athletics for a single year, but also docks them "one season of intercollegiate athletics competition in all sports."[376] With respect to the comparative antitrust liability of the NCAA and NLI restrictions, this distinction is crucial: while the NCAA's year-in-residence requirement simply *delays* an athlete's eligibility, the NLI's Basic Penalty *reduces* eligibility, resulting in an earlier exit from the college athlete labor market. Viewed in this light, the Basic Penalty functions as a group boycott, where the CCA member institutions have refused to engage in economic activity with otherwise eligible athletes who did not fulfill the terms of their NLI.[377] Horizontal agreements such as this "have long been held to be in the forbidden category,"[378] and are not justified by "allegations that they were reasonable in specific circumstances".[379] They are illegal *per se*.[380]

NLI defendants, akin to the NCAA, may attempt to unravel these arguments by claiming the Basic Penalty is primarily an eligibility rule, and therefore entitled to the presumption of pro-competitiveness. This rebuttal is fatally flawed. First, and most important, the NLI is a self-proclaimed "voluntary" document that is not necessary to accept an athletic

---

[374] *See Agnew*, 683 F.3d at 341.

[375] *See infra* Section VI.C.3. for further discussion on venue for NLI-related antitrust challenges.

[376] *See supra* Section II.A.1.

[377] Note, *Antitrust: Limitation on the Group Boycott Per Se Rule*, 1961 DUKE L.J. 606, 606 (1961) ("A group boycott is an agreement by two or more persons not to do business with other individuals or to do business with them only on discriminatory terms."). Group boycotts are also known as a "concerted refusals to deal." *Boycott*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[378] Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); *see also* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 453 n.9 (Brennan, J. and Marshall, J., concurring and dissenting) ("'[G]roup boycotts' often are listed among the types of activity meriting per se condemnation.").

[379] *Klor's Inc.*, 359 U.S. at 212.

[380] Hovenkamp, *supra* note 318.

scholarship or participate in the NCAA.[381] As it is not required for collegiate competition, the NLI, or any of its provisions, cannot be classified as eligibility criteria. The NLI's residency requirement is also duplicative of the NCAA's year-in-residence rule, adding nothing to the NCAA's existing eligibility requirements. That the Basic Penalty charges athletes a year of eligibility is irrelevant because, again, the document is completely voluntary and is not enforced until an athlete signs the agreement. It therefore cannot be a rule governing eligibility. Finally, the pro-competitive presumption attached to NCAA eligibility rules, to the extent one exists, cannot be bestowed on the NLI, which is not enshrined in the NCAA's bylaws and is unnecessary to create or preserve amateur athletics.

Unable to rely on the "eligibility rule" panacea, NLI defendants would likely argue that, even accepting as true the Sherman Act's applicability to the Basic Penalty, the pro-competitive justifications of the provision outweigh any anticompetitive harm. Among these pro-competitive justifications might be arguments that the Basic Penalty, by restricting player movement, promotes amateurism and competitive balance, while further integrating academics and athletics and increasing output in the collegiate athletic market.[382] Plaintiffs could strongly refute each of these supposedly pro-competitive justifications.

Promoting Amateurism: The Basic Penalty does not promote amateurism in college sports, and has no connection to the central tenet of amateurism: the notion that athletes must not receive compensation for their participation in collegiate athletics exceeding their full cost of attendance. The NCAA conceded this in *Pugh*, where it admitted transfer regulations do not affect the value or quantity of athletic Grants-in-Aid.[383] A transfer student

---

[381] *About the National Letter of Intent (NLI)*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html (last visited Dec. 20, 2017).

[382] *See* Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012).

[383] Reply Brief in Support of NCAA's Rule 12 Motion for Partial Dismissal of Plaintiff's Complaint at 11, *Pugh v. NCAA*, No. 1:15-cv-1747-TWP-DKL, 2016 WL 5394408 (S.D. Ind. Sept. 27, 2016) (No. 1:15-cv-01747 TWP-DKL), 2016 WL 1593577, ("The year-in-residence bylaw addresses only eligibility to compete in NCAA athletic competition, not eligibility to receive financial aid. It does not

who can play immediately will still be an amateur, with the same cap on the value of their Grant-in-Aid. Further, there is no evidence that increased player movement will decrease consumer appeal for collegiate athletics. Even with the rise of a so-called "transfer epidemic" in college basketball in recent years,[384] profitability in this sport has risen continually.[385]

Promoting Competitive Balance: The NCAA often points to maintaining competitive balance as a justification for its rules,[386] including those governing transfer athletes, but this myth has been soundly rejected.[387] Still, defendant(s) in NLI litigation would likely advance a similar argument. But instead of promoting competitive equity (which has never existed in collegiate athletics),[388] transfer rules like the Basic Penalty preserve the hegemony of the Power 5 conferences—the richest and most powerful members of the NCAA[389]—that can expend the greatest resources recruiting and retaining the most coveted

---

regulate eligibility for financial aid or any other arguably commercial activity.").

[384] John Kekis et al., *Transfer Epidemic in College Hoops Has Coaches Concerned*, ASSOCIATED PRESS (Nov. 5, 2016, 1:52 AM), https://www.usatoday.com/story/sports/ncaab/2016/11/05/transfer-epidemic-in-college-hoops-has-coaches-concerned/93337732/.

[385] Cork Gaines & Diana Yukari, *The NCAA Tournament is an Enormous Cash Cow as Revenue Keeps Skyrocketing*, BUSINESS INSIDER (Mar. 17, 2017, 2:43 PM), http://www.businessinsider.com/ncaa-tournament-makes-a-lot-of-money-2017-3 (noting that "[a]s recently as 2010, the NCAA's broadcasting rights for the NCAA Tournament were worth just under $550 million per year."). Those rights are now worth $770 million annually until 2025, when their value rises to $1.1 billion per year. *Id.*

[386] *See* Smith v. NCAA, 139 F.3d 180, 185 (3d Cir. 1999) (holding that "the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics."), *vacated on other grounds,* 525 U.S. 459 (1999).

[387] See O'Bannon v. NCAA, 802 F.3d 1049, 1059 (9th Cir. 2015) (citing trial court's finding that economists almost universally agree that NCAA rules do not enhance competitive equity between institutions).

[388] *Id.*

[389] *See* Paula Lavigne, *Rich Get Richer in College Sports as Poorer Schools Struggle to Keep Up*, ESPN (Sept. 6, 2016), http://www.espn.com/espn/otl/story/_/id/17447429/power-5-conference-schools-made-6-billion-last-year-gap-haves-nots-grows.

high school prospects.[390] By locking-in those athletes for at least a year and deterring their movement elsewhere, the Basic Penalty restrains player movement to less-competitive schools and conferences. *There is no competitive balance in collegiate athletics*,[391] and the Basic Penalty only facilitates and strengthens this lack of equity.

Integrating Academics and Athletics: Like the NCAA contended in *Vassar*,[392] NLI defendants could also argue that increased player movement resulting from changes to the Basic Penalty could harm institutions' legitimate interest of melding students' athletic and academic pursuits. This argument is nonsensical when applied to signees of the NLI, the majority of whom have never previously attended college,[393] and thus have

---

[390] Unable to recruit players with direct pay, college athletic departments invest in secondary inputs, namely athletic facilities and coaching staffs, to secure players' labor. In 2014, 48 of the 65 athletic departments in the Power 5 conferences spent a combined $772 million on facilities. Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHICAGO TRIBUNE (Dec. 23, 2015), http://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html. Though primarily geared towards football and basketball programs, facility spending transcends the "revenue sports" and is used to recruit athletes across all sports. *Id.*

[391] Andy Schwarz, *The Competitive-Balance Argument Against Paying Athletes Is Bullshit*, DEADSPIN, (May 15, 2014, 2:14 PM), http://deadspin.com/the-competitive-balance-argument-against-paying-athlete-1576638830 (finding that "of the 1,000 top recruited athletes over a decade, 99.3 percent went to power conference schools" which comprise just 65 of the NCAA's 1200-plus institutions). When nearly all of the best, most highly sought-after talent matriculates to about five percent of an association's members, it is clear that competitive balance simply does not exist.

[392] In *Vassar*, the NCAA argued that unfettered player movement, similar to the free-flow of labor in professional sports (which frankly does not exist and is heavily regulated by collective bargaining), "would completely divorce the athletic and academic experience for NCAA student-athletes." Brief in Support of NCAA's Rule 12(B)(6) Motion For Partial Dismissal Of Plaintiff's Complaint at 7, *Vassar v. NCAA*, No. 1:16-cv-10590, (N.D.Ill. Jan. 31, 2017) (No. 21-1).

[393] *See Signing the NLI FAQs*, NLI, http://www.nationalletter.org/frequentlyAskedQuestions/signingTheNli.html (last visited Nov. 15, 2017) (indicating that "[p]rospective

not even begun those "pursuits" yet. As applied to incoming athletes like Woods, who are beginning their first year of college, the rule is designed to punish students who transfer and provides no pro-competitive benefit.

Moreover, schools have not promulgated similar transfer restrictions for non-athlete students and those participating in other extra-curricular activities. The only segment of students to whom these regulations apply are athletes. This serves to further segregate players from their peers and cannot be said to integrate their academic experience with their athletic endeavors.[394]

Increasing Output in the College Education Market: The transfer rules do nothing to increase output in the college education market.[395] There is no revenue sharing system in the NCAA's Division I,[396] so there is no evidence that monies saved by decreasing administrative costs associated with the recruitment and resettlement of transfer athletes would fund scholarships at low-resource institutions. Nor is there any evidence the administrative costs associated with transfer athletes decreases the number of scholarships at low-revenue schools or otherwise materially increases those schools' costs. Even if the costs associated with transferring were prohibitively high, eliminating the Basic Penalty would allow, *not require*, a school to allow penalty-free transfer of athletes to other member institutions.[397] Thus, a school that does not want to allow its students to transfer

---

student-athletes enrolling in a four-year institution for the first time can sign an NLI").

[394] Cameron Miller, *Why Transfer Restrictions Are Wrong*, STAN. DAILY (Feb. 10, 2016), http://www.stanforddaily.com/2016/02/10/miller-why-transfer-restrictions-are-wrong/.

[395] When this pro-competitive justification was offered to the *O'Bannon* trial court, the court found it "implausible." O'Bannon v. NCAA, 802 F.3d 1049, 1060 (9th Cir. 2015).

[396] B. David Ridpath, *The College Football Playoff and Other NCAA Revenues are an Exposé of Selfish Interest*, FORBES (Jan. 17, 2017, 1:13 PM), https://www.forbes.com/sites/bdavidridpath/2017/01/17/college-football-playoff-and-other-ncaa-revenues-is-an-expose-of-selfish-interest/#1acea9884e1a.

[397] *See Permission to Contact*, NCAA, http://www.ncaa.org/student-athletes/current/permission-contact (last visited Nov. 15, 2017).

could freely do so, but would have to compete with other schools that offer students the freedom to transfer.

The trial court in *O'Bannon* rejected the second and fourth of these justifications, and partially accepted the first and third.[398] However, in litigation targeting the NLI, the promotion of amateurism justification is completely without merit because the Basic Penalty has no effect on the cornerstone of the "collegiate model" (the Grant-in-Aid cap).[399] That leaves the integration of academics and athletics as the only plausibly pro-competitive benefit of the Basic Penalty. To the extent it is pro-competitive, there are less restrictive means to accomplish this goal, such as exempting academically-driven transfers from NLI penalties or instructing the NLI's Review Committee to exempt athletes whose scholastic record shows they are unlikely to underperform academically at their new school.

3. ESTABLISHING IMPACT ON INTERSTATE COMMERCE

The final element of establishing a Section 1 claim under the Sherman Act is a showing that the restraint of trade "affected interstate commerce."[400] "Interstate commerce" is "trade and other business activities between those located in different states; especially traffic in goods and travel of people between states."[401] The athletic recruiting and scholarship offer-and-acceptance processes are clearly interstate commerce, as they routinely involve the recruiting of out-of-state athletes (the last four Heisman Trophy winners matriculated at schools outside their home state)[402] and the disbursement of valuable Grants-in-Aid. And the NLI's Basic Penalty indisputably impacts this commerce,

---

[398] *O'Bannon*, 802 F.3d at 1059–60.

[399] *Amateurism*, NCAA, http://www.ncaa.org/amateurism (last visited Nov. 15, 2017).

[400] Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001).

[401] *Commerce*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[402] *See Heisman Memorial Trophy Winners*, SPORTS REFERENCE, https://www.sports-reference.com/cfb/awards/heisman.html.

regulating and restricting the movement of these recruits between 650-plus collegiate institutions across the country.[403]

Venue would also be a critical factor in any antitrust suit challenging the legality of the Basic Penalty. As evidenced in *Deppe* and *Pugh*, the Seventh Circuit (and the Southern District of Indiana in particular—the home of the NCAA) may not be the most hospitable venue for transfer regulation-related litigation.[404] Suing elsewhere may be more fruitful for athletes looking to invalidate the Basic Penalty. For one, other Circuits have been relatively more sympathetic to the arguments of college athletes than their counterparts in the Seventh Circuit, and could take a different view of transfer regulations.[405] Given the *O'Bannon* Court's pronouncement that "[t]he antitrust laws are not to be avoided by such 'clever manipulation of words,'"[406] labeling the NLI's year-in-residence requirement as an "eligibility rule" may not be received as well in the Ninth Circuit (it is precisely this strategy that allowed the NCAA to prevail in *Pugh*[407] and

---

[403] *See* B. David Ridpath, *NCAA Restrictions on Transfer Athletes Continues A Plantation Mentality*, FORBES (Nov. 11, 2015, 10:14 AM), https://www.forbes.com/sites/bdavidridpath/2015/11/11/ncaa-restrictions-on-transfer-athletes-continues-to-resemble-professional-sports/#700d2ae4533f.

[404] The Seventh Circuit has developed the following threshold question for the evaluation of NCAA regulations: whether the challenged NCAA bylaw is "presumptively procompetitive." Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012). In a long line of cases, the Seventh Circuit (and others) have shown deep reverence to the Supreme Court's dicta in *Board of Regents*, which states, "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore pro-competitive because they enhance public interest in intercollegiate athletics." NCAA v. Board of Regents, 468 U.S. 85, 117 (1984).

[405] *See, e.g.*, O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (refusing to apply the dicta in *Board of Regents* regarding the compensation of college athletes); *see also O'Bannon v. NCAA*, 802 F.3d 1049, 1049 (declaring that the NCAA to not be "above the antitrust laws").

[406] *O'Bannon*, 802 F.2d at 1065

[407] *See* Pugh v. National Collegiate Athletic Ass'n., No. 1:15-cv-1747-TWP-DKL, 2016 WL 5394408 (S.D. Ind. Sept. 27, 2016).

Deppe).[408] Further, the *O'Bannon* appellate court criticized the Seventh Circuit's permissive reading of the pro-competitive presumption of eligibility rules,[409] which indicates it may not permit a challenge to the Basic Penalty to be dismissed in the "twinkling of an eye."[410]

VI. SUGGESTIONS FOR REFORM

"[The transfer rule] once had an academic purpose. When freshmen were required to wait one year before competing in varsity sports, it was argued that [the] transfer students also needed a one-year adjustment period free from the pressures of varsity competition. The rule, however, has become a player control measure in the hands of the coach, a sort of option clause.

If the one-year college residence requirement for transfer players is limited to a transfer during the athlete's playing season, that protects the team. Any other transfer restrictions are unnecessary coercion."

—Former NCAA Executive Director Walter Byers[411]

Although a wide swathe of NCAA member institutions have used the NLI for over a half-century, the NLI's potential for legal liability, particularly class-wide legal liability, jeopardizes its continued use in college athletics. To avert costly and lengthy litigation, we suggest the following reforms to the NLI Program. Each reform suggestion aims to create a fairer, more balanced, and legally-defensible agreement that would better protect the interests of athletes while mitigating the risks of litigation against the NCAA, CCA, and its member conferences.

---

[408] *See* Deppe v. Nat'l Collegiate Athletic Ass'n, No. 1:16-cv-00528-TWP-DKL, 2017 WL 897307, at 3–4 (S.D. Ind. Mar. 6, 2017).

[409] *O'Bannon*, 802 F.3d at 1064 (rejecting *Agnew*'s "dubious proposition that in *Board of Regents*, the Supreme Court 'blessed' NCAA rules that were not before it, and did so to a sufficient degree to virtually exempt those rules from antitrust scrutiny").

[410] *Deppe*, 2017 WL 897307, at *4.

[411] WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 380 (1995).

A. OPTION 1: REFORMING THE CURRENT NLI PROGRAM

The CCA could preempt lawsuits by undertaking internal reform of the entire document—not just the Basic Penalty. We suggest these revisions, which do not alter the language of the Basic Penalty itself, but rather better educate potential signees, give athletes more flexibility in freeing themselves from the agreement, provide the consideration required by contract law, and reduce the NLI's temporal scope.

Increase emphasis on the voluntary nature of the NLI: While the NLI reminds the signee in the opening paragraph the agreement is not required to "receive athletics aid and participate in intercollegiate athletics,"[412] this does not go far enough in alerting the prospective signee that the document need not be signed to receive their athletic scholarship. We propose a cover sheet be added to the NLI that reads, in boldface, all-caps font:

> **PROSPECTIVE STUDENT-ATHLETE NOTICE: THE ENCLOSED NATIONAL LETTER OF INTENT ("NLI") IS BEING DELIVERED TO YOU BY [INSTITUTION]. SIGNING THIS NLI IS <u>NOT REQUIRED</u> TO ACCEPT [INSTITUTION'S] OFFER OF ATHLETIC FINANCIAL AID, WHICH MUST ACCOMPANY THE NLI. YOUR SIGNING OF THE NLI IS <u>COMPLETELY VOLUNTARY</u>, AND YOU WILL STILL BE ABLE TO COMPETE COLLEGIATELY AND RECEIVE ATHLETIC FINANCIAL AID EVEN IF YOU CHOOSE NOT TO SIGN IT. IF ANYONE AFFILIATED WITH [INSTITUTION] SUGGESTS SIGNING THIS DOCUMENT IS MANDATORY, CONTACT THE NLI OMBUDSMAN AT [CONTACT INFORMATION].**[413]

---

[412] NCAA Eligibility Center, *National Letter of Intent 2011-2012* 1, MSNBC MEDIA http://msnbcmedia.msn.com/i/CNBC/Sections/News_And_Analysis/__Story_Inserts/graphics/__PDF/NLI_2010_2011.pdf (last visited Dec. 23 2017).

[413] In addition to its five subcommittees, the NLI Program should add an independent ombudsman committee

> **BE AWARE THAT IF YOU SIGN THE NLI, BUT DO NOT ATTEND [INSTITUTION] FOR ONE ACADEMIC YEAR, YOU MAY BE SUBJECT TO TRANSFER RESTRICTIONS AND LOSS OF ELIGIBILITY. THESE PENALTIES APPLY EVEN IF THE COACH WHO RECRUITED YOU IS FIRED, RETIRED, OR LEAVES THE PROGRAM OR YOUR TEAM IS SUBJECTED TO NCAA PENALTIES (INCLUDING POSTSEASON BANS).**

Further, we suggest placing this language in the header and footer of each page of the NLI:

> **VOLUNTARY DOCUMENT – NOT REQUIRED TO ACCEPT ATHLETIC SCHOLARSHIP OR COMPETE IN THE NCAA.**

Adding this language will make it unequivocal that signing an NLI is not a required and provide the signee with the opportunity to report deceptive practices.

Decrease the Length of the NLI: The NLI is in "full effect" from the date an athlete signs the agreement until the end of their first academic year at the institution.[414] In terms of deterring and restricting athlete transfers, this length is longer than necessary. Once an athlete enrolls at the institution, the NCAA (and possibly conference) transfer regulations come into effect, making the Basic Penalty largely superfluous. To remove a layer of duplicative transfer rules, the NLI and its provisions should be in "full effect" **from the date the recruit signs the document**

---

that provides a forum for athletes to report deceptive behavior by coaches or other institutional parties in connection with the NLI. The ombudsman should have the authority to sanction coaches and/or sport programs that mislead prospective athletes on the meaning, necessity, and effect of the NLI. Penalties could include a reduction on the number of NLIs the coach and/or sport program may offer in a single recruiting cycle.

[414] NCAA Eligibility Center, *supra* note 414.

until the date he or she enrolls (begins classes) at the institution. At that point, scholarship release requests and transfers would be governed by applicable NCAA, conference, and institutional regulations, which still place substantial restrictions on transferring athletes. The benefit for athletes is twofold: reducing the confusing overlap between NCAA, conference, and NLI transfer regulations, while allowing them to take advantage of the one-time transfer exception in NCAA Bylaw 14.5.5.2.10.[415]

Bolster Release Request and Appeals Process Information: The NLI Program should develop sets of publicly available operating and hearing procedures for its Policy, Review, and Appeals Committees. These procedures must, at the very least, set forth an athlete's right to be represented by counsel in appellate proceedings; the right to call as witnesses relevant administrators, head coaches, teammates, and (after a showing of relevance) teammates, and to direct cross-examination; an athlete's right to compel the institution to produce all requested materials documenting their participation in the institution's athletics program; the right to have the proceeding recorded; the right to review past appellate decisions; and the right to a disposition of their appeal in 15 days or less. The NLI Program should also alter the composition of its committees so there is at least one student representative in each group.

The NLI Program must also set forth in writing the criteria on which release appeals are judged, thereby creating substantive and procedural due process rights for all parties. This information should be appended to the NLI when delivered to the signee. In addition, the institution must set forth in writing its objective criteria, in detail, for evaluating initial release requests, and must attach that information to the NLI. In anticipation that requests for

---

[415] Athletes who fulfill certain criteria may qualify for relief from the residency requirements, but this relief is not available to baseball, basketball, football, or men's ice hockey players. See NCAA Bylaw § 14.5.5.2.10. It is worth noting that Eugene Byrd, the former Associate Commissioner in the SEC who was also an administrator in the NLI Program, once suggested this reform in the mid-2000s, but "couldn't get people to listen to (him)." Kevin Scarbinsky, *College Athletes' Rights: National Letter of Intent plus NCAA transfer rules tie student-athletes to schools*, AL.COM (Nov. 27, 2011), http://www.al.com/sports/index.ssf/2011/11/college_athletes_rights_nation.html. "The people in charge have overextended their power," Byrd said at the time. *Id.*

release will rise under this reformed NLI, the CCA could also contract with the American Arbitration Association, or a similar organization, to offer non-binding consumer arbitrations (paid for by the CCA member conferences) where each party can be represented in front of neutral arbitrator(s).[416]

Add and Revise Conditions Precedent for Voiding of NLI (Provision Seven): In addition to the existing conditions precedent that void the NLI, we suggest adding the following:

> **NCAA Sanctions**. If at any time before my enrollment at [INSTITUTION] the athletic team on which I am to participate is sanctioned by the NCAA's Committee on Infractions or Infractions Appeals Committee, the sanctions result in a postseason eligibility ban, and the underlying conduct occurred before my enrollment at [INSTITUTION] or did not directly involve me, I may request and shall be granted an immediate release of this NLI.
>
> **Reduction or Non-Renewal of Aid**. If at any time before my enrollment at [INSTITUTION] I am informed the value of my athletic aid will not be renewed or will be reduced in future years for non-academic or non-disciplinary reasons, I may request and shall be granted an immediate release of this NLI.
>
> **Hostile Team Environment**. If at any time prior to my enrollment at [INSTITUTION] I no longer want to attend [INSTITUTION] due to a hostile team environment, including but not limited to a belief [INSTITUION] is violating NCAA rules or disparagement by an institutional employee, I shall be granted an expedited hearing in front of the NLI Policy and Review Committee. At this hearing, I shall have the opportunity to describe how and why the team environment would interfere with my student-athlete experience.

---

[416] *See generally*, AMERICAN ARBITRATION ASSOCIATION, NON-BINDING CONSUMER ARBITRATION RULES, https://www.adr.org/sites/default/files/Non-Binding%20Consumer%20Arbitration%20Rules.pdf (last visited Dec. 23, 2017).

> Upon a showing of such interference, I shall be released of this NLI.

The Admissions Requirement clause of Provision Seven should be amended to include the following language, because it is unfair to require the student to remain committed to the institution when the institution has not committed to the student:

> **Admissions Notification Requirement**. If I sign this NLI without having received a written notice of admission to [INSTITUTION], the institution will have 20 calendar days from the date of my signing to notify me in writing of an admissions decision. If I do not receive an admissions decision in writing within 20 calendar days of my signing, this NLI is null and void, and the Recruiting Ban shall be lifted. I may choose to re-sign an NLI with [INSTITUTION] if and when I receive a written notice of admission.

Revise Coaching Changes Provision (Provision 11): The NLI does not permit athletes whose programs undergo coaching changes to be automatically released from their agreement.[417] This is one of its most patently unfair aspects, and many college coaches agree.[418] The language of the NLI's Coaching Changes Provision should be altered to read:

> In the event that my team's head coach is fired, resigns, retires or is otherwise replaced as head

---

[417] NCAA Eligibility Center, *supra* note 414, at 2.

[418] Andy Katz, *Less-binding NLI may give recruits more options*, ESPN.COM, http://assets.espn.go.com/ncb/columns/katz_andy/1542395.html (last visited Dec. 23, 2017) (Former New Mexico head men's basketball coach Fran Fraschilla: "Signing a NLI is unfair to the recruit and his family because it locks the student-athlete into having to attend that institution regardless of who is coaching the team."). Prominent men's basketball coach John Calipari went as far as inserting an "out clause" in player's NLIs when coaching at the University of Memphis that would have released them from the agreement in the event he left the institution. *See* Mike DeCourcy, *NCAA Says No Conditions Allowed on Letters of Intent*, THE SPORTING NEWS (Oct. 1, 2009), http://www.sportingnews.com/ncaa-basketball/news/119750-ncaa-says-no-conditions-allowed-on-letters-intent.

> coach for any reason prior to my enrollment at [INSTITUTION], I may request and shall be granted a release of this NLI. If any coach besides the head coach is fired, resigns, retires or is otherwise replaced for any reason before my enrollment at [INSTITUTION], I may submit a request for release of this NLI and the request shall be evaluated based on the totality of the circumstances and in accordance with the attached rules and guidelines governing release requests.
>
> In the event that any member of my team's coaching staff is fired, resigns, retires, or is otherwise replaced, suspended or sanctioned by [INSTITUTION] between the signing of this NLI and my enrollment as the result of abusive, illegal, or improper treatment of athletes, I may request and shall be granted a release of this NLI.

Eliminate Early Signing Period In All Sports: Signing during their sport's "early" period comes back to haunt many athletes, when their coaches leave for other jobs or be fired, or the institution sanctioned by the NCAA in the weeks and months that follow.[419] In the interests of athletes, the CCA should eliminate the early signing period in all sports—including the recently-approved early signing period in football.[420] Further, incoming football and basketball players should not be permitted to sign an NLI until February 15 and April 1 of their senior year in high school (or second year at a two-year institution), respectively. For these athletes especially, this allows the proverbial "dust" of the

---

[419] *See* John Solomon, *Beware, Football Recruits: Your Coach Likely Won't Stay Four Years*, CBS SPORTS (Jan. 30, 2016), https://www.cbssports.com/college-football/news/beware-football-recruits-your-coach-likely-wont-stay-four-years (finding that "[o]f the 650 head coaches and assistants who were coaching at current Power Five schools in 2011, 66 percent of them left the staff by 2015"). RICH RODRIGUEZ EXAMPLE.

[420] Adam Rittenberg, *Collegiate Commissioners Association Approves Early Signing Period for Football*, ESPN (May 9, 2017), http://www.espn.com/college-football/story/_/id/19339267/collegiate-commissioners-association-approves-early-signing-period-football.

annual offseason coaching carousel[421] to settle before athletes enter into restrictive agreements with institutions. To the extent possible, NLI signing dates should be determined on a per-sport basis and in consideration of when programs are most likely to make coaching changes. As they are under the current rules,[422] athletes would still be able to orally accept offers of financial aid, announce their intention to attend a particular school, and no longer engage in the recruiting process at any time before signing day.

Add Consideration: The NLI lacks the necessary consideration to establish its validity as a contract. We suggest bolstering consideration for the signee in the following manner:

> **Signing Bonus**. Upon receipt of this signed NLI, [INSTITUTION] shall deliver to me, within seven (7) calendar days, an agreement signed by the institution's Director of Athletics and my sport's head coach clarifying that my offer of financial aid is guaranteed at its current level until I graduate from the institution, regardless of my eligibility for collegiate competition or my health status. This agreement shall also set forth [INSTITUTION'S] obligation to cover all costs of diagnosing and treating any medical condition or physical injury reasonably attributable to my participation in the institution's athletic program for no less than ten years following my

---

[421] *See, e.g.*, Bill Bender, *Fired, Resigned, Retired: Looking at the FBS Coaching Changes in 2016*, THE SPORTING NEWS (July 20, 2017) http://www.sportingnews.com/ncaa-football/list/fired-coaches-college-football-hired-resigned-tom-herman-charlie-strong-les-miles/1szyiyyx03k3u15dgzmckpidb9 (finding that 23 FBS teams will begin the 2017 season with a new coach); Matt Norlander, *College Basketball Coaching Change Tracker*, CBS SPORTS (July 11, 2017) https://www.cbssports.com/college-basketball/news/college-basketball-coaching-changes-tracker-san-jose-state-opens-up-late (noting that through July 11, 2017, there had been 47 head coaching changes in Division I men's basketball).

[422] *See What is a Verbal Commitment?* NCAA, http://www.ncaa.org/student-athletes/future/eligibility-center/what-verbal-commitment (last visited Dec. 23, 2017).

> graduation from the institution and/or the exhaustion of my collegiate eligibility.[423]

B. OPTION 2: ADOPTING THE NCAA DIVISION III MODEL

The NCAA does not permit Division III institutions to award financial aid based on "athletics leadership, ability, participation, or performance."[424] Therefore, they cannot be members of the NLI Program, and Division III bylaws strictly prohibit any member school from using a letter of intent "or similar form of commitment" in the recruiting process.[425] But this has not stopped these institutions from allowing their incoming athletes to commemorate National Signing Day alongside their Division I and II-bound peers.[426] Since 2015, Division III schools have allowed their incoming athletes to sign a "Nonbinding Athletics Celebratory Form" signifying the athlete's intent to participate in the institution's athletics program.[427] The form—which can only be signed after an athlete has been officially

---

[423] These additional benefits already offered in some conferences, but this change to the NLI will impact a far greater number of athletes. *See* Adam Rittenberg, *Big Ten to Guarantee Scholarships*, ESPN (Oct. 8, 2014), http://www.espn.com/college-sports/story/_/id/11666316/big-ten-guarantees-four-year-scholarships-student-athletes ("Scholarships will be 'neither reduced nor cancelled' as long as athletes maintain good standing in school, within the athletic department and in the community. If athletes leave school for 'a bona fide reason,' they will be allowed to return at a later date to complete their degrees on scholarship."); Jon Solomon, *Pac-12 Making Strong Effort to Care for Ex-Athletes' Medical Costs*, CBS SPORTS (June 20, 2015), https://www.cbssports.com/college-football/news/pac-12-making-strong-effort-to-care-for-ex-athletes-medical-costs/ (noting that Pac-12 Conference schools "must provide direct medical expenses for at least four years following the athlete's graduation or separation from the university, or until the athlete turns 26 years old, whichever occurs first.").

[424] NCAA Division III Bylaw 15.01.3.

[425] NCAA Division III Bylaw 13.9.1.

[426] Alan Parham, *Division III Prospects Finally Have a Commitment to Sign*, NATIONAL SCOUTING REPORT (Nov. 17, 2015), https://www.nsr-inc.com/scouting-news/division-iii-prospects-finally-have-a-commitment-letter-to-sign/.

[427] NCAA Division III Bylaw 13.9.1.1.

accepted at the school[428]—does not obligate the athlete to matriculate to the institution and participate in its athletic program, nor does it require the institution to provide a roster spot for the athlete.[429] In other words, the athlete faces no penalty for matriculating to an institution other than the one providing the form, and the institution is not obligated to hold a spot on one of its athletic rosters for the signee.[430]

To avoid legal challenges, the CCA could radically transform the NLI into the mold of the Division III Celebratory Signing Form. The new "NLI" would be delivered to the signee *after* he or she received, signed, and returned the institution's offer of athletic financial aid, and would commemorate their choice to accept the school's offer. The language could be as simple as:

> I, [SIGNEE NAME], have received and accepted an offer of a grant-in-aid (athletics scholarship) from [INSTITUTION]. In addition to my academic responsibilities, I have been recruited to participate in the sport(s) of the [SPORT(S)].

This form commemorates my choice to attend [INSTITUTION]. I understand my signature neither obligates me to attend the institution named in this document and participate in athletics nor does it guarantee me a roster position. I also understand that if I transfer from the institution or cease participation in the institution's athletic program, I may be subject to NCAA transfer restrictions and my financial aid may be affected.

Gutting the NLI and presenting it to the athlete after he or she has executed his or her financial aid agreement with the institution frees the athlete from onerous provisions and penalties. Yet the institution's interests are still protected, both through the

---

[428] *Id.*

[429] *2015 NCAA Convention Division III Legislative Proposals Question and Answer Guide*, https://www.ncaa.org/sites/default/files/Q_A%20_2015%20Convention%20First%20Edition.pdf (last visited Nov. 19, 2017).

[430] Neither does the NLI guarantee an athlete a roster spot. In this way, the Division III celebratory form and the NLI are very similar from the athlete's perspective, providing nothing in the way of true consideration and not obligating the institution to suffer any legal detriment. *See* Dan Mickle, *2015 NCAA DIII Changes*, THE COACHES MIND (Jan. 21, 2015), http://thecoachesmind.com/2015-ncaa-diii-changes/.

NCAA and conference transfer regulations (which constrain an athlete's transfer options[431]) and the ability to cancel or reduce the aid if the athlete does not participate in the athletics program (meaning the institution is not "locked-in" to the athlete). Adopting the Division III model better aligns the NLI with the spirit of National Signing Day by presenting athletes with a simple, celebratory, commemorative form—not the biased, adhesion-like legal document in current use.

C. OPTION 3: LOOKING TO THE LAW ON COVENANTS NOT TO COMPETE TO TRANSFORM THE BASIC PENALTY

Covenants not to compete must be reasonable in their duration and geographic restrictions.[432] As outlined in Section IV, the NLI's Basic Penalty provision functions like a covenant not to compete and contains sweeping, overly broad restrictions on the economic freedoms of college athletes. These restrictive aspects of the Basic Penalty must be reformed if the NLI—which may have some place in college athletics—is to withstand judicial scrutiny.

Preliminarily, we note that while not implicated by the law on restrictive covenants, the Basic Penalty's second clause (which deducts a year of eligibility from transferring athletes[433]) has no pro-competitive basis and is legally indefensible. It should be stricken from the NLI entirely.

The non-compete portion of the Basic Penalty can be enforced if the restrictions it places on athletes have geographic and temporal bounds intended to safeguard the institution's legitimate competitive, financial, and philosophical goals.[434] As constituted, the restrictions outlined in the Basic Penalty, when considered in context, are far broader than necessary to protect institutional interests. The following revisions purge the Basic Penalty of its onerous terms and transform the provision into an agreement that could be accepted as "reasonable" by the courts—while still protecting the school's economic interests:

---

[431] NCAA Division III Bylaw 14.5.

[432] *See* Wright v. Palmer, 464 P.2d 363, 365 (Ariz. Ct. App. 1970).

[433] *Basic Penalty*, *supra* note 4.

[434] *See Wright*, 464 P.2d at 365.

Limit the Locational (Geographic) Scope of the Basic Penalty. The NLI's Basic Penalty is enforceable at over 650 Division I and Division II institutions.[435] This prohibition on competition at such a wide swathe of schools is far more restrictive than necessary to ensure the signing institution is not unduly prejudiced, as it extends far outside the institution's primary area of operation (its conference).[436] The geographic bounds of the Basic Penalty includes schools the signee's team (a) have not played previously, or (b) are unlikely to play in the near future.[437] For both reasons, the Basic Penalty is unreasonably broad. Revising the prohibition to include **only NLI-subscribing schools in the same athletic conference** is a far more reasonable regulation, since these are the teams the signing institution will compete against several times (if not more) per season.

Limit the Durational (Time) Scope of the Basic Penalty. Athletes who do not fulfill the terms of the NLI must serve a full academic year-in-residence at any NLI-subscribing institution at which they subsequently enroll.[438] In concert with the loss of eligibility clause, the Basic Penalty effectively reduces the college athlete's career by 25 percent.[439] This is similar to a covenant in a doctor's or lawyer's employment contract that prohibited practicing for approximately 7–9

---

[435] *About the National Letter of Intent (NLI)*, *supra* note 25.

[436] *See* Caras v. American Original Corp., No. 1258, 1987 Del. Ch. LEXIS 467 (July 31, 1987) (geographic restrictions in areas where employer does not operate were unenforceable); *see also*, Commercial Bankers Life Ins. Co. v. Smith, 515 N.E.2d 110, 112–13 (Ind. Ct. App. 1987); Delmar Studios of the Carolinas v. Kinsey, 104 S.E.2d 338, 344 (S.C. 1958). However, to the extent that collegiate athletic programs can be said to be operating nationally, some courts have upheld universal locational restrictions. *See* System Concepts Inc. v. Dixon, 669 P.2d 421, 428 (Utah 1983).

[437] *See* George S. May Int'l Co. v. Int'l Profit Assocs., 628 N.E.2d 647, 649–50 (Ill. App. Ct. 1993) (geographic restriction covering 36 states plus two Canadian provinces was overly broad and unenforceable because it included areas where company had never conducted business).

[438] *About the National Letter of Intent (NLI)*, *supra* note 25.

[439] *See* Debra D. Burkea & Angela J. Grube, *The NCAA Letter Of Intent: A Voidable Agreement For Minors*, 81 MISS. L.J. 265, 269 (2011).

years.[440] Covenants just one-third of that length have been declared unreasonable and unenforceable.[441] Moreover, temporal restrictions in non-compete covenants are generally unreasonable if they last longer than it takes for the previous employer to install a new employee "and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers."[442] In the context of collegiate athletics, transferring athletes can be replaced before the ensuing athletic season starts, and "effectiveness" is an ambiguous and relative term, so it could be argued that a *de minimis* residency requirement is all that is legally required.

Given an athlete's short college career, a year sit-out period is overly burdensome, and should be reduced to lessen the hardship imposed on the athlete. **Reducing the length of the residency period to the first half of the conference contests in the athlete's next season of play** is a reasonable restriction for both athlete and institution. The burden on transferring players is substantially lessened, which may lead a greater number to seek out institutions that better meet their athletic, academic, and personal preferences. Further, these athletes' labor will be viewed more favorably by institutions, which no longer are forced to wait a year before using the players' skills.[443] For institutions, the new sit-out period is still restrictive enough to deter transfers and protect schools from direct competition from former athletes, while concomitantly reducing their legal liability. Given these revisions, the Basic Penalty now reads:

> I understand that if I do not attend the institution named in this document for one full academic year and I enroll in another NLI-participating institution that is a member of the athletic conference in which [INSTITUTION'S] [SPORT(S)] program competes, I may not compete in any NCAA-sanctioned athletics

---

[440] *See generally* Greenwood, *supra* note 245.

[441] *See* Valley Medical Specialists v. Farber, 982 P.2d 1277, 1284–85 (Ariz. 1999).

[442] Bed Mart, Inc. v. Kelley, 45 P.3d 1219, 1223 (Ariz. Ct. App. 2002).

[443] NCAA and conference residency requirements still may apply to these athletes, meaning that any changes in the Basic Penalty still may not result in a "free" transfer.

> contest until my previous team has played at least 50 percent of its intra-conference contests.
> To avoid confusion: If I do not attend [INSTITUTION] for a full academic year and then enroll at [NAME ALL INSTITUTIONS IN SPORT(S)' ATHLETIC CONFERENCE], I cannot participate in NCAA-sanctioned sports until my previous team has played 1/2 of its conference games.
> These penalties do not apply if I enroll at an institution which is not a member of [SPORT(S)'] athletic conference.

CONCLUSION

For decades, collegiate athletic programs have used the National Letter of Intent to tie prospective athletes to the institution for their first academic year. Though not legally binding, the NLI has relied on the strength of its restrictive Basic Penalty to deter athletes from transferring to other institutions. The Basic Penalty is not only patently unfair, but could be deemed unenforceable on several bases—including contract, antitrust, and consumer protection grounds. Plainly, the NLI is not a valid contract; it could implicate a number of common law torts and statutory fraud violations; and it unreasonably constrains competition for the valuable services of college athletes. We caution prospective college athletes against signing NLIs, and encourage those seeking to free themselves of the agreement's unreasonable penalties to use the arguments outlined herein during the release process (and possibly during NLI-related legal action). More importantly, we urge NCAA institutions participating in the NLI Program to undertake substantive, meaningful reform of the NLI by implementing one of the three options above (or a combination thereof). Central to those reforms must be enhancing the NLI's transparency, and we hope this article serves as a valuable educational tool for athletes as they further their academic and athletic interests.